

COURT OF APPEAL  
FOR WESTERN SWEDEN  
Department 4  
Division 43

**JUDGMENT**  
27 February 2015  
Gothenburg

Case No.  
T 4028-13

**CLAIMANT**

Berde Plants Sweden AB, Reg. No. 556608-3720  
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**RESPONDENT**

Borkhult Invest AB in bankruptcy, Reg. No. 556872-8439  
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**MATTER**

Challenge of arbitration award

**CHALLENGED ARBITRATION AWARD**

Arbitration award given in Gothenburg on 3 July 2013 in Arbitration Institute of the Stockholm Chamber of Commerce's case No. V (139/2012)

**JUDGMENT OF THE COURT OF APPEAL**

1. The Court of Appeal rejects the challenge brought by Berde Plants Sweden AB.
2. Berde Plants Sweden AB is ordered to compensate Borkhult Invest AB in bankruptcy for its litigation costs before the Court of Appeal in the amount of SEK 128,000, out of which SEK 102,800 comprises costs for legal counsel and SEK 25,700 comprises value added tax, plus interest on the amount pursuant to Section 6 of the Swedish Interest Act (1975:635) from the day of the Court of Appeal's judgment until the day of payment.

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**BACKGROUND**

By way of a share purchase agreement of 6 December 2011, Berde Plants Sweden AB (“Berde Plants”) sold all shares in its wholly owned subsidiary Caesar Collection AB (“Caesar Collection”) to Borkhult Invest AB (“Borkhult Invest”).

The share purchase agreement provides that disputes arising out of the agreement shall be finally resolved by arbitration. A dispute arose, and Borkhult Invest requested arbitration. An arbitration award was rendered on 3 July 2013 in case No. V (139/2012).

The arbitration award ordered Berde Plants to pay to Borkhult Invest a total amount of SEK 1,986,855 plus a certain interest and compensation for litigation costs in the amount of SEK 1,475,742 plus interest. Borkhult Invest’s claim for compensation for damages of SEK 1,099,644 plus interest was rejected. Also, Berde Plants’ counterclaim against Borkhult Invest for the amount of SEK 793,963 was rejected. The parties were ordered to jointly and severally pay the arbitration costs, out of which Berde Plants was held liable, as between the parties, to pay 85 percent of the arbitration costs and Borkhult Invest was held liable to pay 15 percent of the said costs.

On 19 May 2014, Borkhult Invest was declared bankrupt. The bankruptcy administrator has informed that the bankruptcy estate does not wish to accede to these proceedings before the Court of Appeal.

**MOTIONS BEFORE THE COURT OF APPEAL**

Berde Plants has moved that the Court of Appeal shall annul items 1-3 and 5-9 of the operative part of the arbitration award in the arbitration between Borkhult Invest and Berde Plants. In the event that the Court of Appeal would conclude that not all the said items shall be annulled, Berde Plants has moved that the items shall be reviewed separately.

Borkhult Invest has disputed the motions.

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The parties have claimed compensation for litigation costs.

**GROUND**

**Berde Plants**

Items 1-3 and 5-9 of the operative part of the arbitration award shall be annulled because the arbitrator exceeded his mandate pursuant to the second item of Section 34 of the Swedish Arbitration Act (1999:116) by going beyond the parties' motions and considering circumstances which the parties had not referenced.

In the event that the Court of Appeal would find that the arbitrator did not exceed his mandate, the arbitration award shall be annulled pursuant to item 6 of Section 34 of the Swedish Arbitration Act. The arbitrator failed to consider circumstances referenced by Berde Plants. This error likely affected the outcome of the case.

**Borkhult Invest**

The arbitrator did not exceed his mandate by going beyond the parties' motions or by considering circumstances which had not been referenced. Further, the arbitrator did not fail to consider circumstances referenced by Berde Plants. In any event, no error occurred that likely affected the outcome of the case.

**FURTHER DETAILS**

**Berde Plants**

Excess of mandate

Borkhult Invest claimed compensation for costs for the arbitration in the amount of SEK 2,108,203, out of which SEK 375,000 comprised value added tax. Of the claimed amount, SEK 1,875,000 comprised costs for legal counsel including value added tax. The invoice submitted by Borkhult Invest specified that the cost for the counterclaim amounted to SEK 40,000 of the

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costs for legal counsel of SEK 1,500,000, i.e. 2.6 percent. For its part, Berde Plants claimed compensation of SEK 30,000 for time spent on the counterclaim, corresponding to 1.6 percent of the total amount claimed for costs for legal counsel.

