

SVEA COURT OF APPEAL  
Department 02  
Division 020103

**JUDGMENT**  
18 June 2015  
Stockholm

Case No.  
T 4861-14

**CLAIMANT**

Välinge Flooring Technology AB, Reg. No. 556693-2652 (“VFT”)

Counsel: Advokat Fredrik Andersson, advokat Stefan Brocker and advokat Christoffer Monell, assisted by jur. kand. David Jivegård  
P.O. Box 2235  
403 14 Gothenburg

**RESPONDENT**

1. Flooring Technologies Ltd, C36587 (“Krono”)
2. Kronospan Technical Holdings Ltd, HE194308 (“Krono”)

Counsel: Advokat Jesper Grunbaum and advokat Johan Strömbäck and jur.kand. Filippa Wassberg  
P.O. Box 1050  
101 39 Stockholm

**MATTER**

Challenge of arbitration award rendered in Stockholm on 11 April 2014

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**JUDGMENT OF THE COURT OF APPEAL**

1. The Court of Appeal rejects the motions of the claimant.
2. The confidentiality under Section 2 of Chapter 36 of the Public Access to Information and Secrecy Act shall remain for business and operational information of a private entity, presented during a hearing behind closed bars and which is also set out in case document numbers 6, 7, 29 and 52.
3. VFT is ordered to compensate Krono for its litigation costs Appeal in the amount of SEK 1,584,832, plus interest pursuant to Section 6 of the Swedish Interest Act from this day until the day of payment. Of the amount, SEK 1,484,666 comprises costs for legal counsel.

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## **BACKGROUND**

Välinge International AB (“International”) is a holding company in a group of companies involved in research and development of flooring technology. The company is the indirect owner of, among other companies, Välinge Innovation AB (“Innovation”), which is the owner of the intellectual property of the Välinge group. The parties in the present case are the joint owners of all shares in International. VFT is the majority owner of International. The parties’ ownership of International is governed by a shareholders’ agreement (the “Shareholders’ Agreement”). The agreement contains an arbitration agreement, which as regards the present context provides as follows.

“16.2 Any dispute of any kind arising out of this Agreement shall, including, without limitation, a dispute in relation to the question whether breach of contract is of material importance to a Party following Section 15.3 above, but unless otherwise stated in this Agreement, be finally settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The place of arbitration shall be in Stockholm. Unless otherwise agreed in writing between the Parties the language of the arbitration shall be English.”

The Shareholders’ Agreement also contains provisions on the relevance of the provisions of the Swedish Companies Act for the decision-making body of the company.

“4.1 The Swedish Companies Act (*Sw: aktiebolagslagen*) shall apply to the work of the board of directors of Välinge International (the “Board”). All resolutions at Board meetings shall be adopted in accordance with the Swedish Companies Act.”

“5 All resolutions at shareholders’ meetings of Välinge International shall be adopted in accordance with the Swedish Companies Act and its articles of association.”

The agreement also contains provisions on the procedure for disposing of intellectual property held by Innovation.

“4.6 Välinge Flooring undertakes to ensure that no divestiture of intellectual property rights of Välinge Innovation takes place without the prior written approval by Kronospan and Flooring Technologies.”

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As of April of 2011, VFT is wholly owned by Välinge Invest AB (“Invest”), which in its turn is controlled by Mr. P and his family. Prior thereto, Invest owned only half the shares in VFT.

*International’s acquisition of Stubbarp Fastighets AB from Invest*

Supported only by VFT, the annual general meeting of International in 2011 decided that the company should acquire all shares in Stubbarp Fastighets AB from the then owner Invest. The following year, the annual general meeting decided, again only supported by VFT, that the original acquisition should be annulled and that the shares in Stubbarp Fastighets AB should be acquired again, but on slightly different terms. Therefore, the general meeting approved three separate agreements, namely an annulment agreement, a new share purchase agreement and an option agreement. All three agreements contained an arbitration clause and was entered into between International and Invest on 24 August 2012.

*Mr. P’s employment in Innovation*

In 2002, Mr. P was hired as managing director of Innovation. The employment agreement provided that intellectual property created or patented with contributions from Mr. P within the scope of the company’s field of operations would become the property of the company. The employment agreement further contained an arbitration clause. Later, Mr. P resigned from his employment in Innovation. During May of 2012 – August of 2013, VFT submitted several patent applications stating Mr. P as the inventor.

*The arbitration proceedings*

Based on the arbitration clause of the Shareholders’ Agreement, in August of 2011, Krono requested arbitration against VFT.

In the arbitration, Krono maintained that VFT had breached the Shareholders’ Agreement by the company having, directly or indirectly, participated in several transactions which, under the Companies Act, constituted unlawful distributions from International. Krono referenced International’s acquisition of Stubbarp Fastigheter AB and that VFT had, without consideration and Krono’s written consent, received

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intellectual property from Innovation, consisting of inventions that Mr. P had created during his employment at Innovation.

