DECISION of the

SWEDISH SUPREME COURT No. SÖ 250

Case/Matter No.

given in Stockholm on 12 February 1980 Ö 108/78

APPELLANT

Tureberg-Sollentuna Lastbilscentral (*Eng. Truck Center*) ek.för.,
Box 42, 191 21 SOLLENTUNA
Counsel: jur. kand. Ronnie Wandt, Advokatfirman Gunnar Schön,
Stureplan 19, 111 45 STOCKHOLM

COUNTERPARTY

Byggnadsfirman (*Eng. Construction Company*) Rudolf Asplund Aktiebolag,
Västergårdsvägen 64, 141 42 HUDDINGE
Counsel: jur. kand. Bo Nyström, Advokatfirman Palm-Jensen & Roos,
Kungsgatan 44, 111 35 STOCKHOLM

MATTER

Dismissal of claim

APPEALED DECISION

Svea Court of Appeal, dep. 12, decision of 29 December 1977 No. 12:SÖ 52

Decision of Court of Appeal see Appendix

DECISION OF THE SUPREME COURT

The Supreme Court confirms the decision of the Court of Appeal.

The Truck Center is ordered to compensate the Construction Company for its litigation costs before the Supreme Court in the amount of SEK two-hundred (200), plus an annual interest of six percent from the date of the decision of the Supreme Court until the day of payment.

MOTIONS BEFORE THE SUPREME COURT

The Truck Center has moved that the Supreme Court shall, by annulling the decision of the Court of Appeal, remand the case to the District Court.

The Construction Company has moved that the appealed decisions be confirmed and has claimed compensation for its litigation costs.

GROUNDS

From the investigation into the case, it is clear that the parties conducted oral negotiations at a meeting on 15 June 1976. The Construction Company has stated that the parties then agreed on the scope of the construction work and the prices that should apply for the various parts of the construction project. On 16 June 1976, the Construction Company by way of a letter referencing the negotiations and the offer made by the Truck Center ordered the works. The letter stated the conditions that would apply to the works. The letter also stated that for the “procurement” the standard terms Svenska teknologföreningens allmänna bestämmelser (AB 72) should apply. These standard terms include, amongst other things, an arbitration clause. The applicability of the standard terms was not discussed during the parties’ oral negotiations and they have not been provided to the Truck Center. The Truck Center has received the letter and not objected. The Truck Center subsequently commenced the works.

Even if the Truck Center was of the opinion that a final agreement was reached at the meeting on 15 June, it must have understood upon receiving the letter of 16 June that the Construction Company considered itself bound

only upon sending the letter and upon the terms therein stated. Because the Truck Center has commenced the works, without raising any objections to the letter, the agreement between the parties must be deemed entered into on the conditions of the letter. The arbitration has consequently become binding on the Truck Center, provided that no other conditions must be met in order for such a clause to become binding.

On this issue, the following should be noted. In some case law, it has been held that special circumstances must be at hand for a provision of the relevant nature – arbitration clauses and similar – to be deemed part of an agreement. In NJA 1949 p. 609, concerning a purchase agreement between traders, the seller had referenced general terms and conditions for a sale, which had not been provided to the buyer; the general terms and conditions contained an arbitration clause and the applicability of which was the issue of the dispute. It was held, mainly because the general terms and conditions had not been provided to the buyer and that the buyer also otherwise could not be presumed to have known that the general terms and conditions contained an arbitration clause, that an arbitration clause had not been entered into. A similar outcome and rationale can be found in NJA 1969 p. 285, in which, however, the counterparty was foreign (Yugoslavian). In this context, the Supreme Court's judgment of 20 June 1979 No. DT 22 can also be mentioned. This case concerned an index clause, and the party against whom it was relied was not a trader but a private consumer, which was given substantial weight in the grounds for the judgment.

The general circumstances in commercial contract law and neighboring fields have without doubt undergone substantial changes since the time of the case of 1949. The use of printed standard terms and similar has increased substantially. These conditions obviously meet a concrete need and are most likely considered by most traders of any size as a natural and valuable component in the execution of agreements. The standard terms now in use appear to often be drafted carefully and considering the needs of both contractual parties. These standard terms often contain an arbitration clause

and this cannot be considered surprising to anyone with any experience in these fields. It could further hardly be claimed, at least in cases where the trader is a legal entity not entitled to public legal aid, that an arbitration clause is a particularly onerous provision to the contractual parties; a separate matter is the fact that it is disadvantageous for the evolution of case law in the relevant fields that disputes are resolved by arbitration to such a great extent. That a contractual party has been unaware that the standard terms to which an agreement refers contain an arbitration clause can in view of the foregoing not be deemed relevant. At least when the contractual parties are domestic, it appears nowadays to be rather unrealistic to make the actual provision to which the agreement refers to the counterparty of a copy of the standard terms the determining factor; the counterparty could reasonably through telephone inquiry, with the other party, or with its trade organization, receive the required information.

A change in the legal landscape, as compared to the situation at the time of the cases of 1949 as well as 1969, is the change enacted in 1976 through Section 36 of the Swedish Contracts Act, which expands the possibilities of adjusting or setting aside unreasonable contract terms. This circumstance appears to make it less pressing to be able to claim, compared with what may previously have appeared possible, that a provision, which technically falls within the scope of a reference in an agreement, should not be deemed part of the agreement. The provision could, if reasons therefor exist, be set aside as unreasonable based on Section 36 of the Swedish Contracts Act in accordance with its new wording.

The foregoing gives reason to question, in relations between traders, whether the principles established by the case of 1949 should still be applied. To a certain extent, also whether a situation as the one in the case of 1969 should now be treated differently.