The grounds of the arbitration award provide that the arbitrator initially noted that the amounts claimed for costs for legal counsel were reasonable. Thereafter, they provide that ten percent of the time spent related to the counterclaim. Thus, the arbitrator concluded that Borkhult Invest should be awarded compensation for litigation costs corresponding to ten percent of time spent, despite Borkhult Invest itself maintaining that 2.6 percent corresponded to time spent on the counterclaim. Thereby, the arbitrator went beyond the motions of the parties and exceeded his mandate. Borkhult Invest claimed compensation for the counterclaim in the amount of SEK 40,000, corresponding to 2.6 percent of the total amount, and the arbitrator was bound by the motion. By awarding Borkhult Invest a higher amount, ten percent, the arbitrator exceeded his mandate.

In addition, the arbitrator exceed his mandate as follows. On page 26 of the arbitration award, the arbitrator has stated that allowing a party to benefit from its own breach of contract would violate a general principle of law. The circumstances referenced by the arbitrator in his line of reasoning were never referenced by the parties. Further, the alleged breaching party was not a party to the dispute. In the event that the Court of Appeal would conclude that this involves only the application of the law on the part of the arbitrator, then it was for the arbitrator to guide the proceedings so as to avoid surprising the parties. The arbitrator failed to do so.

Failure to consider referenced circumstances

The arbitrator has failed to consider circumstances referenced by Berde Plants. As regards the calculation of the adjusted equity, as it is defined in Section 9.2 of the share purchase agreement, Berde Plants asserted that it should be calculated so that it comprises the company's equity plus 73.7

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percent of the company's profit prior to corporate tax for the period 1 January – 31 December 2011, plus 73.7 percent of the company's untaxed reserves. The definition entails that the company's equity includes first and foremost the company's determined equity in the form of share capital, retained earnings and that year's profit. To this should be added 73.7 percent of the company's profit in 2011 and 73.7 percent of the company's untaxed reserves. At the main hearing, Berde Plants maintained that it was willing to accept the amount SEK 7,876,237 in order to simplify the proceedings, also taking into account the calculation and the objections raised by Borkhult Invest. The arbitrator did not take this into account. In Section 4.2.2 of its Statement of Defense, Berde Plants asserted that also that year's profit should be taken into account. The arbitrator failed to consider this objection. A calculation of the adjusted equity based on Berde Plants' arguments would have led to a different conclusion than that reached by the arbitrator. Berde Plants repeated this objection during the main hearing, but the arbitrator nevertheless did not change his opinion.

Further, in Section 1.1 of its Statement of Defense, Berde Plants maintained that Borkhult Invest's claim for SEK 700,001 in the main should be set off against Berde Plants' claim against Borkhult Invest. However, the arbitrator failed to consider this.

Further, Section 7.2 of the share purchase agreement provides that in the event that a reduction of the purchase price shall be made, then it shall be deducted from any possible outstanding loan amount. The arbitrator failed to consider this despite it being referenced during the arbitration. The arbitrator referenced this only under motion 1 in the arbitration award, but it should rightly have been considered also under this motion and it is obvious as it set out in the provision. In this respect, the arbitrator has failed to remain impartial and failed to guide the proceedings.

Finally, the arbitrator has failed to consider the following. During the main hearing, a letter from Mr. A was read and Mr. A confirmed its contents. The letter provided, amongst other things, that Borkhult Invest had been in

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composition negotiations with its bank and that the group had increased its borrowing by more than SEK 5,000,000 in the preceding year. In the arbitration award, the arbitrator merely noted that there had been oral information from Berde Plants on Borkhult Invest's and Caesar Collection's financial situation. The arbitrator failed to consider that Mr. A orally confirmed the contents of the letter sent by his counsel to Mr. K and that the company was in composition negotiations with the bank. Further, the arbitrator did not consider that when Caesar Collection's CFO, Ms. W, was questioned on finances and borrowing of the preceding year, she refused to respond. Considering the aforementioned, it was incorrect by the arbitrator to maintain that the information was not presented to him in its context and that there was no information upon which the assessment of the Borkhult Invest group's financial situation could be based. It is remarkable how the arbitrator could conclude that there was no information on the Borkhult Invest group's financial situation, when its representatives attested that the company was in composition negotiations with the banks. Composition negotiations with banks only occur in situations of financial distress. Here, it was for the counterparty to establish the opposite, and this was not done.

