QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

Mar. 7, 1997

ABDULLAH M. FAHEM & CO.
v.
MAREB YEMEN INSURANCE CO. AND TOMEN (U.K.) LTD.

Before Mr. Justice CRESSWELL

Arbitration — Arbitration clause — Stay of proceedings — Plaintiffs bought sugar from second defendants on c. & f. terms — First defendants insured cargo — Vessel sank at Piraeus and cargo lost — Actions brought against first and second defendants — Whether action against second defendant should be referred to arbitration — Whether second defendants entitled to stay of action.

On Oct. 31, 1990, the second defendants sent a telex to the plaintiffs which was expressed to be an "offer" for sale of 30,000 tonnes of bagged white sugar on c. & f. terms. The telex contained various proposed terms including an arbitration clause which stated:

> All disputes arising out of this contract shall be referred to the Council of the Refined Sugar Association of London for settlement in accordance with the rules of the Refined Sugar Association of London relating to arbitration.

On Nov. 1, the second defendants sent a telex to the plaintiffs confirming the sale of 30,000 tonnes 10 per cent. more or less at seller's option to the plaintiff. That telex stated inter alia:

> All other terms and conditions as per our offer telex . . . dated Oct. 31, 1990.

The plaintiff arranged marine insurance with the first defendants in respect of the cargo. Twelve thousand tonnes of sugar were shipped by way of part performance of the contract on *Argo Carrier*. On or about Apr. 18, 1991 that vessel sank at Piraeus and her cargo was lost.

The plaintiffs commenced an action against the first defendants alone claiming the insured value of the cargo lost.

The first defendants alleged inter alia that the shipment of the goods was delayed by reason of the second defendants' financial problems and that the loss was caused not by an insured peril but by the second defendants' financial problems.

The plaintiffs joined the second defendants to the action claiming against them damages for breach of duty and/or breach of contract in failing to use reasonable skill and care in and about procuring, chartering and fixing the vessel to carry the cargo.

By summons dated Nov. 13, 1996 the second defendants sought an order that the proceedings by the plaintiffs against the second defendants be stayed under s. 1 of the Arbitration Act, 1975 on the ground that there was a written arbitration agreement between the second defendants and the plaintiffs covering the dispute raised by the plaintiffs' claim.

The plaintiffs submitted that there was no arbitration agreement between the plaintiffs and the second defendants within the meaning of s. 7(1) of the Arbitration Act, 1975 in that the second defendants could not show that there was an agreement to arbitrate and that the agreement was in writing.

———*Held*, by Q.B. (Com. Ct.) (CRESSWELL, J.), that (1) on the facts it was quite clear that the requirements of s. 7 of the 1975 Act were satisfied (*see* p. 741, col. 2);

———*Zambia Steel & Building Supplies Ltd. v. Clark & Eaton Ltd.*, [1986] 2 Lloyd's Rep. 225 applied.

(2) any claims in tort in the present case fell within the arbitration agreement (*see* p. 742, col. 2);

———*The Angelic Grace*, [1995] 1 Lloyd's Rep. 87, applied.

(3) where the claim was within the arbitration clause all defences must be available within the arbitration, including the defence of settlement; the fact that the second defendants might seek to raise an alleged settlement by way of defence did not preclude the reference of this matter to arbitration (*see* p. 742, col. 2; p. 743, col. 1);

———*The Paola d'Alesio*, [1994] 2 Lloyd's Rep. 366 distinguished.

(4) the second defendants were entitled to a stay of the proceedings (*see* p. 743, cols. 1 and 2).

The following cases were referred to in the judgment:

Angelic Grace, The [1995] 1 Lloyd's Rep. 87;
Ermopoulis, The [1990] 1 Lloyd's Rep. 160;
Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd., (C.A.) [1993] 1 Lloyd's Rep. 455;
Paola d'Alesio, The [1994] 2 Lloyd's Rep. 366;
Playa Larga, The [1983] 2 Lloyd's Rep. 171;
Zambia Steel & Building Supplies Ltd. v. Clark & Eaton Ltd., (C.A.) [1986] 2 Lloyd's Rep. 225.

This was a summons by the second defendants Tomen (U.K.) Ltd. seeking an order that the proceedings brought by the plaintiffs, Abdullah M. Fahem & Co. be stayed on the ground that there was a written arbitration agreement between the plaintiffs and the second defendants covering the dispute raised by the plaintiffs' claim for loss of or damage to their cargo.

Mr. Graham Dunning (instructed by Messrs. Shaw and Croft) for the plaintiffs; Mr. Steven Berry (instructed by Messrs. Ince & Co.) for the second defendants.

The further facts are stated in the judgment of Mr. Justice Cresswell.

Judgment was given in Chambers but released for publication.

JUDGMENT

Mr. Justice CRESSWELL: By summons dated Nov. 13, 1996 the second defendants seek an order that the proceedings by the plaintiffs against the second defendants be stayed under s. 1 of the Arbitration Act, 1975 on the grounds that there is a written arbitration agreement between the second defendants and the plaintiffs covering the dispute raised by the plaintiffs' claim and the plaintiffs are either an individual or individuals who is or are nationals of or resident in a state other than the United Kingdom, namely the Yemen, or is a body corporate incorporated in or having its central management and control in a state other than the United Kingdom, namely the Yemen. An alternative application in par. 2 of the summons has been abandoned.

