JUDGMENT of the

SWEDISH SUPREME COURT

Case No.

given in Stockholm on 27 October 2000 T 1881-99

APPELLANT

Bulgarian Foreign Trade Bank Ltd, 7 Sveta Nedelya Square,
1000 SOFIA, Bulgaria
Counsel: advokat Torgny Wetterberg, Box 14055, 104 40 STOCKHOLM

COUNTERPARTY

A.I. Trade Finance Inc, 160 Water Street, NEW YORK, NY, 100 38, USA
Counsel: advokat Claes Broman, Arsenalsgatan 6, 111 47 STOCKHOLM

MATTER

Challenge proceedings with respect to arbitral award

APPEALED JUDGMENT

Svea Court of Appeal, dep. 16, judgment of 30 March 1999, in case T 1092-98

Judgment of the Court of Appeal see Appendix

JUDGMENT

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

Bulgarian Foreign Trade Bank Ltd is ordered to compensate A.I. Trade Finance Inc. for its litigation costs before the Supreme Court in the amount of SEK two-hundred-sixty-eight-thousand two-hundred-twenty-eight (268,228), out of which SEK 245,000 comprises of costs for legal counsel, plus interest according to Section 6 of the Swedish Act on Interest from the date of the Supreme Court's judgment until the day of payment.

MOTIONS BEFORE THE SUPREME COURT

Bulgarian Foreign Trade Bank Ltd (Bulbank) has moved that the Supreme Court shall grant Bulbank's claim, discharge it from the order to compensate A.I. Trade Finance Inc. (AIT) for its litigation costs before the District Court and the Court of Appeal, and shall order AIT to compensate it for its litigation costs before the District Court and the Court of Appeal.

On 6 September 1999, the Supreme Court granted Bulbank leave to appeal in so far as relates to the issue of whether the arbitration clause could be terminated for breach of contract or not, but did not grant it with respect to the other grounds referenced by Bulbank.

AIT has disputed any amendments to the judgment of the Court of Appeal.

The parties have claimed compensation for the litigation costs before the Supreme Court.

GROUNDS

The background to the dispute is that AIT requested arbitration against Bulbank based on an arbitration clause in a loan agreement between Bulbank and an Austrian creditor. In the arbitration proceedings, Bulbank objected that the arbitration clause was not binding upon Bulbank in relation to AIT. The arbitral tribunal rendered a separate decision on the matter, in which it found

it had jurisdiction to try the case and that the proceedings should proceed to the merits of the case.

Some time after the arbitral tribunal's decision, it was published in Mealy's International Arbitration Report, a publication published in the USA. The decision had been submitted to the publication by representatives of AIT.

When Bulbank became aware of the publication, Bulbank notified AIT and the arbitral tribunal in writing and, referencing the publication, declared its immediate termination of the arbitration clause, and further motioned that the arbitral tribunal should declare the arbitration clause invalid on the same grounds.

In a separate decision, the arbitral tribunal dismissed the aforementioned claim, and subsequently rendered an arbitral award on the merits.

Bulbank has subsequently challenged the arbitral award and motioned that the arbitral award shall be annulled or, in the alternative, be set aside.

The issue in the present case is whether Bulbank's case can be granted on the grounds that it had terminated the arbitration clause for breach of contract and that as a result no valid arbitration clause was at hand when the arbitral award was rendered.

AIT has claimed that public courts lack jurisdiction to try the relevant issue since the arbitral tribunal already has, upon Bulbank's motion thereto, tried the issue. According to AIT, the test was based on the merits, and since no procedural error has been committed or even claimed, the issue cannot be tried within the scope of challenge proceedings.

An essential ground for challenge proceedings is that no valid arbitration clause has been at hand. The fact that the arbitral tribunal in such a case has tried the issue does not entail a procedural impediment to the issue

subsequently being tried by public courts. That the lack of a valid arbitration clause is claimed to not to have been at hand initially, but rather the result of a termination during ongoing arbitration proceedings bears no relevance to this conclusion.

The agreement comprising the arbitration clause provides that the agreement shall be governed by the laws of Austria. There is, however, no particular provision on the laws applicable to the arbitration clause. In these circumstances, the question of the validity of the arbitration clause shall be tried under the laws of the country where the arbitration proceedings took place, i.e. the laws of Sweden. The parties have not claimed otherwise. As provided by the arbitration clause, the Arbitration Rules of the United Nations Commission for Europe (the ECE-rules) are also applicable.

AIT has claimed that Bulbank has introduced new grounds before the Supreme Court and claimed that these shall be dismissed. What has been the contention is that Bulbank has claimed that the separate decision contained financially sensitive information and that the publication was made in bad faith and caused damage to Bulbank. The Supreme Court notes that Bulbank already before the District Court claimed that a material breach of contract was at hand, that what has been referenced by Bulbank appears to mainly comprise opinions included in the closing statements based on grounds referenced already before the District Court and that, undisputedly, corresponding statements have been made before the Court of Appeal and finds that what has been referenced by Bulbank cannot be considered to mean that Bulbank has referenced new grounds before the Supreme Court.

