

**International Centre for
Settlement of Investment Disputes**

GEA GROUP AKTIENGESELLSCHAFT

Claimant

v.

UKRAINE

Respondent

ICSID Case No. ARB/08/16

Procedural Order No. 4

Rendered by an Arbitral Tribunal composed of:

Professor Albert Jan van den Berg, President

Toby Landau QC, Arbitrator

Professor Brigitte Stern, Arbitrator

Ms. Aïssatou Diop, Secretary of the Arbitral Tribunal

CONSIDERING:

- (A) Procedural Order No. 1 and Annex B thereto dated 19 February 2010 regarding production of documents;
- (B) Respondent's letter of 18 March 2010, attaching: (a) letter from Respondent to Claimant dated 12 March 2010; and (b) letter from Claimant to Respondent dated 16 March 2010, and seeking the following orders from the Tribunal regarding alleged instances of non-compliance by the Claimant with Procedural Order No. 1:
 - (i) an order requiring "the Claimant to disclose the documents identified in the Respondent's letter dated 12 March 2010 or to provide a precise explanation of the steps it has taken to obtain these documents and the reasons why it has failed to produce them";
 - (ii) an order that "the Claimant ... produce a complete unredacted copy of the [share purchase and assignment agreement dated 4 December 1997]";
 - (iii) an order "that the Claimant produce unredacted copies of all documents contained in its disclosure (including those listed [in the letter of 18 March 2010]) as already ordered in Procedural Order No. 1";
- (C) That the requested order set out in (B)(i), above, concerns:
 - (i) notarial deeds produced by Claimant in response to Respondent's Request No. 1 relating to Spin-Off and Acquisition Agreements dated 29 May 1995 and 31 August 1995, in respect of which Respondent alleges that Claimant previously informed the Tribunal that it had no documents in its possession, custody or control responsive to Request No. 1;
 - (ii) documents of which only extracts have been produced; and
 - (iii) documents that the Respondent claims exist, but which Claimant has not produced;
- (D) That the requested order set out in (B)(ii), above, concerns Claimant's refusal to produce the share purchase and assignment agreement dated 4 December 1997 (the

“1997 Agreement”) on the grounds that production would breach the confidentiality clause in the agreement;

- (E) That in respect of the requested order set out in (B)(ii), Respondent offered in its letter of 18 March 2010 to give an undertaking “not to disclose the 1997 Agreement, or its contents, to any third party, thereby ensuring that the 1997 Agreement will remain confidential within this arbitration”;
- (F) That the requested order set out in (B)(iii), above, concerns Respondent’s allegation that Claimant’s claim of privilege in respect of portions of certain documents is unacceptable both because it was not made in a timely fashion and because the criteria for establishing a claim of privilege under German law have not been made out by the Claimant;
- (G) E-mail from the ICSID Secretariat on behalf of the Tribunal sent on 19 March 2010, directing Claimant to provide its response to Respondent’s letter of 18 March 2010 by close of business on 23 March 2010;
- (H) Claimant’s letter of 23 March 2010, stating:
 - (i) that there is no basis for the requested order set out at (B)(i), above, because:
 - (a) the documents that were not produced are not in Claimant’s possession custody or control; (b) the original documents of which Claimant produced only extracts or translations are not in Claimant’s possession, custody or control; (c) the documents falling within Request No. 1, which Claimant indicated it did not have, were the Spin-Off and Acquisition Agreements themselves, not notarial deeds relating to those Agreements;
 - (ii) that Claimant’s wholly-owned subsidiary, solvadis ag, was a party to the 1997 Agreement, and would be in breach of the confidentiality clause thereof if Claimant were to disclose the 1997 Agreement in this arbitration, and that Claimant “finds no comfort in Ukraine’s proposal to undertake not to disclose the 1997 agreement or its contents to any third party”;
 - (iii) that Claimant acknowledged that in its Memorial it had “erroneously described the transaction resulting in the sale of KCH as a sale of shares of solvadis ag” rather than as a sale of shares in KCH, thus suggesting that solvadis ag was no longer a wholly-owned subsidiary of Claimant;

- (iv) that, given the timetable for document production in this matter, Claimant had not been required to indicate in its responses to Respondent's Document Requests that certain documents it had agreed to produce would be produced with redactions in respect of matters to which attorney-client privilege was claimed to apply;
 - (v) that the rules applicable to the question of whether such privilege existed in the relevant documents were "rules of attorney-client privilege recognized under public international law", not German rules, and that under the relevant international rules the privilege was properly claimed, in that "[t]he redacted passages concern legal communications between outside counsel and the client containing legal advice on decision [sic] that was in, or was in contemplation of, legal contention";
- (I) Respondent's letter of 24 March 2010, stating:
- (i) that, in respect of the documents referred to at (C)(i), above, "Respondent assumes that the documents in question are deposited with the notary that prepared the notarial deeds and that the Claimant accordingly can obtain the documents in question";
 - (ii) that, in respect of the documents referred to at (C)(ii), above, "Respondent notes the Claimant's comment that it 'has produced all that it has'";
 - (iii) that, in respect of the documents referred to at (C)(iii), above, "Respondent notes the Claimant's indication that scheduled meetings to address the facts that are at issue in this arbitration apparently did not take place";
 - (iv) that, in respect of the 1997 Agreement referred to at (D), above, "Claimant has failed to establish that the Claimant itself would be in contractual breach" if the 1997 Agreement were disclosed, and that in any case "if disclosure of the agreement is permitted in the 'ordinary course of business', it follows that it should be disclosed in the ordinary course of an arbitration (commenced by the Claimant)";
 - (v) that Respondent reaffirms its offer to provide a confidentiality undertaking in respect of the 1997 Agreement;