The affidavit evidence before the Court is as follows: the second, third and fourth affidavits of Miss Clare Horrocks, on behalf of the plaintiffs, and the first and second affidavits of Mr. David McInnes, on behalf of the second defendants.

The background

The plaintiffs are a firm of sugar traders based in the Yemen. On or about Oct. 31, 1990 they agreed to buy 30,000 tonnes of bagged white sugar from the second defendants on c. & f. terms. The plaintiffs arranged marine insurance of the goods with the first defendants. Twelve thousand tonnes of sugar were shipped by way of part performance of the contract on *Argo Carrier*. On or about Apr. 18, 1991 that vessel sank at Piraeus and her cargo was lost.

The plaintiffs commenced this action in 1992 against the first defendants alone, claiming the insured value of the cargo lost, namely U.S.$4.08 m. The first defendants sought to have service of the proceedings on them set aside, arguing that they should be sued in the Yemen. Mr. Justice Waller, as he then was, rejected their application. The first defendants then served points of defence, alleging, inter alia, that shipment of the goods was delayed by reason of the carriers' financial problems, that the vessel was arrested in Piraeus in connection with a considerable number of debts, that there was no P. & I. cover for the vessel and that the carriers were insolvent and unable to crew the vessel properly. They alleged that the loss was caused by these financial matters and not by an insured peril.

In the circumstances (and, say the plaintiffs, at the insistence of the first defendants that the plaintiffs should act as prudent uninsured and join the second defendants before the six year time limit expired) the plaintiffs added the second defendants to the proceedings, claiming against them damages for breach of duty and/or breach of contract in failing to use reasonable skill and care in and about procuring, chartering and fixing the vessel to carry the cargo (if the first defendants' allegations are true).

The second defendants' submissions

Mr. Berry, on behalf of the second defendants, submitted as follows. The telex dated Oct. 31, 1990 provided:

> Arbitration. All disputes arising out of this contract shall be referred to the Council of the Refined Sugar Association of London for settlement in accordance with the rules of the Refined Sugar Association of London relating to arbitration.

The plaintiffs' own case in this action as set out in their points of claim against the first defendants is that:

> By a contract contained in or evidenced by a telex dated 31st October 1990 the Plaintiffs agreed to purchase from Tomen (UK) Ltd . . .

This is a written arbitration agreement under s. 1 of the 1975 Act. Compare *Zambia Steel & Building Supplies Ltd. v. Clark & Eaton Ltd.*, [1986] 2 Lloyd's Rep. 225. The plaintiffs being domiciled in the Yemen, it is non-domestic arbitration agreement. The plaintiffs' contention that the arbitration clause —

> . . . does not cover the complex disputes of the type which have arisen between the parties . . .

is wrong. The arbitration clause covers disputes "arising out of" the contract. All the disputes arise out of the contract. As regards the disputed claims for breach of contract or duty, the plaintiffs' claim is based on an obligation to use reasonable skill. The obligation arises out of "an actual or implied term of the contract" see the writ. The contractual claim arises out of the contract. In so far as the claims are put in tort, any duty of care arises out of the terms of the contract and constitute claims for what has been described as "contractual negligence". There is either total or almost total overlap between the contractual and the tortious claims. Arbitration clauses, particularly those covering disputes "arising out of" the contract, are amply wide enough to cover disputes based on claims in tort of this nature: see Mustill & Boyd, Commercial Arbitration, 2nd ed., p. 117 and footnote 12, p. 120; *The Playa Larga*, [1983] 2 Lloyd's Rep. 171; *The Ermopoulis*, [1990] 1 Lloyd's Rep. 160; *The*

Angelic Grace, [1995] 1 Lloyd's Rep. 87. It would be absurd if it were otherwise. The contractual claims would have to be arbitrated whereas the identical tortious claims would have to be litigated. This would offend against "the presumption in favour of one-stop arbitration" see *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.*, [1993] 1 Lloyd's Rep. 455 at p. 470, and *The Angelic Grace*, sup., at pp. 89–90.

As regards the dispute whether the claims have been settled, this is also covered by the arbitration clause. Where the claim itself is covered by the arbitration clause, so also must be all the defences to it, including the defence of settlement. Such a conclusion is implicit in the dicta of Mr. Justice Rix in *The Paola d'Alesia*, [1994] 2 Lloyd's Rep. 366 at p. 371, that under normal circumstances a defence of settlement is arbitrable. It would be absurd if it were otherwise. The result would be that some parts of the claims (e.g. the contractual claims) and some part of the defences, (e.g. whether there was any duty of reasonable skill in contract and, if so, whether it was broken) would have to be arbitrated, whereas other parts (e.g. whether there was any duty of reasonable skill in tort and, if so, whether it was broken and the defence of settlement) would have to be litigated. This also would offend against the presumption in favour of one-stop adjudication and cannot have been intended.

The plaintiffs' submissions

Mr. Dunning, on behalf of the plaintiffs, submitted that there was no arbitration agreement between the plaintiffs and the second defendants within the meaning of s. 7(1) of the Arbitration Act, 1975; alternatively, that any such agreement does not extend to cover the plaintiffs' claims against the second defendants.

As to s. 7(1) four matters are to be noted:

(i) there must be an "agreement" to arbitrate and such agreement must be "in writing";

(ii) reference is made to an agreement "contained in" an exchange of letters or telegrams, but not to an agreement "evidenced by" such documents;

(iii) s. 7(1) is to be considered against the background of the New York Convention (which is enacted by the 1975 Act). This requires that the arbitration agreement must be "signed by the parties";

(iv) so far as concerns agreements which are merely "evidenced in writing", s. 7(1) should be construed in the light of the considerations outlined in an article by the late Dr. Mann, Q.C., in Arbitration International entitled "An Agreement in Writing to Arbitrate".

