

Confidentiality—A Fundamental Principle in International Commercial Arbitration?

Hans BAGNER*

I. INTRODUCTION

Confidentiality and privacy¹ have been widely assumed to be fundamental principles for international commercial arbitration. According to a statistical survey of US/European users of international commercial arbitration conducted in 1992 for the LCIA by the London Business School, confidentiality was listed as the most important perceived benefit. Until the late 1980s these principles were almost sacrosanct and were not even debated. They were taken for granted.

As a matter of routine over the years arbitration textbooks have contained standard statements to the effect that arbitration is confidential and private, a feature which gives arbitration an advantage as compared with court procedures.²

In the 1995 decision by the High Court of Australia in *Esso/BHP v. Plowman*,³ a majority of the Court rejected the then prevailing English judicial view that a general duty of confidentiality existed, albeit subject to limited exceptions and qualifications. There had been a number of cases in England during the 1980s and early 1990s where the view had been taken that arbitration is a private process of dispute resolution and that arbitral proceedings are confidential, albeit that the duty of confidentiality is not absolute, but subject to limited qualifications or exceptions.⁴

The *Esso* decision resulted in a special issue of *Arbitration International* totally devoted to the confidentiality theme.⁵ The editorial of the special issue described the decision as ‘dramatic’ and concluded that ‘for common law systems the logical strength of the High Court’s reasoning suggests that a statutory remedy may be required for England and elsewhere’ and that for arbitral institutions an express rule on confidentiality should be considered. For countries outside the common law tradition, it was suggested that ‘arbitration practitioners might need to justify the legal basis for

* The author is a partner with the Swedish law firm Vinge. He is the Swedish member of the ICC, the International Court of Arbitration in Paris.

¹ Privacy is concerned with limiting the right of persons other than the arbitrators, the parties and witnesses, to attend meetings and hearings and to know about the arbitration. Confidentiality is the obligation on the arbitrators and the parties not to divulge or give out information relating to the contents of the proceedings, documents or the award, see Dr Julian Lew, *Expert Report of Dr. Julian D.M. Lew (in Esso/BHP v. Plowman)* (1995) 11 *Arbitration International* 3, p. 285.

² As an example see, Robert Merkin, *Arbitration Law* (LLP, 1991), p. 1: ‘The advantages of arbitration are readily apparent. First, arbitration allows the parties to keep private the details of their dispute.’

³ *Esso Australia Resources Ltd and Others v. Plowman (Minister for Energy and Minerals) and Others* (1995) 128 ALR 391.

⁴ *Oxford Shipping Co. Ltd v. Nippon Yusen Kaisha (the Eastern Saga)* [1984] 3 All ER 835; *Dolling-Baker v. Merrett* [1990] 1 WLR 1205; *Hassneh Insurance v. Mew* [1993] 2 Lloyd’s Rep. 243.

⁵ (1995) 11 *Arbitration International* 3.

confidentiality under their respective legal systems, whether by contract, status, copyright or otherwise.⁶

There have been various activities on the arbitration scene as a direct consequence of the Australian High Court decision, including commentaries seeking to limit the application of the *Esso* case as being a statement of law and practice in Australia.⁷ The subsequent English court decision in *Ali Shipping Corp. v. Shipyard Trogir*⁸ reconfirmed the English position that there is a general obligation of confidentiality by implication of law. There have also been recent activities among the arbitral institutions which I shall seek to describe in this article. Last, but by no means least, there was the Swedish Bulbank case which had a roller-coaster ride through the Swedish court system before the Swedish Supreme Court finally gave its decision right at the end of 2000.

II. INSTITUTIONAL RULES AND CONFIDENTIALITY

The Arbitration Rules of the London Court of International Arbitration (LCIA), effective as of 1 January 1998, cater extensively for confidentiality. Articles 19.4 and 30 provide for privacy of the hearings and state that it is the duty of the parties to keep all awards and associated documentary material confidential, except to the extent that disclosure may be required by legal duty or to protect a legal right. It would seem that these rules reflect the English judicial position referred to above.

The comparatively new ICC Rules of Arbitration, also effective as of 1 January 1998, contain a provision (Article 20.7) suggesting that the arbitral tribunal may take measures to protect trade secrets and confidential information. However, it should be noted that arbitrators often now propose that a confidentiality clause is included in the terms of reference to be agreed and signed by the parties. Further, there is provision in the ICC Rules (Article 21.3) securing that the hearings shall be private.

The WIPO Arbitration Rules 1994 contain extensive provisions on confidentiality and privacy (Articles 52–53, 73–76) defining ‘confidential information’ and providing for hearings to take place in private. The confidentiality applies to the existence of the arbitration, disclosures made during the arbitration and the award.

The Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) only provide that the SCC Institute and the Arbitral Tribunal, respectively, must maintain the confidentiality of the arbitration (Articles 9 and 20 (3)), which provisions seem to be directed at the Institute and the tribunal rather than the parties.