One condition required in order for Bulbank to be successful in this case is that AIT was, as a result of the agreement, bound by a confidentiality undertaking. It is uncontested as between the parties that the arbitration clause does not contain any such undertaking. Further, there is no confidentiality undertaking in the Swedish Arbitration Act of 1929, which is applicable. It

could further be noted that there is no provision thereon in the new Swedish Arbitration Act replacing the Act of 1929.

As grounds for AIT being bound by a confidentiality undertaking, Bulbank has referenced Article 29 of the ECE-rules, which provides that “The proceedings shall be held in camera unless both parties request that they shall be held in public”. This provision must, according to Bulbank, be interpreted as a confidentiality undertaking applicable to the entire arbitration proceedings including separate decisions, albeit that the literal wording could be deemed to cover only the oral proceedings. However, from the literal wording no other conclusion can be drawn, even when read in conjunction with the remainder of the ECE-rules, than that oral proceedings shall be held in camera unless the parties agree that they shall be held in public. There is no explicit provision in the ECE-rules on the parties’ possible obligation to hold information in confidence and no other circumstance has been presented in the case that would give cause to interpret the provisions as including a confidentiality undertaking of the extent claimed by Bulbank.

Bulbank has further claimed that the parties through the arbitration clause are bound by a confidentiality undertaking with respect to arbitration proceedings and that the undertaking is based on general principles and the very nature of arbitration proceedings.

Information given out with respect to arbitration proceedings can relate to various things, mainly the fact that arbitration proceedings are taking place (or have taken place) between certain named parties in a particular matter, the contents of a rendered arbitration award or a decision rendered during the proceedings and circumstances of various nature that have come to light during the proceedings. Bulbank has not differentiated between various circumstances but has claimed that a general confidentiality undertaking applies, irrespective of the nature of the information.

When considering the issue of whether a confidentiality undertaking of the nature Bulbank claims applies, there is, in principle, no ground for differentiating between information of different nature. In this context, it should be noted that Section 6 of the Swedish Act on the Protection of Trade Secrets (SFS 1990:409) provides that anyone who willfully or negligently reveals a trade secret of a trader, which the revealing person has received in confidence when trading with the trader, is liable for the damages caused by his actions. If these conditions are met with respect to circumstances related to arbitration proceedings, there is an obligation under law to not reveal the information that is sanctioned by the liability to pay damages (cf. NJA II 1990 p. 590). This fact is ignored below.

A general starting point for deciding the confidentiality issue is that arbitration proceedings are based on an agreement. (Arbitration proceedings prescribed by law are ignored herein.) It follows from this that arbitration proceedings are of a private nature, which is not changed by the fact that certain aspects thereof are regulated by law. The purpose of the legislation is mainly to grant the institution of arbitration some stability and quality and is further required to grant legal effect to arbitral awards, with respect to, amongst other things, procedural impediments and enforceability (see NJA II 1929 p. 6 f. and Government Bill 1998/99:35 p. 41 f.). That arbitration proceedings are governed by legislation can consequently not affect the issue of a party’s possible obligation to hold information in confidence. It is also irrelevant for resolving this issue that it is the Swedish Arbitration Act of 1929, and not of 1999, that has been applicable to the dispute.

From the private nature of arbitration proceedings follows that third parties do not have the right to be present at the proceedings or access written documents of the file. Further, there is probably an almost unanimous view that arbitrators directly, as a result of the assignment with which they have been entrusted, shall treat the arbitration proceedings as confidential; this applies also when the arbitrator has been appointed by a public court. A party’s counsel has a similar obligation as to its client, also as a result of the

assignment as such. From these circumstances no conclusion can be drawn, however, with respect to the question of whether a party is bound by a confidentiality undertaking sanctioned by law, for which a whole set of different circumstances are relevant.

One of the advantages of having a dispute by arbitration rather than by public courts and that causes companies to choose arbitration is the confidentiality connected to arbitration proceedings. Often, this is expressed by the wording that arbitration proceedings are protected from the public eye. A large portion of the jurisprudence referenced by Bulbank refers to this aspect. This advantage, however, does not necessarily assume that the parties are bound by a confidentiality undertaking. The actual meaning thereof, as compared with trials before public courts, is obviously that the proceedings are not public, i.e. the general public does not have the right to be present at oral hearings and does not have the right to access written documents in the file (see, for example, Government Bill 1998/99:35 p. 40 f.). It is not contradictory to this that the parties concurrently should be allowed to provide information to third parties about the arbitration proceedings.

In most cases, both parties to arbitration proceedings would prefer that the dispute and what occurs during the proceedings is not known to third parties. However, this is not always the case. For example, a party in a position inferior to a strong counterparty, which it considers to act in bad faith, might want to put pressure on the counterparty by making the dispute public. A party might also for other reasons wish, or even be obliged, to inform a third party about arbitration proceedings and decisions rendered therein.