The second defendants cannot show that both of the requirements set out in (i) above are satisfied in the present case, the burden being on them to do so.

As to *Zambia Steel v. Clark*, sup., the decision was per incuriam of the vital considerations outlined by Dr. Mann in the above article, and is distinguishable inter alia because in that case it was held to be "quite unarguable" (p. 229, col. 1) that the contract did not include the arbitration clause printed on the quotation form. Further, in that case, no question arose as to whether an agreement evidenced by a telex was an "agreement in writing".

In the alternative any agreement to arbitrate does not cover disputes of the type which have arisen between the parties and particularly disputes as to the claim in tort and as to whether or not the plaintiffs' claims against the second defendants have been settled. Such disputes do not "arise out of the contract". They have no basis in the contract and are distinct from it. In the case of the tort dispute, this arises out of the non-contractual aspects of the relationship between the parties. In the case of a settlement dispute, this arises out of a separate (alleged) agreement of compromise.

Analysis and conclusions

(i) Section 7(1) of the Arbitration Act, 1975 provides that:

> "Arbitration agreement" means an agreement in writing (including an agreement contained in an exchange of letters or telegrams) to submit to arbitration present or future differences capable of settlement by arbitration.

(ii) On Oct. 31, 1990 the second defendants sent a telex, reference No. 622, to the plaintiffs, which was expressed to be an "offer" for sale of sugar with price to be advised later by separate telex. The telex contained various proposed terms, including an arbitration clause, which stated:

> All disputes arising out of this contract shall be referred to the Council of The Refined Sugar Association of London for settlement in accordance with the rules of The Refined Sugar Association of London relating to arbitration.

On the same day the second defendants sent a further telex to the plaintiffs, reference No. 630, quoting a price of U.S.$343 per net tonne. On Nov. 1 the second defendants sent a telex to the plaintiffs, reference No. 644, confirming sale of 30,000 tonnes, 10 per cent. more or less at seller's option, to the plaintiffs. That telex stated inter alia:

> All other terms and conditions as per our offer telex number 622 dated 31/10/90.

Later on the same day the plaintiffs sent a telex to the second defendants which (having expressly

referred to the second defendants' telexes reference 622 and 630 of Oct. 31, 1990) and reference 644 of Nov. 1, 1990:

> We hereby confirm having purchased from you as follows . . .

(iii) In their points of claim against the first defendants the plaintiffs pleaded at par. 5:

> By a contract contained in or evidenced by a telex dated 31st October 1990 the Plaintiffs agreed to purchase from Tomen (UK) Ltd 50,000 metric tonnes (10 per cent more or less) of bagged white or refined sugar on C & F terms . . .

(iv) I am bound by the decision of the Court of Appeal in *Zambia Steel* sup. At p. 229 Lord Justice O'Connor said:

> I am quite clear that when the authorities are examined, if it is established that a document with an arbitration clause in writing forms part of a contract between the parties, the asset by one party orally to the contract is sufficient.

At p. 233 he continued:

> For the reasons which I have already given, I am satisfied that the quotation, including the printed terms on the back of it, did form part of the agreement of sale, and as a result, the arbitration clause was incorporated into that agreement. By making the agreement, albeit orally assenting to it, once it is clear that that document formed part of the agreement, then in my judgment the requirement of s. 7 of the 1975 Act is satisfied and there was a binding agreement to arbitrate.

Lord Justice Ralph Gibson, at p. 234 said:

> It seems to me that the phrase "an agreement in writing" may have two meanings at least. The first is that the terms agreed between the parties are set out in writing. On that basis, provided that the terms of agreement to submit to arbitration are contained in a document or documents, proof that those terms were agreed by the parties to be binding upon them may be given outside those documents. Such proof may be given by evidence of conduct, from which the Court is persuaded that the inference of agreement must be drawn, or by evidence of oral acceptance, or indeed any other evidence which satisfies that Court that the written terms constitute or form part of an agreement between the parties.

At p. 235 he continued:

> If the term containing the agreement to submit is incorporated in a document and it is proved that the party is bound by an agreement which includes the terms of that document, then no further proof of an agreement to submit is, in my judgment, required.

Sir Denys Buckley at p. 235 said:

> In consequence of that sequence of events, the contract was, in my view, a contract partly unwritten and partly in writing, and I think that on the facts of this case the agreement to arbitrate was a term in writing, a written term, of the agreement which the parties entered into. The endorsed terms of business contained in each of the quotations thus became, in my judgment, a written record of the terms to which the parties were assenting, and a contractual document, part of the contract.

In my view, applying the decision of the Court of Appeal in *Zambia Steel v. Clark* it is quite clear that the requirements of s. 7 of the 1975 Act are satisfied.

