DECISION of the

SWEDISH SUPREME COURT

Case No.

given in Stockholm on 10 May 2012 Ö 1590-11

APPELLANT

Euroflon Tekniska Produkter AB, Reg. No. 556502-4162

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Counsel: Advokat BE and Advokat KI

COUNTERPARTY

Flexiboys i Motala AB, Reg. No. 556720-4861

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MATTER

Duty of disclosure

APPEALED DECISION

Göta Court of Appeal, decision of 8 March 2011 in Case No. ÖÄ 3478-10

SUPREME COURT
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DECISION OF THE SUPREME COURT

The Supreme Court amends the operative part of the decision of the Court of Appeal so as to affirm item 1 of the decision of the District Court, however, with the amendment that the invoices shall be submitted to the arbitrator within three weeks of the decision of the Supreme Court.

The Supreme Court amends the decision of the Court of Appeal with respect to compensation for litigation costs so

that the Supreme Court discharges Euroflon Tekniska Produkter Aktiebolag from the liability to compensate Flexiboys i Motala AB for its litigation costs before the District Court and orders Flexiboys to compensate Euroflon for its litigation costs before the District Court in the amount of SEK 25,000, all comprising of costs for legal counsel, plus interest thereon under Section 6 of the Swedish Act on Interest from 22 November 2010 until the date of payment,

that the Supreme Court discharges Euroflon from the liability to compensate Flexiboys for its litigation costs before the Court of Appeal and orders Flexiboys to compensate Euroflon for its litigation costs before the Court of Appeal in the amount of SEK 15,900, all comprising of costs for legal counsel, plus interest thereon under Section 6 of the Swedish Act on Interest from 8 March 2011 until the date of payment.

The Supreme Court orders Flexiboys to compensate Euroflon for its litigation costs before the Supreme Court in the amount of SEK 22,000, all comprising of costs for legal counsel, plus interest thereon under Section 6 of the Swedish Act on Interest from the day of the decision of the Supreme Court until the date of payment.

MOTIONS BEFORE THE SUPREME COURT

Euroflon Tekniska Produkter Aktiebolag has moved that the Supreme Court, by amending the decision of the Court of Appeal, shall affirm the decision of the District Court.

Euroflon has further moved that the Supreme Court shall discharge it from the liability to compensate Flexiboys i Motala AB for its litigation costs before the Court of Appeal and further shall order Flexiboys to compensate Euroflon for its litigation costs before the Court of Appeal.

Flexiboys has objected to any amendments to the decision of the Court of Appeal.

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

GROUNDS

Background

1. Arbitration proceedings are ongoing between Euroflon and BA. In the arbitration proceedings, Euroflon has moved that BA shall be ordered to pay SEK 1.5 million to Euroflon and, as grounds for the motion, it has claimed that BA has breached a non-compete clause in a share purchase agreement between Euroflon and BA. The clause provides that BA shall not directly or indirectly engage in or support any business that competes with the business of Euroflon. Euroflon has in the arbitration proceedings claimed that BA – through Flexiboys, which is owned and run by him – with respect to certain named companies, engaged in business that breaches the clause.

2. The arbitrator has granted Euroflon the right to move for an order of disclosure against Flexiboys before a competent court with respect to certain invoices issued by Flexiboys (No. 34, 37, 38, 40, 42, 43, 45-48,

50, 52-56, 58-60, 62, 63, 66-69, 71, 73-79, 82, 84-86, 88, 89 and 92), after having inferred that the documents have, or could have, importance as evidence in the arbitration proceedings.

3. If a party wishes that a party or a third party shall be ordered to submit documents as evidence, that party may, under Section 26 of the Swedish Arbitration Act (SFS 1999:116), after the arbitral tribunal has granted leave thereto, apply for such an order before a District Court. If the District Court deems the application reasonable considering the investigation of the case, it shall grant the application. The District Court shall grant the application if there are legal grounds for the measure.

