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SVEA COURT OF APPEAL
Division 2
Bench 020108

DECISION
9 March 2011
Stockholm

Case No.
Ö 8181-10

DECISION APPEALED

Stockholm District Court, decision dated 23 September 2010 in case number T 6510-10, see Appendix A.

APPELLANT

Yara International ASA
[…]

Counsel: *Advokat* Kaj Hobér and *Advokat*
Kristoffer Löf
Box 1711
111 87 Stockholm

RESPONDENT

Joint Stock Company Acron
[...]

Counsel: *Advokat* Jonas Eklund and *Advokat*
Johan Gernandt
Box 1703
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MATTER

Disclosure order

DECISION OF THE COURT OF APPEAL

1. The Court of Appeal rejects Yara International ASA's motion for dismissal of Joint Stock Company Acrons's application for a disclosure order.

2. The Court of Appeal modifies the district court's decision (item 3) only insofar that the documents must be provided not later than 6 April 2011.

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3. What is stated under item 2 of the aforementioned decision shall also apply during the period until the decision becomes final.

4. The Court of Appeal's decision dated 18 October 2010 concerning stay of execution shall no longer apply.

5. Yara International ASA shall compensate Joint Stock Company Acron for its litigation costs in the Court of Appeal in the amount of SEK 170 000 regarding counsel fees plus interest in accordance with section 6 of the Swedish Interest Act (1975:635) from the date to the Court of Appeal's decision until such time as payment occurs.

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MOTIONS, ETC. IN THE COURT OF APPEAL

Yara International ASA ("Yara") has moved that the Court of Appeal shall dismiss or, in the alternative, reject Joint Stock Company Acron's ("Acron") application for a disclosure order. In the event that Yara is ordered to disclose the documents, Yara has moved that the district court should reject Acron's motion that the decision may be enforced notwithstanding that it has not become final. Yara has also moved that the district court shall release Yara from the obligation to pay Acron's litigation costs in the district court and that Acron shall be ordered to pay Yara's litigation costs in the district court.

Joint Stock Company Acron ("Acron") has opposed any amendment.

The parties have claimed compensation for litigation costs in the Court of Appeal.

On 18 October 2010, the Court of Appeal decided that enforcement of the district court's decision may not take place until further order.

EVIDENCE IN THE COURT OF APPEAL

The Court of Appeal has reviewed the evidence in the case. Written evidence has been adduced.

The parties have maintained and expanded upon their submissions in the district court. In addition, they have stated, among other things, the following.

Yara: Neither the arbitral tribunal nor the district court has assessed the evidential significance that the requested documents may possess. The evidential value must be weighed against Yara's interest in not disclosing the documents. Yara has already demonstrated how the shareholders' agreement was dealt with in connection with the relevant share transfers by producing an extract from an agreement. The district court has not adjudicated whether the legal prerequisites exist for an application for disclosure and the arbitral tribunal has not provided any reasons for its decision to grant Acron permission to apply for disclosure. The documents contain information concerning co-operations which are still ongoing and which are irrelevant for the determination of the arbitral dispute. The district court has erroneously taken into consideration that the subject matter of the dispute pertains to a significant amount of money and that the requested documents are old. The request for disclosure is insufficiently detailed and lacks an evidential purpose. It includes not only agreements but also documents in general. An enforcement authority cannot possibly assess whether an order in

accordance with the motion is complied with. The arbitral tribunal has indicated that the final hearing will be held only after a final decision is obtained in respect of the disclosure issue. Accordingly, there is no prejudice in the event of delay and thus no reason to decide upon immediate enforcement.

Acron: The arbitral tribunal has confirmed on three occasions that the documents possess evidential significance and are relevant in the case. The extract of an agreement produced by Yara does not show that the requested documents are of no significance in the case. The motion for disclosure only covers agreements, which is also apparent from the wording of the motion for disclosure. In addition, the motion has been drafted in accordance with the permission granted by the arbitral tribunal. In the event the Court of Appeal finds that the motion for disclosure is ambiguous, the company does not have any objection to the Court of Appeal redrafting an order for disclosure in which it is unambiguously stated that the decision only pertains to agreements which correspond to the documents described in the motion. It is denied that the documents contain trade secrets and that the district court has taken irrelevant circumstances into consideration. The age of the documents is significant since, for example, price information and information concerning legal relations which are no longer prevalent cannot constitute such sensitive information that Yara has a legitimate and strong interest in not disclosing the information. Yara has not described how the information in the requested agreements could possibly damage the company. Since the conclusion of the arbitral proceedings has already been significantly delayed and should thus not be subject to any further delays, the Court of Appeal's decision should be enforced immediately. It is necessary to obtain the requested documents in due time prior to the final hearing so that there is the possibility to adduce evidence as a result of what transpires following a review of the documents in question.