(v) For completeness, I note that in the Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill, Chairman: Lord Justice Saville, dated February, 1996, it is stated at p. 14, par. 34:

> We have, however, provided a very wide meaning to the words "in writing". Indeed, this meaning is wider than that found in the Model Law, but in our view, is consonant with Article II.2 of the English text of the New York Convention. The non-exhaustive definition in the English text ("shall include") may differ in this respect from the French and Spanish texts, but the English text is equally authentic under Article XVI of the New York Convention itself, and also accords with the Russian authentic text . . . see also the 1989 Report of the Swiss Institute of Comparative Law on Jurisdictional Problems in International Commercial Arbitration (by Adam Samuel) at pages 81–85.
>
> It seems to us that English law, as it stands, more than justifies this wide meaning; See, for example *Zambia Steel v. James Clark*. In view of rapidly evolving methods of recording, we have made clear that "writing" includes recording by any means.

(vi) It is to be noted that Mr. McInnes says at par. 12 of his second affidavit:

> It is almost universally the case that contracts involving the sale and carriage of refined sugar include a clause referring disputes to arbitration by the Refined Sugar Association.

This accords with the Court's experience. Mr. McInnes' comments are consistent with the conclusions set out above.

Mr. McInnes also states in his second affidavit at par. 7:

> I am informed by Mr Kadowaki that *all* of the contracts between the Plaintiff and the Second Defendants contain the same arbitration clause as

set out in the Second Defendants' telex of 31st October 1990.

At par. 12 he added:

> It was the practice of the Second Defendants always to include a clause in their contracts for the sale and/or carriage of sugar, referring disputes to arbitration by the Refined Sugar Association, and all the contracts between the Second Defendants and the Plaintiff over a period of ten years included a clause referring disputes to Refined Sugar Association arbitration.

The conclusions set out above are consistent with these passages in Mr. McInnes' second affidavit.

(vii) As to claims in tort, Mustill & Boyd, 2nd ed., p. 117 state:

> If the agreement to arbitrate is drawn in sufficiently wide terms, it will give the arbitrator jurisdiction to decide a dispute arising from a claim in tort. Most instances of claims in tort submitted to arbitration relate to "contractual negligence", ie the breach of a duty of care arising from a contract. Most of the more common forms of arbitration clause are sufficiently wide to give the arbitrator jurisdiction over such claims.

In *The Angelic Grace*, sup., at p. 89 Lord Justice Leggatt said:

> The question in a nutshell is whether the relevant claims and cross-claims arise out of the contract. It is common ground that the question must be answered in the light of *The Playa Larga*, in which this Court upheld the dictum of Mr. Justice Mustill, that a tortious claim does "arise out of" a contract containing an arbitration clause if there is a sufficiently close connection between the tortious claim and a claim under the contract. In order that there should be a sufficiently close connection, as the Judge said, the claimant must show either that the resolution of the contractual issue is necessary for a decision on the tortious claim, or, that the contractual and tortious disputes are so closely knitted together on the facts that an agreement to arbitrate on one can properly be construed as covering the other.

At p. 91 he continued:

> Where such general words have been chosen in an arbitration clause as "arise out of", it is not difficult to conclude that a particular dispute is within its terms. It is then that Judges have found room for the exercise of common sense, and have not readily been prepared to assume that the parties would have intended that cross-claims arising out of the same incident should be tried in different countries by different processes, that is by litigation and arbitration.

In my view, any claims in tort in the present case plainly fall within the arbitration agreement.

(viii) As a matter of general principle, it seems to me that where the claim is within the arbitration clause, all defences must be available within the arbitration, including the defence of settlement. The plaintiffs do not contend that there has been a settlement; on the contrary, they say there has been no settlement. The second defendants apparently intend to pursue the assertion of a settlement.

This case is distinguishable from *The Paola d'Alesio*, sup., where it is to be noted Mr. Justice Rix, said at p. 370:

> The settlement of differences would suffice to provide a defence in the arbitration.

At p. 371 he continued:

> The next matter which I was invited to determine by Mr. Sussex on behalf of the plaintiffs was that, not only the current arbitration in which Mr. Robertson is arbitrator but, any future arbitration in which any claim might be made to demurrage or damages for detention in respect of the period down to Dec. 30, 1992 would be void and lacking in any jurisdiction, upon the assumption that the settlement is valid and effective. On behalf of the defendants, Mr. Mcdonald asked that I should not determine this issue as it did not yet arise. It seems to me that this issue is not within the relief sought by the originating summons and that, in the light of Mr. Mcdonald's objection, I should not determine it. I will merely opine first, that cl. 5 of the settlement agreement does not specifically refer to any new arbitration and that the argument that the settlement agreement, if valid, is destructive of an arbitrator's jurisdiction with regard to a fresh reference would not necessarily have the same force as it has with regard to the present arbitration; secondly, that the concept of a partial abrogation of an arbitration agreement, as distinct from an arbitration reference, by reason of the settlement of a dispute, strikes me as a difficult one; and, thirdly, that is does not necessarily follow from my decision under (2) above that a new arbitrator would be prevented from determining the validity of the settlement agreement as part of a dispute in which the claimant in that arbitration relied on the terms of the bill of lading, the respondent relied on the settlement agreement by way of defence, and the claimant put in issue the validity of that settlement agreement. However, I have not heard full argument on these matters.

In my view, the fact that the second defendants may seek to raise an alleged settlement by way of defence does not preclude the reference of this matter to arbitration. In view of the above, I

I consider that the second defendants are entitled to the stay which they seek. In reaching that conclusion, I pay tribute to the way that this matter has been argued on both sides and to the skeleton arguments.