The UNCITRAL Arbitration Rules provide for private hearings (Article 25.4) and forbid the parties from making the award public (Article 32.5). These rules imply that the parties should consider entering into an express agreement on confidentiality (Notes to the Rules, item 6).

⁶ See note 5 above, pp. 231–232.

⁷ Patrick Neill QC, *Confidentiality in Arbitration* (1996) 12 *Arbitration International* 3, pp. 287–317.

⁸ *Ali Shipping Corp. v. Shipyard Trogir* [1998] 2 All ER 136.

The American Arbitration Association (AAA) International Arbitration Rules 1997 provide that the hearings shall be private (Article 20.4), that the award may not be made public (Article 27.4) and that confidential information disclosed during the arbitration shall not be divulged by the tribunal or the AAA administration (Article 34). It would seem that the non-disclosure requirement is not imposed on the parties.

III. NATIONAL LEGISLATION

There is probably no national legislation which contains an express provision as to confidentiality except for that of New Zealand, which enacted a new statute in 1996, based upon the UNICITRAL Model Law but with an amendment stating that the parties to an arbitration agreement shall be deemed to have agreed that 'the parties shall not publish, disclose or communicate any information relating to the arbitral proceeding or to an award made for those proceedings'⁹

IV. *BULBANK v. AIT*—THE SWEDISH ROLLER COASTER

In the footsteps of the 'dramatic' Australian High Court decision in the *Esso* case, the Stockholm City Court startled the international arbitration community by rendering a judgment in September 1998, declaring in the *Bulbank v. AIT* case that an arbitration agreement gave rise to an inherent duty of confidentiality between the parties. According to the Stockholm City Court, any breach of this duty would be regarded as a *material* breach of contract, giving the other party the right to set aside the arbitration agreement.¹⁰

V. BACKGROUND TO THE CASE

Arbitral proceedings were conducted in Stockholm pursuant to the arbitration rules of the United Nations Economic Commission for Europe (the ECE Rules) between A.I. Trade Finance Inc. (AIT) and Bulgarian Foreign Trade Bank Ltd (Bulbank). The jurisdiction of the arbitral tribunal was challenged by Bulbank on the grounds that no arbitral agreement existed between the parties. In an interim award the tribunal decided that it did have jurisdiction to hear the case. On the initiative of AIT's counsel the interim award was made public in Mealey's International Arbitration Report.

⁹ Gregory Reid, 'Confidentiality— An Algorithm', Stockholm Arbitration Report, 2000:1, p. 59.

¹⁰ Case T-6-111-98, *Bulgarian Foreign Trade Bank Ltd vs. A.I. Trade Finance Inc.*

VI. STOCKHOLM CITY COURT

Having complained to the tribunal that the publication of the interim award constituted a material breach of contract, which entitled Bulbank to repudiate the arbitral agreement, Bulbank requested the tribunal to declare the arbitral agreement null and void. The tribunal rejected this request and rendered its final award in the case.

After the final arbitral award had thus been rendered in favour of AIT, Bulbank challenged the award in the Stockholm City Court. Bulbank again claimed that the disclosure of the interim award constituted a material breach of the arbitral agreement between the parties, and it invited the Court to declare the final award invalid or to set it aside.

In its judgment the Stockholm City Court stated that confidentiality is an implied condition in an arbitration agreement which is silent on this point. Confidentiality must be considered to be a fundamental principle in arbitration. For this reason, the Court decided that nullification of the award was the most appropriate remedy.

VII. SWEDISH COURT OF APPEAL

Bulbank appealed to the Swedish Court of Appeal, which gave its decision on 30 March 1999. The Appeal Court concluded that neither the ECE Rules nor the Swedish Arbitration Act explicitly impose a duty of confidentiality. The duty of confidentiality is neither statutorily regulated nor does it exist as an implied condition of any arbitral agreement which is silent on this point. However, the Appeal Court held that confidentiality is an essential feature of arbitration. The Court did not agree that a confidentiality obligation can only be imposed on the parties by an express contractual provision. Instead, the Court referred to a 'duty of loyalty' or good faith between the parties, stating that disclosure of information or documents relating to an arbitration can, under certain circumstances, be regarded as a breach of such 'duty of loyalty'.

The Appeal Court also made a distinction between the types of information made public. For example, information concerning the parties' business or their development of the case in dispute may be considered more worthy of protection than information that an arbitration between the parties is ongoing or information concerning purely procedural questions of a general nature. Other factors to be taken into account include, amongst other things, whether there were good reasons for the disclosure, to what extent the opposite party has been damaged by it, and, where applicable, whether the information has been disclosed in order to harm the opposite party.

Crucially, in relation to the relief claimed, the Appeal Court held that compensation for damages suffered was preferable to the invalidation of the arbitration agreement. For an arbitration agreement to be declared void, as with

other civil legal contracts, it is necessary that a party has been guilty of a substantial breach of contract. The Appeal Court concluded:

“Taking into account the far-reaching consequences of the cancellation of an arbitration agreement, such right of cancellation must be given a very limited scope.”