REASONS FOR THE COURT OF APPEAL'S DECISION

Section 46 of the Swedish Arbitration Act (1999:116) provides that the Act shall apply to arbitral proceedings which take place in Sweden notwithstanding that the dispute has an international connection. In a recent decision of the Swedish Supreme Court, the Court held that in conjunction with the assessment of Swedish jurisdiction it is irrelevant that the dispute relates to an arbitration agreement which does not have any connection to Sweden. The decisive factor in relation to the issue of jurisdiction is whether the parties have agreed that the proceedings shall take place in Sweden (see the Supreme Court's decision dated 12 November 2010 in case number Ö 2301-09). In the event that Swedish jurisdiction exists, a court of general jurisdiction can assist by, for example, hearing a witness under oath or, as in this case, hearing an application for a

disclosure order. In the present case it is common ground that the parties have agreed that the arbitral proceedings shall take place in Sweden. Since a Swedish court has jurisdiction to try Acron's application for a disclosure order, Yara's motion for dismissal shall thus be rejected.

If a party to arbitral proceedings has applied to court for a disclosure order following the consent of the arbitral tribunal, the court shall grant the application provided the legal prerequisites exist for an order for disclosure (section 26 of the Arbitration Act). The adjudication is limited in such a manner that the court shall not retry the arbitral tribunal's assessment of whether a measure is warranted on the basis of the evidence. Accordingly, as the district court held, Yara's submission concerning the lack of evidential significance of the documents is not something that can cause the motion for disclosure to be rejected.

It is evident from the arbitral tribunal's consent to the court application for disclosure and the district court's decision what documents are referred to in the motion for disclosure, namely documents that show how the shareholders' agreement was dealt with, directly or indirectly, in certain specified agreements. In the Court of Appeal, Acron has confirmed that the motion only relates to agreements. In light of the aforesaid, there cannot be deemed to be any difficulties for Yara to identify the documents in question. The Court of Appeal finds that the district court's decision is sufficiently detailed in order to be enforced and there is no reason to further clarify the decision.

Yara has stated that the purpose of the relevant share transfers was to secure phosphate to Yara's facilities, that the transfers were important for Yara's production activities and that the documents relating to the transactions contain sensitive information relating to co-operations, price information and commercial circumstances of major financial significance for Yara's business operations. Yara has also stated that the transactions are subject to confidentiality undertakings in relation to third parties. In light of the aforesaid and due to the fact that Yara and Acron are unquestionably competitors on the same market, the Court of Appeal agrees with the district court's assessment that the requested documents may be deemed to constitute trade secrets pursuant to chapter 36, section 6 of the Swedish Code of Judicial Procedure.

The issue is thus whether there are exceptional grounds to order Yara to disclose the documents. In conjunction with the assessment, a balancing exercise must be performed between the evidential significance of the trade secret and the financial value thereof. In addition, consideration also has to be given to the likelihood that disclose may cause significant damage (see Peter Fitger, the Swedish Code of Judicial Procedure, commentary to chapter 36, section 6). The

arbitral tribunal has decided that Yara shall disclose the requested documents and has also granted permission to Acron to apply for a court order for disclosure. In the opinion of the arbitral tribunal, Acron has been deemed to have a legitimate interest in reviewing the documents and that they may have evidential significance in the arbitral proceedings. The Court of Appeal agrees with the district court's assessment that there are cogent reasons as to why the documents should be disclosed. Yara's submission concerning the damage that may ensue as a result of disclose is very widely framed. It has not been specified in detail what information would cause damage for the company if such is disclosed or what damage the company might suffer. The documents are also relatively old and Yara's interest in preserving confidentiality in respect of the contents of the documents may be deemed to have diminished with the effluxion of time. In conjunction with an overall assessment, the Court of Appeal holds that Acron's interest in receiving the documents outweighs Yara's interest in not disclosing such documents and that there are exceptional grounds as to why such should be disclosed. Acron's application for disclosure shall thus be granted. The documents should be disclosed not later than four weeks from the date of this decision.

Taking into account the risk of the arbitral proceedings being further delayed, the decision should be enforced notwithstanding that it has not become final.

In light of the outcome of these proceedings, Yara shall compensate Acron for its litigation costs in the Court of Appeal. The amount claimed is reasonable.

APPEAL PROCEDURE, see Appendix B.

Appeal notice not later than 6 April 2011