### **Borkhult Invest**

#### Excess of mandate

The arbitrator did not go beyond the parties' motions when he awarded Borkhult Invest compensation for costs corresponding to ten percent of the time spent in the arbitration due to Berde Plants' counterclaim having been rejected. As evident from Borkhult Invest's invoice specification, Borkhult Invest claimed compensation in the amount of SEK 2,108,203. Thus, the arbitrator did not go beyond the amount claimed by Borkhult Invest. Borkhult Invest was awarded compensation for litigation costs in the amount of SEK 1,475,742. The arbitrator is not bound by the parties' estimates of how the litigation costs relate to the various parts of the case.

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Further, motion 1 of the main case and motion 1 of the counterclaim were based on the same circumstances, i.e. different sides of the same coin. This is evident from, amongst other things, page 7 of appendix 2 to the arbitration award, which provides that both parties have the “[s]ame position as under motion 1 of the main case”. Thus, when the arbitrator granted Borkhult Invest’s motion 1 of the main case, it entailed that the counterclaim was rejected in this respect. All in all, Borkhult Invest was not awarded full compensation for its litigation costs related to motion 1 of the main case and the counterclaim. In addition, Borkhult Invest wishes to particularly stress that the arbitrator on page 28 of the arbitration award details the parties’ claims for compensation for their respective litigation costs, and there points out that Borkhult Invest has left it to the arbitrator to decide on the allocation of litigation costs between the different parts of the case.

It is disputed that the arbitrator exceeded his mandate by on page 26 referencing circumstances which the parties had not referenced. The arbitrator does not reference any particular circumstances on page 26. On page 26, the arbitrator draws legal conclusions based on the factual circumstances referenced by the parties. These factual circumstances are described on page 6 of appendix 2 to the arbitration award. Berde Plants has not referenced one single circumstance referenced by the arbitrator, which had not been referenced in the arbitration.

Further, Borkhult Invest wishes to stress that the Court of Appeal in its review shall not review the merits of the arbitration award and thus not review which legal provisions that arbitrator applied. In other words, an arbitrator is entitled and obliged to apply legal provisions which the parties have not referenced. This course of action does not mean that the mandate was exceeded.

Failure to consider referenced circumstances

It is disputed that the arbitrator failed to consider circumstances referenced by Berde Plants. As regards Berde Plants’ objection to the calculation of the

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adjusted equity, it is Borkhult Invest's opinion that the arbitrator considered them fully in line with how Berde Plants presented its case as well as with how the case was presented in the arbitrator's summary set out appendix 2 to the arbitration award. In any event, no error occurred that likely affected the outcome. Berde Plants bears the burden of proof for its assertion, and has not explained – and certainly not proven – how the relevant assertion would have affected the outcome of the case.

It is correct that Berde Plants maintained that Borkhult Invest's claim for SEK 700,001 mainly should be set off against the claim Berde Plants has against Borkhult Invest. It is incorrect, however, that the arbitrator failed to consider this objection. In fact, since the arbitrator rejected Berde Plants' two motions of the counterclaim there was no claim against which to set off the claimed amount.

It is further disputed that Berde Plants during the arbitration maintained that Borkhult Invest claim of SEK 1,000,000 should be reduced by possible outstanding loan amounts. Berde Plants did not maintain this during the arbitration. Nevertheless, the objection was considered in the enforcement of the arbitration award, and so the amount as *de facto* been set off.

It is not correct that the arbitrator failed to consider what was referenced concerning the Borkhult Invest group's financial situation. The arbitrator considered that which was referenced, but concluded it was presented out of context. During main hearing, the arbitrator pointed out that Berde Plants' counsel did not provide him with a context in which to assess the information referenced on these matters. Berde Plants referenced no documentary evidence in support of its fragmentary claims that Borkhult Invest was insolvent. The letter originally referenced by Berde Plants in the proceedings was a settlement offer drafted by Borkhult Invest in relation to an ongoing legal dispute. After it having been pointed out that it would be in breach of the Bar Association's Code of Conduct to disclose Borkhult Invest's settlement offer, Berde Plants opted not to divulge the specifics of the letter,

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not to reference the letter in the arbitration and to not submit the letter to the arbitrator.