That a party to arbitration proceedings generally wishes that information about the dispute is not disclosed and assumes that the counterparty is of the same opinion, as well as that parties most commonly actually would not disclose information, is, however, something completely different than a legal obligation to not disclose information at the risk of sanctions – most likely damages – in case of breach of that obligation.

In the present case, reasons referenced against a confidentiality undertaking are that arbitration proceedings can be made public by, relying on the provisions set out in the arbitration legislation, turning to public courts for, amongst other things, the appointment of arbitrator, obtaining security measures, recording evidence or challenge proceedings. This argument, however, is not convincing. In case there are grounds for a confidentiality undertaking, it could apply without impeding the possibility to turn to court as permitted by law, i.e. an obligation to not disclose information on the arbitration proceedings in bad faith. Such is the situation when parties have agreed specifically on a confidentiality undertaking.

It is clear that parties that resolve a dispute through negotiations or arrange for it to be resolved through other means than arbitration are not bound by any confidentiality undertaking without specifically agreeing thereto. Thus, the question is what could form the basis for the undertaking when the dispute is resolved by arbitration. Above, it has been established that it cannot be the legislation as such or the contents of the provisions therein. Nor has the privacy of the proceedings or the obligation of other involved parties to not disclose information been considered sufficient grounds for establishing a confidentiality undertaking binding the parties. What then remains is the question of whether a general opinion has been formed to the effect that each of the parties to a dispute are bound by a confidentiality undertaking as towards each other, based on the nature of arbitration proceedings. Of interest in this context are the opinions expressed in the preparatory works and in jurisprudence.

From the investigations presented in the present case, no opinion that a general confidentiality undertaking binding on the parties exists has been established. The generally held opinion among counsels and arbitrators appears to be that no confidentiality undertaking exists without a specific agreement thereon.

The fact that such a radical obligation as a confidentiality undertaking has not been prescribed by legislation, at least in the new Swedish Arbitration Act, is a strong indicator that no such obligation can be deemed to exist. The Arbitration Report states in its separate report Dispute resolution in commercial relations (*Sw. Näringslivets tvistlösning*) (SOU 1995:65 p. 186) that the confidential nature of arbitration proceedings is based on rather weak legal grounds and that a party wishing to disclose information about a dispute is free to do so.

On the other hand, there is some support in jurisprudence for a confidentiality undertaking. In Jarvin, Sekretess i svenska och internationella skiljeförfaranden in Juridisk Tidskrift 1996-97 p. 149 ff. it is stated that such an obligation exists, but it appears rather unclear what this would entail more precisely in a Swedish legal environment. In Cars, Lagen om skiljeförfarande (1999) p. 103, it is held that it must be assumed that a confidentiality undertaking applies, unless otherwise agreed between the parties, and that this means that the parties may not disclose information about the proceedings to third parties. The rationale for this is that one reason for parties to choose arbitration over trial before public courts commonly is that the proceedings are not public, a rationale that above has been held insufficient. Also in Heuman, Skiljemannarätt (1999), it is held that parties are bound by a confidentiality undertaking, at least to some extent (p. 30 ff.). It is held therein, amongst other things, that it is generally assumed that arbitration proceedings are not public, and that consequently parties entering into an arbitration clause should be deemed to have agreed that the proceedings shall be confidential (p. 32 f.).

Thus, there is no coherent and well-founded view in jurisprudence and in the preparatory works as to whether a confidentiality undertaking binds the parties.

With respect to foreign law, the investigations made available to the Supreme Court do not permit any other firm conclusion than that in different countries,

different principles apply in this matter. Under English law, it appears that the common view is that the parties are bound by a confidentiality undertaking (see, e.g., Ali Shipping Corp. v Shipyard Trogir [1998] 2 All E.R. 136). A judgment of 1986 by a French appellate court (G. Aïta c. A. Ojjeh, restated in Revue de l'Arbitrage 1986, No 4, p. 583) appears based on a confidentiality undertaking resulting from the nature of arbitration proceedings. In a famous case from 1995 (Esso Australia Resources Ltd v Plowman, 183 C.L.R. 10), the High Court of Australia held the opposite view. Already from the above, it has been established that there is no united view in other countries that can help enlighten the contents of Swedish law.

In view of the foregoing, the Supreme Court holds that a party to arbitration proceedings cannot be deemed bound by a confidentiality undertaking, unless the parties have agreed thereon specifically.

Consequently, AIT has not committed breach of contract by having the decision rendered by the arbitrators during the arbitration proceedings published. Thus, Bulbank had no grounds for terminating the arbitration clause and Bulbank's claim to have the arbitral award annulled or set aside shall be dismissed.

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[ILLEGIBLE SIGNATURES]

The decision has been made by: Supreme Court Justices G., B., L., W. and V. (Reporting Justice).
Reporting clerk: M.