The arguments of the parties

4. Euroflon has mainly referenced the following. During the arbitration proceedings, BA has submitted invoices issued by Flexiboys to various companies, after Euroflon having referenced evidence showing that BA has breached the non-compete clause in relation to these companies. Euroflon is of the opinion that there are more invoices that will show the breach of the non-compete clause. The invoices do not contain confidential business information. The invoices already submitted by Flexiboys state the name of the customers, as well as the products or services sold by Flexiboys and the invoiced amounts. This information has consequently already been revealed. Even if the invoices were to contain confidential business information, extraordinary grounds for an order to disclose are at hand considering the aforementioned. BA owns Flexiboys and is the sole director of the board. The application for the order to disclose is thus only formally directed at a company, which is not a party to the arbitration proceedings. In reality, the application is in fact directed at BA.

5. Flexiboys has mainly referenced the following. In the arbitration proceedings, BA has admitted that he, in relation to certain companies has

undertaken measures which constitute a breach of the non-compete clause, but he has disputed the claim on other grounds. In the arbitration proceedings, BA has submitted 19 invoices issued by Flexiboys to the companies with respect to which Euroflon has claimed that the breach of the non-compete clause has been committed. No other invoices have been issued to these companies. Thus, the application covers invoices issued to other companies. The purpose of the application is consequently not to obtain evidence for the claim brought before the arbitral tribunal, but rather to investigate whether there are grounds to widen the claim as brought before the tribunal. Thus, the application is a "fishing expedition" and should be dismissed already on this ground. Further, the invoices include confidential information in the form of prices applied by Flexiboys in relation to the relevant customers. Revealing this information could be detrimental to Flexiboys. The size of the customer, the customers' volumes and prices for certain specific sales is typically confidential information for any company and keeping this information confidential is of vital importance to Flexiboys in order to be competitive in its business. The fact that the application is directed at a third party and not the counterparty in the arbitration proceedings is a further ground for denying the application.

The scope of the Court's test of the merits

6. Section 26 of the Swedish Arbitration Act provides that the arbitral tribunal shall grant leave for an application to the courts, if the arbitral tribunal deems the measure reasonable, considering the investigation into the case. The review of the arbitral tribunal shall consider whether the measure could be of importance for the evidence of the case. Guidance for how to make the decision can be found in Section 2 of Chapter 38 of the Swedish Code of Judicial Procedure (see, e.g., Lars Heuman, Skiljemannarätt, 1999, p. 471 ff. and Stefan Lindskog, Skiljeförfarande. En kommentar, 2nd ed., 2012, section 26-4.1.4) as well as in Article 3 of the IBA Rules on the Taking of Evidence in International Arbitration of

2010. In order for a document to be considered to be of importance as evidence, it is required that it can be assumed that the document adds something to the existing evidence. The arbitral tribunal, which appears to have rather wide discretion to reach its decision, can deny such a motion if the evidence relates to irrelevant circumstances or if the issue has been sufficiently clarified through the existing evidence. However, the arbitral tribunal is not entitled to deny such a motion in cases where the taking of evidence before a court is called for. Since the court shall try the matter with respect to its legality (see items 8 and 11), the arbitral tribunal shall typically also try the matter in this respect, so as to avoid decisions that are rendered irrelevant.

7. If the arbitral tribunal refuses to grant a motion for an application before a court for an order to disclose, the court is barred from trying the application, if such an application is nevertheless submitted. If, on the other hand, an arbitral tribunal grants leave for such an application, it entails that the arbitral tribunal shall have considered that the documents falling within the scope of the application for an order to disclose are of importance as evidence in the arbitration proceedings and also that, in normal circumstances, the legal grounds for an order to disclose are at hand. The court shall in these cases try whether the legal grounds for the measure are at hand.

8. The preparatory works of the Swedish Arbitration Act provide that, after the arbitral tribunal has granted leave for the application and the party has submitted the application to a court, the court should only try whether any legal impediments to grant the application are at hand. Thus, the court shall not review whether the measure is called for or not. (See Government Bill 1998/99:35 p. 117 and p. 226 f.)