I quite understand the plaintiffs' concern reflected in par. 6 of their skeleton argument that interrelated claims against the first and second defendants should be resolved at the same time in one and the same forum. It would, of course, be open to the parties to agree that all disputes between the plaintiffs and the first and second defendants be resolved by way of one arbitration, and ad hoc arrangements could, of course, be arrived at by agreement. Nothing in this judgment should be taken as any discouragement to that course, but on the material before me the second defendants are entitled to the order that they seek.

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(2) ABDULLAH M. FAHEM CO.V.MAREB YEMEN INSURANCE CO.AND TOMEN (U.K.)

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QUEEN'S BENCH DIVISION(COMMERCIAL COURT)

Mar. 7, 1997

ABDULLAH M. FAHEM CO.v.MAREB YEMEN INSURANCE CO.AND TOMEN (U.K.) LTD.

Before Mr. Justice Cresswell

Arbitration - Arbitration clause - Stay of proceedings - Plaintiffs bought sugar from second defendants on c. f. terms - First defendants insured cargo - Vessel sank at Piraeus and cargo lost - Actions brought against first and second defendants - Whether action against second defendant should be referred to arbitration - Whether second defendants entitled to stay of action.

On Oct. 31, 1990, the second defendants sent a telex to the plaintiffs which was expressed to be an "offer" for sale of 30,000 tonnes of bagged white sugar on c. f. terms. The telex contained various proposed terms including an arbitration clause which stated:
All disputes arising out of this contract shall be referred to the Council of the Refined Sugar Association of London for settlement in accordance with the rules of the Refined Sugar Association of London relating to arbitration.
On Nov. 1, the second defendants sent a telex to the plaintiffs confirming the sale of 30,000 tonnes 10 per cent. more or less at seller's option to the plaintiff. That telex stated inter alia:
All other terms and conditions as per our offer telex. . .dated Oct. 31, 1990.
The plaintiff arranged marine insurance with the first defendants in respect of the cargo. Twelve thousand tonnes of sugar were shipped by way of part performance of the contract on Argo Carrier. On or about Apr. 18, 1991 that vessel sank at Piraeus and her cargo was lost.
The plaintiffs commenced an action against the first defendants alone claiming the insured value of the cargo lost.
The first defendants alleged inter alia that the shipment of the goods was delayed by reason of the second defendants' financial problems and that the loss was caused not by an insured peril but by the second defendants' financial problems.
The plaintiffs joined the second defendants to the action claiming against them damages for breach of duty and/or breach of contract is failing to use reasonable skill and care in and about procuring, chartering and fixing the vessel to carry the cargo.
By summons dated Nov. 13, 1996 the second defendants sought an order that the proceedings by the plaintiffs against the second defendants be stayed under s. 1 of the Arbitration Act, 1975 on the ground that there was a written arbitration agreement between the
second defendants and the plaintiffs covering the dispute raised by the plaintiffs' claim.
The plaintiffs submitted that there was no arbitration agreement between the plaintiffs and the second defendants within the meaning of s. 7(1) of the Arbitration Act, 1975 in that the second defendants could not show that there was an agreement to arbitrate and that the agreement was in writing.
-Held, by Q.B. (Com. Ct.) (Cresswell, J.), that (1) on the facts it was quite clear that the requirements of s. 7 of the 1975 Act were satisfied (see p. 741, col. 2);
-Zambia Steel Building Supplies Ltd. v. Clark Eaton Ltd., [1986] 2 Lloyd's Rep. 225 applied.
(2) any claims in tort in the present case fell within the arbitration agreement (see p. 742, col. 2);
-The Angelic Grace, [1995] 1 Lloyd's Rep. 87, applied.
(3) where the claim was within the arbitration clause all defences must be available within the arbitration, including the defence of settlement; the fact that the second defendants might seek to raise an alleged settlement by way of defence did not preclude the reference of this matter to arbitration (see p. 742, col. 2; p. 743, col. 1);
-The Paola d'Alesio, [1994] 2 Lloyd's Rep. 366 distinguished.
(4) the second defendants were entitled to a stay of the proceedings (see p. 743, cols. 1 and 2).

The following cases were referred to in the judgment:
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This was a summons by the second defendants Tomen (U.K.) Ltd. seeking an order that the proceedings brought by the plaintiffs, Abdullah M. Fahem Co. be stayed on the ground that there was a written arbitration agreement between the plaintiffs and the second defendants covering the dispute raised by the plaintiffs' claim for loss of or damage to their cargo.
Mr. Graham Dunning (instructed by Messrs. Shaw and Croft) for the plaintiffs; Mr. Steven Berry (instructed by Messrs. Ince Co.) for the second defendants.
The further facts are stated in the judgment of Mr. Justice Cresswell.
Judgment was given in Chambers but released for publication.

JUDGMENT

Mr. Justice CRESSWELL: By summons dated Nov. 13, 1996 the second defendants seek an order that the proceedings by the plaintiffs against the second defendants be stayed under s. 1 of the Arbitration Act, 1975 on the grounds that there is a written arbitration agreement between the second defendants and the plaintiffs covering the dispute raised by the plaintiffs' claim and the plaintiffs are either an individual or individuals who is or are nationals of or resident in a state other than the United Kingdom, namely the Yemen, or is a body corporate incorporated in or having its central management and control in a state other than the United Kingdom, namely the Yemen. An alternative application in par. 2 of the summons has been abandoned.
The affidavit evidence before the Court is as follows: the second, third and fourth affidavits of Miss Clare Horrocks, on behalf of the plaintiffs, and the first and second affidavits of Mr. David McInnes, on behalf of the second defendants.