Also the circumstances in the present matter contradict a position that the arbitration clause should be treated differently than if it fell within the scope

of a reference included in the agreement. As already noted, the Truck Center is a trader, which, in addition, fairly often undertakes contracting of the relevant nature. Nothing in the present matter would indicate that the Truck Center would be in an inferior position as against the Construction Company. It should further be noted, that the Truck Center, according to what itself has stated, with respect to transports, usually references and applies standard terms (The City of Stockholm's and County of Stockholm's Road Transportation Standard terms for Contracting Transportations and the like). These standard terms contain a special provision (Section 15) on the resolution of disputes. This provision provides that disputes "may be resolved by public courts". The existence of such a provision in its own standard terms should have given the Truck Center reason, when faced with a reference to other standard terms, to inform itself of the particular contents thereof, as far as it found it of importance. It should be noted that the reference to AB 72 in the letter of 16 June 1976 was not in an inconspicuous place, but rather had the same typed font as the remainder of the fairly brief letter.

Thus, sufficient reasons for considering that the arbitration clause was not part of the agreement entered into between the Construction Company and the Truck Center are not at hand. To set the provision aside because it is unreasonable considering the circumstances, has not been motioned by the Truck Center.

Thus, because the dispute between the parties shall be resolved by arbitration, the case brought by the Truck Center shall – as found by the courts – be dismissed.

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[ILLEGIBLE SIGNATURES]

The decision has been made by: Supreme Court Justices H., H. (dissenting), H., S. (Reporting Justice), and S.
Reporting clerk: W.

Supreme Court Justice H. dissents with respect to the grounds and states:

“From the judgment of the District Court and from the file, the following has been established with respect to the parties’ relations. The Construction Company, which had undertaken to erect a workshop building for another company, was informed through the developer that the Truck Center could undertake excavation and blasting. After the Construction Company having contacted the Truck Center, a meeting took place on 15 June 1976 at the construction site between representatives of the Construction Company and the Truck Center. There, the parties reached an oral agreement concerning the scope of the works and the prices applicable to different aspects of the works. The question of how disputes were to be resolved was not discussed. The following day, the Construction Company sent a letter to confirm the oral agreement to the Truck Center. In this letter, which is worded as an order confirmation, the Construction Company ordered, while referencing “conducted negotiations, site visit, and offer of 15 June 1976”, certain therein stated works. Finally, the letter stated: “The standard terms Svenska teknologföreningens allmänna bestämmelser (AB 72) apply to the procurement. A copy of these terms was not, however, enclosed with the letter. After receiving the order confirmation, the Truck Center commenced the ordered works.

AB 72 contains the provision that disputes arising out of the contract shall be settled by arbitration under the Swedish Arbitration Act, unless otherwise provided in the contract.

The Truck Center has objected to the motion for dismissal by the Construction Company because an arbitration agreement has not been entered into, since this matter was never brought up during the parties’ oral negotiations. The circumstance that the Construction Company unilaterally requested by way of the letter of 16 June 1976, that the standard terms of Teknologföreningen should apply, cannot entail that they are applicable, and

even less so since they have not even been provided to the Truck Center. The Truck Center has further mainly referenced the following. The Truck Center did not know the contents of the standard terms of Teknologföreningen. It usually referred to the “Road Transportation Standard terms for Contracting Transportations and the like”, published in November 1973 by the Road Transportation Association of the City and County of Stockholm. The Truck Center further had no knowledge of the customs of the construction sector. In the terms that the Truck Center normally uses, it is provided that disputes shall be resolved by public courts. An arbitration clause is such an onerous provision that it should not be applicable, unless the party wishing to have it applicable had brought to the counterparty’s attention that such a provision would be part of the agreement.

Nowadays it is very common in purchase agreements and contracting agreements that the agreements struck refer to a set of general provisions that have been drafted especially for the relevant field, so-called standard terms. This is true for public procurements as well as private contracts. Such standard terms exist for domestic use as well as for widespread international trade, in the latter case drafted by representatives from numerous countries. There are also examples of standard terms drafted to apply in Denmark, Finland, Norway and Sweden. The latest developments are characterized not only by the fact that the use of standard terms is becoming more common. The provisions now used are also, as compared to what was commonplace earlier, drafted more carefully, and also considering to a greater extent the interests of both parties.

In view of the foregoing, it must be assumed that the Construction Company considered that the order confirmation, with its addition on the applicability of AB 72, complied with the parties’ oral agreement.

The Truck Center is a trader, just as the Construction Company, and is, according to what has been established in the case, used to applying standard terms to its agreements, albeit with different content than that of AB 72.

Taking this into consideration, it must be held that the Truck Center must have realized that the Construction Company considered that the order confirmation and its reference to AB 72 complied with the oral agreement of the parties. By way of the Truck Center not having objected to the order confirmation, but rather having commenced the works after the receipt thereof, the agreement must be deemed entered into on the terms of the order confirmation.

However, case law has been strict with respect to arbitration clauses in standard terms. Thus, in the cases NJA 1949 p. 609 and 1969 p. 285, it was held that no arbitration agreement had been entered, mainly because the standard terms had not been provided to the counterparty and the latter could not be presumed to nonetheless have known about the arbitration clause. In the latter case, it could be noted that the counterparty was foreign (Yugoslavian).

Considering the recent developments in the use of standard terms referenced above, and that these standard terms usually contain an arbitration clause, deviations from what should be deemed to be agreed in accordance with the above, when the parties are both traders, must be made only in extraordinary circumstances. Such circumstances are not at hand in the present case, whether because of the provision being an arbitration clause or otherwise. In this context it should be noted that the reference to the standard terms, AB 72, is clearly worded in the text of the order confirmation.

In view of the foregoing I confirm the decision of the Court of Appeal.”