- (vi) that, in respect of the documents referred to at (F), above, Respondent maintains its position that the claim of privilege was not timely made and that German privilege rules apply. Further, the Respondent states that were the standard claimed by Claimant to apply, the documents would still not be privileged because they do not constitute legal communications;
- (J) Claimant's e-mail of 24 March 2010 objecting to the submission of Respondent's letter of 24 March 2010 and requesting an opportunity to respond to it;
- (K) Letter from the ICSID Secretariat on behalf of the Tribunal dated 24 March 2010 noting that where a Party wishes to file a submission not contemplated by the procedural timetable it should seek the Tribunal's permission to do so, and noting that, as Claimant had filed a submission on 24 March 2010, Respondent would have until 26 March 2010 to file a response;
- (L) Letter from the ICSID Secretariat on behalf of the Tribunal dated 25 March 2010 correcting the letter referred to in (K), above, to reference the submission filed by Respondent on 24 March 2010 and to allow Claimant to file a response by 26 March 2010;
- (M) Claimant's letter of 26 March 2010, stating:
 - (i) regarding the Spin-Off and Acquisition Agreements referred to at (C)(i), above, that "[t]here is no basis for Ukraine's assertion that documents in the possession of the notary are within GEA's possession, custody or control";
 - (ii) that Respondent "appear[ed] to have abandoned its request" regarding extracts and translations of documents referred to at (C)(ii), above, and regarding minutes referred to at (C)(iii), above;
 - (iii) that "[t]he fact that GEA has included in its response a description of documents held by a wholly owned subsidiary ... does not mean that that subsidiary can breach its contractual obligations with impunity" and denying that disclosure in the "'ordinary course of an arbitration' commenced by a parent company equates to the 'ordinary course of business' of mg capital gmbh";

- (iv) that the redacted portions of the documents referred to in (F), above, “[reflect] legal advice given by outside counsel to the client” and are privileged according to the approach set out in the *OSPAR* case cited in Claimant’s letter referred to in (H), above;
- (N) That the Tribunal considers that:
- (i) based on the foregoing, the Claimant’s failure to produce the Spin-Off and Acquisition Agreements referred to in C(i), above, does not breach Procedural Order No. 1;
 - (ii) Respondent has, by its letter of 24 March 2010 referred to in (I), above, withdrawn its objections regarding non-production of documents referred to at (C)(ii) and (iii), above;
 - (iii) based on the explanations set out in Claimant’s letters referred to in (H) and (M), above, Claimant is not entitled to resist production of the 1997 Agreement referred to in (D), above, on the grounds that its subsidiary may be obliged to keep the agreement confidential, if the agreement is in Claimant’s possession, custody or control;
 - (iv) legal professional privilege may be claimed in this proceeding in respect of documents in the possession, custody or control of Claimant that satisfy the test for legal professional privilege under either or both of the relevant German rules and the international rules set out in the *OSPAR* case;
 - (v) all claims for legal professional privilege should in principle properly have been made at the time each Party responded to the other’s request for document production;
 - (vi) Claimant has explained that it believed it was not required to make its claims of privilege at that time;
 - (vii) statements in internal documents of Claimant reflecting legal advice sought or obtained from counsel are privileged to the extent that the subsequent or prior communication of Claimant with counsel would be privileged, provided that the statement referring to such advice sought or obtained is not made in circumstances resulting in waiver of that privilege by Claimant;

- (viii) Claimant states in its letter referred to in (H), above, that “[t]he redacted passages concern legal communications between outside counsel and the client containing legal advice on decision [sic] that was in, or was in contemplation of, legal contention”;
- (ix) Respondent has not alleged that any privilege in the documents referred to in (F), above, has been waived, other than by Claimant’s failure to claim the privilege at the time of its response to Respondent’s document request;

THE ARBITRAL TRIBUNAL HEREBY DECIDES AS FOLLOWS:

1. The Tribunal rejects the order sought by Respondent at (B)(i), above.
2. The Tribunal orders Claimant, upon receipt of an undertaking from Respondent in the form referred to in (E), above, to produce a complete unredacted copy of the 1997 Agreement.
3. The Tribunal rejects the order sought by Respondent at (B)(iii), above.

Date: 6 April 2010

On behalf of the Arbitral Tribunal

[signed]

Albert Jan van den Berg,
President