## **GROUND OF THE COURT OF APPEAL**

### **Procedural issues and the investigation before the Court of Appeal**

Pursuant to item 5 of the first paragraph of Section 18 of Chapter 42 and Section 1 of Chapter 53 of the Swedish Code of Judicial Procedure, the Court of Appeal has decided the case without a main hearing.

The parties have referenced documentary evidence.

### **Starting points for the Court of Appeal's review**

Items 2 and 6 of the first paragraph of Section 34 of the Swedish Arbitration Act provide that an arbitration award shall, upon it being challenged, be annulled if the arbitrator has given his award after the deadline set by the parties, if the arbitrator has exceeded his mandate, or if procedural errors occurred, without having been caused by the parties, that likely affected the outcome.

### **The Court of Appeal's conclusion whether the arbitrator exceeded his mandate**

Did the arbitration go beyond the parties' motions as regards litigation costs? An arbitrator may not go beyond the framing of the case set by the parties through their motions. Thus, if the arbitration award goes beyond the underlying motion, the arbitrator has exceeded his mandate (see Lindskog, Skiljeförfarande – En kommentar, 2012, p. 871).

In the arbitration, Borkhult Invest claimed compensation in the amount of SEK 2,108,203. Of the amount, SEK 1,500,000 related to costs for legal counsel. As regards the allocation of the work, it was noted that "Borkhult Invest estimates that the above said costs are allocated to the various parts of the case as follows", after which is set out an allocation of the fees for legal

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counsel for the various parts of the case, expressed in percentages. Thereafter, it is stated: “The costs for the counterclaim amounts to SEK 40,000 (and the full amount of which is included in the above claim for compensation for costs for legal counsel)”.

The arbitrator assessed that the main case corresponded to 90 percent and the counterclaim ten percent of the time spent in the case, and that the three parts of the main case – adjustment of the purchase price, breach of warranty and reduction of the purchase price – corresponded approximately 33 percent each of the time spent. The arbitrator concluded that Berde Plants should compensate 70 percent of Borkhult Invest’s litigation costs, and that, as between the parties, Berde Plants should pay 85 percent and Borkhult Invest 15 percent of the costs for the arbitration.

Courts shall *ex officio* decide on the allocation of litigation costs within the boundaries of the claimed amount (see Government Bill 1986/87:89 p. 120 f.). The same ought analogously apply to arbitrators in arbitrations (see Lindskog, *op. cit.*, p. 1022 ff., and Government Bill 1998/99:35 p. 166). Borkhult Invest’s claim for compensation did not preclude the arbitrator to allocate the amounts in the manner he did. Thus, the arbitrator cannot be deemed to have gone beyond the motions of the parties as regards litigation costs, and has consequently not exceeded his mandate in this respect.

Did the arbitrator consider circumstances which had not been referenced?

First, the Court of Appeal notes that an arbitrator shall be deemed to have exceeded his mandate if has based his decision on circumstances which have not been referenced by a party (see Lindskog, *op. cit.*, p. 872 f.). The starting point is that the arbitrator is obliged to resolve the dispute based on the circumstances (legally relevant circumstances), which the parties reference in support of their respective cases. However, the arbitrator is generally entitled (and also obliged) to apply legal rules which have not been referenced.

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In the arbitration, Borkhult Invest referenced, in support of one of its motions, that Mr. K, by acting in a manner that forced Caesar Collection to terminate his employment, should be deemed to have himself terminated his employment and that as a consequence the purchase price should be reduced pursuant to Section 7.2 of the share purchase agreement. The arbitrator concluded that it would violate a principle of law to allow a party to benefit from its own breach of contract. Therefore, he found that was it not reasonable that Caesar Collection, upon Mr. K's actions, would have been obliged to keep him employed so that Borkhult Invest could later rely on the right to a reduction of the purchase price under Section 7.2 of the agreement. Thus, the arbitrator's conclusion was that Mr. K, just as asserted by Borkhult Invest, should be deemed to have terminated his own employment and that Section 7.2 of the agreement was directly applicable.

The Court of Appeal concludes that the arbitrator did not base his decision on any other factual circumstances than those referenced by Borkhult Invest in support of its motion.