The background

The plaintiffs are a firm of sugar traders based in the Yemen. On or about Oct. 31, 1990 they agreed to buy 30,000 tonnes of bagged white sugar from the second defendants on c. f. terms. The plaintiffs arranged marine insurance of the goods with the first defendants. Twelve thousand tonnes of sugar were shipped by way of part performance of the contract on Argo Carrier. On or about Apr. 18, 1991 that vessel sank at Piraeus and her cargo was lost.
The plaintiffs commenced this action in 1992 against the first defendants alone, claiming the insured value of the cargo lost, namely U.S.$4.08 m. The first defendants sought to have service of the proceedings on them set aside, arguing that they should be sued in the Yemen. Mr. Justice Waller, as he then was, rejected their application. The first defendants then served points of defence, alleging, inter alia, that shipment of the goods was delayed by reason of the carriers' financial problems, that the vessel was arrested in Piraeus in connection with a considerable number of debts, that there was no P. I. cover for the vessel and that the carriers were insolvent and unable to crew the vessel properly. They alleged that the loss was caused by these financial matters and not by an insured peril.
In the circumstances (and, say the plaintiffs, at the insistence of the first defendants that the plaintiffs should act as prudent uninsured and join the second defendants before the six year time limit expired) the plaintiffs added the second defendants to the proceedings, claiming against them damages for breach of duty and/or breach of contract in failing to use reasonable skill and care in and about procuring, chartering and fixing the vessel to carry the cargo (if the first defendants' allegations are true).

The second defendants' submissions

Mr. Berry, on behalf of the second defendants, submitted as follows. The telex dated Oct. 31, 1990 provided:
Arbitration: All disputes arising out of this contract shall be referred to the Council of the Refined Sugar Association of London for settlement in accordance with the rules of the Refined Sugar Association of London relating to arbitration.
The plaintiffs' own case in this action as set out in their points of claim against the first defendants is that:
By a contract contained in or evidenced by a telex dated 31st October 1990 the Plaintiffs agreed to purchase from Tomen (UK) Ltd . . .
This is a written arbitration agreement under s. 1 of the 1975 Act. Compare Zambia Steel Building Supplies Ltd. v. Clark Eaton Ltd., [1986] 2 Lloyd's Rep. 225. The plaintiffs being domiciled in the Yemen, it is non-domestic arbitration agreement. The plaintiffs' contention that the arbitration clause -
. . .does not cover the complex disputes of the type which have arisen between the parties. . .
is wrong. The arbitration clause covers disputes "arising out of" the contract. All the disputes arise out of the contract. As regards the disputed claims for breach of contract or duty, the plaintiffs' claim is based on an obligation to use reasonable skill. The obligation arises out of "an actual or implied term of the contract" see the writ. The contractual claim arises out of the contract. In so far as the claims are put in tort, any duty of care arises out of the terms of the contract and constitute claims for what has been described as "contractual negligence". There is either total or almost total overlap between the contractual and the tortious claims. Arbitration clauses, particularly those covering disputes "arising out of" the contract, are amply wide enough to cover disputes based on claims in tort of this nature; see Mustill Boyd, Commercial Arbitration, 2nd ed., p. 117 and footnote 12, p. 120; The Playa Larga, [1983] 2 Lloyd's Rep. 171; The Ermopoulis, [1990] 1 Lloyd's Rep. 160; The Angelic Grace, [1995] 1 Lloyd's Rep. 87. It would be absurd if it were otherwise. The

contractual claims would have to be arbitrated whereas the identical tortious claims would have to be litigated. This would offend against "the presumption in favour of one-stop arbitration" see Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd., [1993] 1 Lloyd's Rep. 455 at p. 470, and The Angelic Grace, sup., at pp. 89-90.
As regards the dispute whether the claims have been settled, this is also covered by the arbitration clause. Where the claim itself is covered by the arbitration clause, so also must be all the defences to it, including the defence of settlement. Such a conclusion is implicit in the dicta of Mr. Justice Rix in The Paola d'Alesio, [1994] 2 Lloyd's Rep. 366 at p. 371, that under normal circumstances a defence of settlement is arbitrable. It would be absurd if it were otherwise. The result would be that some parts of the claims (e.g. the contractual claims) and some part of the defences, (e.g. whether there was any duty of reasonable skill in contract and, if so, whether it was broken) would have to be arbitrated, whereas other parts (e.g. whether there was any duty of reasonable skill in tort and, if so, whether it was broken and the defence of settlement) would have to be litigated. This also would offend against the presumption in favour of one-stop adjudication and cannot have been intended.

The plaintiffs' submissions

Mr. Dunning, on behalf of the plaintiffs, submitted that there was no arbitration agreement between the plaintiffs and the second defendants within the meaning of s. 7(1) of the Arbitration Act, 1975; alternatively, that any such agreement does not extend to cover the plaintiffs' claims against the second defendants.
As to s. 7(1) four matters are to be noted:
(i) there must be an "agreement" to arbitrate and such agreement must be "in writing";