In the circumstances of the case, the Appeal Court found that what had been made public mainly concerned procedural questions of a general nature. Therefore, the Court held that there had been no breach of the ‘duty of loyalty’. As there were no grounds for the cancellation of the arbitration agreement, the arbitral award was upheld.

VIII. SWEDISH SUPREME COURT

The Swedish Supreme Court decided to exercise its discretion by deciding to hear the case. On 27 October 2000 the Supreme Court gave its decision, declaring that there is no *legal* duty of confidentiality implied or inherent in an arbitration agreement.

The Supreme Court held that arbitration is based upon an agreement, from which it generally follows that the proceedings will be private. The statutory framework provided to arbitral proceedings does not change its contractual nature, but is there to give the procedure a certain stability and quality and is necessary to give the award legal consequences, e.g. in relation to enforcement. However, the fact that arbitration is regulated by statute does not of itself give rise to a duty of confidentiality upon the parties.

The private nature of arbitration will exclude any outsider from being present during the proceedings or receiving any of the documents produced during the proceedings. Furthermore, the arbitrators have to uphold confidentiality when performing their duties and counsel for the parties are restricted by professional rules. The Supreme Court recognized that many commercial enterprises prefer arbitration because the proceedings are not open to the public. However, the Court did not consider that there was necessarily any contradiction between this aspect and the right of a party to provide a third party with information about the arbitration.

In most instances both parties are interested in restricting the information provided to others, but that might not always be the case. The Court stated that an inferior party may wish to put pressure on a superior party by publicising the dispute and there might be instances where a party will have a duty to provide information about a pending arbitration and its outcome.

However, to say that the parties normally recognize confidentiality is totally different from holding that there is a *legal* duty of confidentiality combined with legal sanctions—normally damages. What would bring about such a legal duty? It cannot be the legislation, which is silent on the subject. The new Swedish Arbitration Act 1999 does *not* provide for a duty of confidentiality, which would suggest that there is no such duty. Is there a generally accepted opinion that there is duty of confidentiality?

The Supreme Court did not find the existence of such a generally accepted opinion among lawyers, arbitrators and scholars. The Court surveyed the international scene and found that international opinion is divided, citing on the one hand the Australian High Court case declaring that one of the parties to an arbitration could use information obtained from the arbitral proceedings in court proceedings outside the scope of the arbitration,¹¹ and on the other hand English and French cases upholding the general principle of confidentiality in arbitration.¹²

IX. CONCLUSIONS

The myth about the duty of confidentiality in arbitration, fatally wounded in 1995 by the Australian High Court, has now been laid to rest, at least in Sweden.

The Swedish Supreme Court has accepted that arbitral proceedings will generally be conducted in private and the parties are expected to treat the information surrounding the arbitration with the appropriate discretion. However, unless the parties have expressly provided that this information is to remain confidential, there is no implied *legal* duty of confidentiality. This position is to be contrasted with that of the English courts.

In practice, the conclusion to be drawn from the Supreme Court's decision is that parties must draft their arbitration clauses with more care if they wish to retain confidentiality in relation to the arbitration and the information which is disclosed during the arbitral proceedings. Ideally, they should expressly state that the proceedings and all documentation are to be confidential; alternatively, they might opt for institutional rules which include such a duty of confidentiality, and this is a matter which the arbitral institutions should bring to the attention of the parties.

It should be noted that a contract containing a general confidentiality clause which makes no particular reference to arbitration may not be sufficient for these purposes. What is needed is a clause which states expressly not only that the arbitral proceedings will be private but also that all documents, evidence, the award and possibly the very existence of the arbitration shall be treated as confidential. Any disclosure will only be made if required by law or by a competent regulatory body. To avoid such a drastic consequence as repudiation of the arbitration agreement which was imposed by the Stockholm City Court, the clause would also need to address the sanctions to follow in case of breach.

However, parties will not always include such an elaborate arbitration clause in their contracts. At that time parties are often not particularly inclined to go into details about the seemingly unlikely event that they will end up in dispute. The parties might agree on procedural issues, such as confidentiality when the dispute has arisen, but the

¹¹ See note 3 above.

¹² Reference was made to the English case of *Ali Shipping Corp. v. Shipyard Trogir* [1998] 2 All ER 136 (see note 8 above), and the French court of appeal case of *E. Aïta c. A. Ojeh*, *Revue de l'Arbitrage* 1986, No. 4, p. 583.

more realistic solution will be for the arbitral institutions to continue to develop and promote confidentiality rules which will apply to the arbitrations conducted under their respective auspices.¹³ At least as regards institutional arbitrations, this would take us back to the point where we were before 1995, i.e. prior to the *Esso and Bulbank* decisions, and would establish and define confidentiality as a fundamental principle of (institutional) international commercial arbitration. Perhaps then, in time, confidentiality will be accepted throughout the world as one of the main advantages of arbitration as opposed to litigation.

¹³ See Jan Paulsson and Nigel Rawding, *The Trouble with Confidentiality* (1995) 11 *Arbitration International* 3, pp. 314–320, setting out a number of suggested stipulations regarding confidentiality in institutional rules and contractual clauses.