9. Jurisprudence holds an almost unanimous view that the courts should not review the decision of the arbitral tribunal that an order to disclose is reasonable. The review of the courts should, on this view, not take aim at

reviewing the arbitral tribunal's conclusion that the documents are of importance as evidence. Instead, the courts should accept the arbitral tribunal's view in this respect but review the legality of the measure (see, e.g., Heuman, op. cit., p. 483, Heuman, Editionsförelägganden i civilprocesser och skiljetvister. Del II, JT 1989-90, p. 258, Lindskog, op. cit., section 26-4.2, Thorsten Cars, Lagen om skiljeförfarande. En kommentar, 1999, p. 122, Bengt Olsson and Johan Kvart, Lagen om skiljeförfarande. En kommentar, 2000, p. 113 f., Fredrik Andersson, Therese Isaksson, Marcus Johansson and Ola Nilsson, Arbitration in Sweden, 2011, Section 48.3.1, and Finn Madsen, Skiljeförfarande i Sverige, 2nd ed., 2009, p. 228. Cf., however, Kaj Hobér, International Commercial Arbitration in Sweden, 2011, p. 6.177, who claims that the court must review the issue of the relevance of the evidence, if the arbitral tribunal has not undertaken a careful review of whether the conditions for an order for disclosure are at hand).

10. The parties have often appointed arbitrators with special competencies in the field to which the dispute relates. A review by the courts of the arbitral tribunal's decision that the document is of importance as evidence would entail that the arbitral tribunal, when reviewing the merits of the case, could be deprived of the possibility to consider documents, which it has deemed to be of importance. Such a review consequently could, with respect to decisions that an order for disclosure should not be issued, affect the review of the merits of the case before the arbitral tribunal. However, the actual purpose of an order to disclose is that the documents within the scope of the order should grant the tribunal access to evidence relevant for the review of the merits of the case. Thus, orders for disclosure serve to ensure the efficacy of arbitration proceedings and not to form the basis of any future review by the courts. This supports the view of the preparatory works as well as that of the jurisprudence. The fact that the courts normally would not have access to the full file of the arbitral tribunal and thus is not in the position to try whether the documents are of importance as evidence further supports this view. It is

further not desirable, particularly with respect to confidentiality considerations, that the procedure before the courts would require that the applicant submits such background material to the dispute that would be required for a full review by the courts of whether the documents are of importance and relevant as evidence.

11. Undoubtedly, in the court's review of whether there are legal grounds for the measure, it shall review if the arbitral tribunal has granted leave for submitting the application, if the application has been submitted to the correct court, if it is precise enough to be enforced, if any of the exemptions for related parties, authorized representatives and draft notes of the second or third paragraphs of Section 2 of Chapter 38 of the Swedish Code of Judicial Procedure are at hand, and whether any applicable confidentiality provisions prevent the disclosure of the documents (see, e.g., Section 5 of Chapter 36 of the Swedish Code of Judicial Procedure; c.f. Government Bill 1998/99:35 p. 116 f.).

12. The line between the legality review of the courts and the review which must fall within the exclusive jurisdiction of the arbitral tribunal should be drawn so that the court, when reviewing whether any legal impediments for an order to disclose are at hand, shall undertake this review in the same fashion as when the court has determined that the requested document is of importance as evidence. Thus, when the arbitral tribunal has determined that the document is of importance as evidence, then the review of the court should be limited to circumstances of the nature as referenced under item 11 above. The issue of whether an arbitral tribunal has committed a procedural error when granting leave for an application for an order to disclose must consequently be determined in the framework provided under the Swedish Arbitration Act.

The review in the present case

13. The arbitrator has granted leave for Euroflon to apply for an order to disclose before the public courts. Nothing to contradict that Euroflon has

submitted the application to the correct court has been referenced. The application is precise enough to be enforceable. Since the court shall not review whether the arbitrator's decision to grant leave for the application for an order to disclose is reasonable, the remaining issue is whether, as claimed by Flexiboys, the invoices comprise confidential business information (see the third sentence of the second paragraph of Section 2 of Chapter 38 and the second paragraph of Section 6 of Chapter 36 of the Swedish Code of Judicial Procedure) and whether the circumstance that the application for an order to disclose relates to documents of a third party is of any relevance for the outcome.