(ii) reference is made to an agreement "contained in" an exchange of letters or telegrams, but not to an agreement "evidenced by" such documents;
(iii) s. 7(1) is to be considered against the background of the New York Convention (which is enacted by the 1975 Act). This requires that the arbitration agreement must be "signed by the parties";
(iv) so far as concerns agreements which are merely "evidenced in writing", s. 7(1) should be construed in the light of the considerations outlined in an article by the late Dr. Mann, Q.C., in Arbitration International entitled "An Agreement in Writing to Arbitrate".
The second defendants cannot show that both of the requirements set out in (i) above are satisfied in the present case, the burden being on them to do so.
As to Zambia Steel v. Clark, sup., the decision was per incuriam of the vital considerations outlined by Dr. Mann in the above article, and is distinguishable inter alia because in that case it was held to be "quite unarguable" (p. 229, col. 1) that the contract did not include the arbitration clause printed on the quotation form. Further, in that case, no question arose as to whether an agreement evidenced by a telex was an "agreement in writing".
In the alternative any agreement to arbitrate does not cover disputes of the type which have arisen between the parties and particularly disputes as to the claim in tort and as to whether or not the plaintiffs' claims against the second defendants have been settled. Such disputes do not "arise out of the contract". They have no basis in the contract and are distinct from it. In the case of the tort dispute, this arises out of the non-contractual aspects of the relationship between the parties. In the case of a settlement dispute, this arises out of a separate (alleged) agreement of compromise.

Analysis and conclusions

(i) Section 7(1) of the Arbitration Act, 1975 provides that:
"Arbitration agreement" means an agreement in writing (including an agreement contained in an exchange of letters or telegrams) to submit to arbitration present or future differences capable of settlement by arbitration.
(ii) On Oct. 31, 1990 the second defendants sent a telex, reference No. 622, to the plaintiffs, which was expressed to be an "offer" for sale of sugar with price to be advised later by separate telex. The telex contained various proposed terms, including an arbitration clause, which stated:
All disputes arising out of this contract shall be referred to the Council of The Refined Sugar Association of London for settlement in accordance with the rules of The Refined Sugar Association of London relating to arbitration.
On the same day the second defendants sent a further telex to the plaintiffs, reference No. 630, quoting a price of U.S.$343 per net tonne. On Nov. 1 the second defendants sent a telex to the plaintiffs, reference No. 644, confirming sale of 30,000 tonnes, 10 per cent. more or less at seller's option, to the plaintiffs. That telex stated inter alia:

All other terms and conditions as per our offer telex number 622, dated 31/10/90.
Later on the same day the plaintiffs sent a telex to the second defendants, which (having expressly
referred to the second defendants' telexes reference 622 and 630 of Oct. 31, 1990) and reference 644 of Nov. 1, 1990:
We hereby confirm having purchased from you as follows . . .
(iii) In their points of claim against the first defendants the plaintiffs pleaded at par. 5:
By a contract contained in or evidenced by a telex dated 31st October 1990 the Plaintiffs agreed to purchase from Tomen (UK) Ltd 50,000 metric tonnes (10 per cent more or less) of bagged white or refined sugar on C F terms . . .

(iv) I am bound by the decision of the Court of Appeal in Zambia Steel sup. At p. 229 Lord Justice O'Connor said:
I am quite clear that when the authorities are examined, if it is established that a document with an arbitration clause in writing forms part of a contract between the parties, the asset by one party orally to the contract is sufficient.
At p. 233 he continued:
For the reasons which I have already given, I am satisfied that the quotation, including the printed terms on the back of it, did form part of the agreement of sale, and as a result, the arbitration clause was incorporated into that agreement. By making the agreement, albeit orally assenting to it, once it is clear that that document formed part of the agreement, then in my judgment the requirement of s. 7 of the 1975 Act is satisfied and there was a binding agreement to arbitrate.
Lord Justice Ralph Gibson, at p. 234 said:
It seems to me that the phrase "an agreement in writing" may have two meanings at least. The first is that the terms agreed between the parties are set out in writing. On that basis, provided that the terms of agreement to submit to arbitration are contained in a document or documents, proof that those terms were agreed by the parties to be binding upon them may be given outside those documents. Such proof may be given by evidence of conduct, from which the Court is persuaded that the inference of agreement must be drawn, or by evidence of oral acceptance, or indeed any other evidence which satisfies that Court that the written terms constitute or form part of an agreement between the parties.
At p. 235 he continued:
If the term containing the agreement to submit is incorporated in a document and it is proved that the party is bound by an agreement which includes the terms of that document, then no further proof of an agreement to submit is, in my judgment, required.