That the arbitrator based his decision concerning what factual circumstances ta had been established on a general principle of law does not entail that he exceeded his mandate (cf. Svea Court of Appeal's judgments of 29 April 2013 in case No. T 6198-12 and of 22 April 2013 in case No. T 6123-12). Further, it cannot be deemed surprising to the parties that an arbitrator in this manner, within the scope of his mandate, applies a general principle of law. Thus, the Court of Appeal concludes that the arbitrator did not fail to fulfill his obligation to guide the proceedings.

**The Court of Appeal's conclusion as regards whether the arbitrator failed to consider referenced circumstances**

Berde Plants' objection to the calculation of the adjusted equity

Under heading B of the arbitration award, "THE PROCEDURE OF THE ARBITRATION", it is stated that the arbitrator on two occasions has

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summarized the parties' motions and legal grounds. Further, it is stated that the parties have commented on the summaries and finally framed their respective cases as set forth in appendix 2 to the arbitration award. This appendix provides that the arbitrator understood Berde Plants' case so that no binding closing accounts existed, that Grant Thornton's audit should be deemed irrelevant based on Section 36 of the Contracts Act and that the adjusted equity rightfully should amount to SEK 7,876,237, less a specific amount due to customer claims and a claim against the subsidiary not having been accounted for correctly.

In the event that Berde Plants had been of the opinion that the arbitrator had not understood all objections correctly, it was for Berde Plants to point this out to the arbitrator. Nothing in the case, other than Berde Plants' assertion that the objection was repeated during the main hearing and was submitted in writing, supports that Berde Plants objected to how the arbitrator had understood the objection.

Against the above background, the Court of Appeal concludes that Berde Plants has not established that the arbitrator failed to consider a referenced objection. Thus, the arbitrator cannot be deemed to have committed a procedural error in this respect.

Berde Plants' objection that the amount SEK 700,001 should in the main be set off against the counterclaim

The arbitration award provides that the arbitrator rejected Berde Plants' counterclaim in its entirety. Thus, it was not possible to set off against the counterclaim asserted by Berde Plants. Also the arbitrator has noted this. Thus, the arbitrator cannot be deemed to have failed to consider a referenced circumstance or committed a procedural error in this respect.

Objection on deduction under Section 7.2 of the share purchase agreement

Borkhult Invest has disputed that Berde Plants in the arbitration maintained that Borkhult Invest's claim for SEK 1,000,000 should be deducted from any

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possible outstanding loan amount. The investigation has not established that Berde Plants raised any such objection in the arbitration. It has consequently not been established that the arbitrator failed to consider any such objection from Berde Plants. Further, it has not been established that the arbitrator was not impartial or that he failed to guide the proceedings or committed any other procedural error in this respect.

Consideration of information on the Borkhult Invest group's financial situation

In the arbitration award, the arbitrator has stated that during the main hearing there was oral information from Berde Plants concerning Borkhult Invest's or Caesar Collection's financial position. For reasons detailed in the arbitration award, the arbitrator concluded, however, that Berde Plants has failed to establish its assertion that there were grounds to assume that the Borkhult Invest group was in financial duress and that it was therefore reasonable to assume that Borkhult Invest would fail to fulfill its obligation on the due date. The aforementioned shows that the arbitrator considered the issue. The fact that Berde Plants does not agree with the arbitrator's evaluation of the evidence is not subject to challenge. Thus, also not in this respect can the arbitrator be deemed to have failed to consider a referenced circumstance or committed any other procedural error.

**Summarized conclusion of the Court of Appeal**

Considering the above stated conclusions, Berde Plants has failed to establish that the arbitrator has exceeded his mandate or committed a procedural error that would give grounds to annul the arbitration award. Therefore, Berde Plants' motions shall be rejected.

**Litigation costs**

Upon the above outcome, Berde Plants shall compensate Borkhult Invest for its litigation costs before the Court of Appeal. The claimed amount is reasonable and shall be awarded.

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**Appeal**

The second paragraph of Section 43 of the Swedish Arbitration Act provides that the judgment of the Court of Appeal may be appealed only if it is important for the development of case law that an appeal is reviewed by the Supreme Court.

The Court of Appeal finds that there are no grounds to allow an appeal of the judgment.

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The judgment has been made by: Judges of Appeal HJ and KR and Deputy Associate Judge JH (reporting).