14. The Report for a Code of Judicial Procedure stated (see NJA II 1943 p. 472) that confidential business information comprises manufacturing procedures, installations, business relations, or other circumstance that can be deemed for a specific company as "proprietary" and with respect to which the holder has a reasonable claim that they should not be disclosed. In this respect, the Report referenced the Act concerning certain Provisions on Illegal Competition (SFS 1931:152). That act has subsequently been replaced by the Swedish Act on Protection of Trade Secrets. The definition of trade secrets of the act of 1990 often corresponds to the definition of the term confidential business information of the act of 1931 (cf. SOU 1983:52 p. 41 f, 284 ff. and 294 ff. as well as Government Bill 1987/88:155 p. 37; cf., also, Reinhold Fahlbeck, Lagen om skydd för företagshemligheter, 2nd ed., 2004, p. 223 ff.) In the case NJA 1995 p. 347, the term business secret was given a, in any case, not wider definition than the term confidential business information (see Peter Fitger, Rättegångsbalken, supplement 71, October 2011, p. 36:27 a-b). In the act of 1990 (see Section 1), the term business secret is defined as information relating to business or operational circumstances of a trader's business that a trader holds confidential and the disclosure of which is potentially detrimental to the trader in respect of the trader's competitors. This implies that the information must have financial value to the trader (see case NJA 1992 p. 307).

15. The test of whether certain information comprises confidential business information is evidently burdened with substantial difficulty, particularly in a case, such as this one, where one party objects to an application for an order to disclose. The test must be made without access to the documents and without the information, which is claimed to be confidential information, having been submitted to the court. The court's review must as a consequence be focused on whether the documents, against the background of what has been referenced in the case, could contain protected information.

16. Flexiboys has claimed, in this respect, that the documents contain information on customers, customer sizes, customer volumes and prices. Disclosure of information of this kind is typically detrimental from a competition perspective for the trader. It can also be assumed that the invoices contain information of this nature. Thus, they contain confidential information (see NJA 1986 p. 398 and NJA 1988 p. 652). This means that Flexiboys cannot be ordered to disclose them unless extraordinary circumstances are at hand.

17. The interests to be weighed in the test of whether extraordinary circumstances for disclosure of the relevant documents are at hand are their relevance as evidence, on the one hand, and the financial value of the confidential information, on the other. The review of the document's importance as evidence must also in this test be the exclusive jurisdiction of the arbitral tribunal (see item 12 above). If, however, the arbitral tribunal has not specified its reasoning with respect to the importance of the document as evidence, the court, which is to weigh the importance of the document against the potential harm of disclosure, must make its own judgment. In certain typical situations, the importance of the documents is clear even if the tribunal has not specified its reasoning. In these cases, the court can rely on this for its review. When this is not the case, the court can only assume that the importance of the document was only just

sufficient for the arbitral tribunal's decision to grant leave for the application to a court.

18. In this case, it must be deemed that the invoices will have substantial importance as evidence for the issue of to what extent BA has, directly or indirectly, conducted business in competition with that of Euroflon. Concurrently, the potential harm of Flexiboys appears clearly limited. It would therefore appear that a disclosure of the documents would not cause such harm that, considering Euroflon's interest of having the documents disclosed, any legal impediments for an order to disclose is at hand.

19. The application for an order to disclose is directed at a third party, which can typically affect the review of whether extraordinary circumstances are at hand to issue an order to disclose. Considering that BA is the sole owner and sole director of Flexiboys, and the entailing strong relation between Flexiboys and BA, this cannot be deemed of any vital importance, particularly considering that BA has undertaken, in relation to Euroflon, to not, directly or indirectly, engage in any competing business. Further, the disclosure is to be made to the arbitrator, which means that the documents will not be made generally available to the public.

20. In view of the aforementioned, and despite the fact that a strict restrictive stance must be taken when reviewing an application for an order to disclose with respect to confidential information, there are no legal impediments for granting Euroflon's application for an order to disclose. Thus, the decision of the Court of Appeal shall be reversed and the decision of the District Court shall be affirmed. However, the decision of the District Court shall be amended so that the disclosure of the documents shall be made to the arbitral tribunal within three weeks of the decision of the Supreme Court.

Litigation costs

21. In a case of this nature – where the issue is whether a third party, upon the request of a party to an arbitration is obliged to disclose documents in that arbitration – the provisions on litigation costs in the Swedish Code of Judicial Procedure are not directly applicable. Further, the provisions of Section 7 of Chapter 38 of the Swedish Code of Judicial Procedure only regulate the rights to compensation of a third party when it has fulfilled its obligations to disclose.