Sir Denys Buckley at p. 235 said:
In consequence of that sequence of events, the contract was, in my view, a contract partly unwritten and partly in writing, and I think that on the facts of this case the agreement to arbitrate was a term in writing, a written term, of the agreement which the parties entered into. The endorsed terms of business contained in each of the quotations thus became, in my judgment, a written record of the terms to which the parties were assenting, and a contractual document, part of the contract.
In my view, applying the decision of the Court of Appeal in Zambia Steel v. Clark it is quite clear that the requirements of s. 7 of the 1975 Act are satisfied.
(v) For completeness, I note that in the Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill, Chairman: Lord Justice Saville, dated February, 1996, it is stated at p. 14, par. 34:
We have, however, provided a very wide meaning to the words "in writing". Indeed, this meaning is wider than that found in the Model Law, but in our view, is consonant with Article II.2 of the English text of the New York Convention. The non-exhaustive definition in the English text ("shall include") may differ in this respect from the French and Spanish texts, but the English text is equally authentic under Article XVI of the New York Convention itself, and also accords with the Russian authentic text. . .see also the 1989 Report of the Swiss Institute of Comparative Law on Jurisdictional Problems in International Commercial Arbitration (by Adam Samuel) at pages 81-85.
It seems to us that English law, as it stands, more than justifies this wide meaning; See, for example, Zambia Steel v. James Clark. In view of rapidly evolving methods of recording, we have made clear that "writing" includes recording by any means.
(vi) It is to be noted that Mr. McInnes says at par. 12 of his second affidavit:
It is almost universally the case that contracts involving the sale and carriage of refined sugar include a clause referring disputes to arbitration by the Refined Sugar Association.
This accords with the Court's experience. Mr. McInnes' comments are consistent with the conclusions set out above.
Mr. McInnes also states in his second affidavit at par. 7:
I am informed by Mr Kadowaki that all of the contracts between the Plaintiff and the Second Defendants contain the same arbitration clause
as set out in the Second Defendants' telex of 31st October 1990.
At par. 13 he added:
It was the practice of the Second Defendants always to include a clause in their contracts for the sale and/or carriage of sugar, referring disputes to arbitration by the Refined Sugar Association, and all the contracts between the Second Defendants and the Plaintiff over a period of ten years included a clause referring disputes to Refined Sugar Association arbitration.
The conclusions set out above are consistent with these passages in Mr. McInnes' second affidavit.
(vii) As to claims in tort, Mustill Boyd, 2nd ed., p. 117 state:
If the agreement to arbitrate is drawn in sufficiently wide terms, it will give the arbitrator jurisdiction to decide a dispute arising from a claim in tort. Most instances of claims in tort submitted to arbitration relate to "contractual negligence", ie the breach of a duty of care arising from a contract. Most of the more common forms of arbitration clause are sufficiently wide to give the arbitrator jurisdiction over such claims.
In The Angelic Grace, sup., at p. 89 Lord Justice Leggatt said:
The question in a nutshell is whether the relevant claims and cross-claims arise out of the contract. It is common ground that the question must be answered in the light of The Playa Larga, in which this Court upheld the dictum of Mr. Justice Mustill, that a tortious claim does "arise out of" a contract containing an arbitration clause if there is a sufficiently close connection between the tortious claim and a claim under the

contract. In order that there should be a sufficiently close connection, as the Judge said, the claimant must show either that the resolution of the contractual issue is necessary for a decision on the tortious claim, or, that the contractual and tortious disputes are so closely knitted together on the facts that an agreement to arbitrate on one can properly be construed as covering the other.
At p. 91 he continued:
Where such general words have been chosen in an arbitration clause as "arise out of", it is not difficult to conclude that a particular dispute is within its terms. It is then that Judges have found room for the exercise of common sense, and have not readily been prepared to assume that the parties would have intended that cross-claims arising out of the same incident should be tried in different countries by different processes, that is by litigation and arbitration.
In my view, any claims in tort in the present case plainly fall within the arbitration agreement.
(viii) As a matter of general principle, it seems to me that where the claim is within the arbitration clause, all defences must be available within the arbitration, including the defence of settlement. The plaintiffs do not contend that there has been a settlement; on the contrary, they say there has been no settlement. The second defendants apparently intend to pursue the assertion of a settlement.
This case is distinguishable from The Paola d'Alesio, sup., where it is to be noted Mr. Justice Rix, said at p. 370:
The settlement of differences would suffice to provide a defence in the arbitration.
At p. 371 he continued:
The next matter which I was invited to determine by Mr. Sussex on behalf of the plaintiffs was that, not only the current arbitration in which Mr. Robertson is arbitrator but, any future arbitration in which any claim might be made to demurrage or damages for detention in respect of the period down to Dec. 10, 1992 would be void and lacking in any jurisdiction, upon the assumption that the settlement is valid and effective. On behalf of the defendants, Mr. Mcdonald asked that I should not determine this issue as it did not yet arise. It seems to me that this issue is not within the relief sought by the originating summons and that, in the light of Mr. Mcdonald's objection, I should not determine it. I will merely opine first, that cl. 5 of the settlement agreement does not specifically refer to any new arbitration and that the argument that the settlement agreement, if valid, is destructive of an arbitrator's jurisdiction with regard to a fresh reference would not necessarily have the same force as it has with regard to the present arbitration; secondly, that the concept of a partial abrogation of an arbitration agreement, as distinct from an arbitration reference, by reason of the settlement of a dispute, strikes me as a difficult one; and, thirdly, that is does not necessarily follow from my decision under (2) above that a new arbitrator would be prevented from determining the validity of the settlement agreement as part of a dispute in which the claimant in that arbitration relied on the terms of the bill of lading, the respondent relied on the settlement agreement by way of defence, and the claimant put in issue the validity of that settlement agreement. However, I have not heard full argument on these matters.
In my view, the fact that the second defendants may seek to raise an alleged settlement by way of defence does not preclude the reference of this matter to arbitration. In view of the above, I
consider that the second defendants are entitled to the stay which they seek. In reaching that conclusion, I pay tribute to the way that this matter has been argued on both sides and to the skeleton arguments.
I quite understand the plaintiffs' concern reflected in par. 6 of their skeleton argument that interrelated claims against the first and second defendants should be resolved at the same time in
one and the same forum. It would, of course, be open to the parties to agree that all disputes between the plaintiffs and the first and second defendants be resolved by way of one arbitration, and ad hoc arrangements could, of course, be arrived at by agreement. Nothing in this judgment should be taken as any discouragement to that course, but on the material before me the second defendants are entitled to the order that they seek.