22. If a third party acquiesces to the applicant's claim and discloses the documents, there is no reason to grant that party compensation for its costs. The situation is different when the third party disputes the obligation to disclose the documents. If the applicant in this situation reaffirms its application, the arisen situation is very similar to that of an ordinary trial. In such cases, therefore, there is reason to analogously apply at least some of the provisions on litigation costs of the Swedish Code of Judicial Procedure.

23. Before the District Court, Flexiboys disputed Euroflon's application for an order to disclose, and as a result initiated the proceedings in which Euroflon now is finally determined the winning party. In line with this outcome, Flexiboys should be – in an analogous application of Section 1 of Chapter 18 of the Swedish Code of Judicial Procedure – ordered to compensate Euroflon its litigation costs arisen after the objections of Flexiboys. A reasonable amount for the proceedings before the District Court is SEK 25,000.

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The decision has been made by: Supreme Court Justices M.L., S.B. (Reporting Justice, dissenting), J.H., I.P. and M.B.
Reporting clerk: U.L.

Appendix to Minutes

28 February 2012

DISSENTING OPINION

Reporting Justice, Supreme Court Justice S.B. dissents and states as follows:

1. If a party to arbitration proceedings wishes that an order shall be issued for the counterparty or a third party to disclose information, that party is entitled to apply thereon before a District Court provided that the arbitral tribunal has granted leave therefor, see Section 26 of the Swedish Arbitration Act. The Section further provides that the arbitrators shall grant leave for the application if they consider the application reasonable considering the investigation of the case, and that the District Court shall grant the application if there are legal grounds for the measure.

2. Thus, the jurisdictional divide of the Section between the arbitrators and the District Court is drawn so that the arbitrators shall determine whether the measure is called for considering the investigation in the case, and the District Court shall determine whether there are legal grounds for the measure. When the arbitrators have granted a party leave to apply for an order to disclose, the court shall only review whether there any impediments under law preventing the measure.

3. Under Section 2 Chapter 38 of the Swedish Code of Judicial Procedure, anyone in possession of a document of presumed importance as evidence is liable – with certain exceptions – to disclose it. The starting point for a party wishing to obtain an order to disclose is that it shall specify the document and what it wishes to prove therewith. In cases where the document cannot be specifically identified, it may be sufficient that the party states that the application takes aim at a specific category of documents or all documents of importance related to a very clearly specified topic. (See NJA 1998 p. 590.) A party's application should not be granted, if the purpose is to obtain access to documents that will show

the party how to finally determine its claims before a court, which possible alternative claims can be brought or which grounds could be referenced (see Per-Olof Ekelöf *et al.*, Rättegång IV, 7th ed., 2009, p. 264 f. and Lars Heuman, Editionsförelägganden i civilprocesser och skiljetvister. Del I, Juridisk Tidskrift 1989-90, p. 25 f.).

4. Typically, the court should accept the arbitrators' view that the documents for which the order to disclose is sought are of importance as evidence in the arbitration proceedings. If, however, it becomes clear in the case before the court that the sole purpose of the application is to gain access to documents so as to facilitate the party's ability to determine its claim (so-called "fishing expedition"), no legal grounds are at hand to grant an application for an order to disclose, and the court shall not grant the measure.

5. The relevant arbitration proceedings are entirely domestic and do not give grounds to consider if the application should be modified because of the international aspect of certain arbitration proceedings (cf. Heuman, op. cit., p. 4 f.).

6. In its motion to the arbitrator for the leave to apply for an order to disclose, Euroflon did not provide what was to be proven by the relevant invoices. Instead, the purpose was stated to be that Euroflon wished to determine to what extent the counterparty had engaged in competing consulting business and when it had been initiated, and further to enable Euroflon to determine if and to what extent the business of Flexiboys competed with that of Euroflon's.

7. Thus, already from the motion for leave to apply for an order to disclose it is clear that it is solely such a "fishing expedition" for which there are no legal grounds, and that the court as a result shall not grant it.

In my view, the appeal shall be denied.

Being in the minority in this view, I agree with the majority on the issue of litigation costs.