VFT, which disputed Krono's motions, objected to the jurisdiction of the arbitral tribunal to decide on the above actions, maintaining that they were preliminary issues that fall outside the scope of the the Shareholders' Agreement and that should be decided by public courts or arbitral tribunals pursuant to other arbitration agreements.

In a preliminary decision of 17 May 2013, the arbitral tribunal concluded that it had jurisdiction to resolve the preliminary issues of the dispute.

Through an arbitration award of 11 April 2014, the arbitral tribunal confirmed its preliminary decision on the jurisdictional issue and granted all of Krono's motions against VFT.

**MOTIONS**

VFT has moved that the Court of Appeal shall

- (a) *in the main* declare invalid or annul the arbitration award in its entirety,
- (b) as a *first alternative*, declare invalid or annul items 1-3, 4 c, 5 c and 8-10 of the operative part of the arbitration award and declare that, as between the parties, VFT shall be liable for half of the compensation to the arbitral tribunal and compensate Krono for half of the compensation for litigation costs it was awarded through the arbitration award.
- (c) as a *second alternative*, declare invalid or annul items 1, 4 c, 5 c, and 8-10 of the operative part of the arbitration award and declare that, as between the parties, VFT shall be liable for half of the compensation to the arbitral tribunal and compensate Krono for half of the compensation for litigation costs it was awarded through the arbitration award.

Krono has disputed the motions.

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

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## **GROUND**

### VFT

In its review of whether VFT breached the Shareholders' Agreement, the arbitral tribunal carried out a review on the merits of the agreements governing International's acquisition of Stubbarp Fastighets AB and Mr. P's employment at Innovation, and its decision was based thereon. These agreements involve parties other than the parties to the Shareholders' Agreement. The arbitral tribunal thus exceeded its mandate, because the arbitral tribunal preliminarily decided on legally relevant circumstances referenced by Krono, although they fell outside the scope of the legal relationship governed by the arbitration clause in the Shareholders' Agreement. The excess of mandate affected the outcome of the case as regards items 1-3, 4 c and 5 c of the operative part of the arbitration award. Therefore, the arbitration award shall be annulled pursuant to items 1, 2 and 6 of the first paragraph of Section 34 of the Swedish Arbitration Act (1999:116).

In its review of the aforementioned legally relevant circumstances, the arbitral tribunal concluded that the transactions related to the relevant agreements constituted unlawful distributions under the Companies Act. The question whether a distribution was unlawful or not under the said Act is not, however, eligible for arbitration and may not be decided by arbitrators under Swedish law. Therefore, the arbitration award is invalid pursuant to item 1 of the first paragraph of Section 33 of the Swedish Arbitration Act.

In the event that the Court of Appeal would declare the arbitration award partially invalid or partially annul the award pursuant to the first or second alternative motions, then both the compensation to the arbitrators as well as the compensation for litigation costs awarded to the respondents shall be allocated to the portion of the arbitration award that remains valid and is annulled, respectively. The costs (in items 8 and 9 of the operative part of the arbitration award) shall thus be allocated so that VFT, as between the parties, shall be liable only for half of the compensation to the arbitral tribunal and half of the litigation costs awarded to the respondents.

The arbitral tribunal has concluded that all the alleged breaches of contract seen as a whole constituted a material breach of contract. The grounds of the arbitration award do

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not clarify whether the arbitral tribunal concluded that each of the alleged breaches of contract alone constituted a material breach, or if the other alleged breaches of contract taken together were considered sufficiently serious to constitute one material breach of contract. If the arbitral tribunal had not taken the agreements governing International's acquisition of Stubbarp Fastighets AB and Mr. P's employment at Innovation into consideration, the arbitral tribunal could not have concluded that VFT had committed a material breach of contract based only on the other alleged breaches of contract. Therefore, the arbitration award shall *in the main* be declared invalid or be annulled in its entirety.

As a *first alternative*, items 1-3, 4 c, 5 c and 8-10 of the operative part of the arbitration award shall be declared invalid or be annulled, because the arbitral tribunal's review of the agreements governing International's acquisition of Stubbarp Fastighets AB and Mr. P's employment at Innovation affected all of the said items.

As a *second alternative*, the arbitration award shall be declared invalid or be annulled as regards items 1, 4 c, 5 c and 8-10 of the operative part of the arbitration award, because the arbitral tribunal should in any event have concluded that it lacked jurisdiction to decide on the agreements governing International's acquisition of Stubbarp Fastighets AB.

### Krono

The arbitration agreement of the Shareholders' Agreement granted the arbitral tribunal jurisdiction to – at least at a preliminary stage – decide on issues concerning International's acquisition of the shares in Stubbarp Fastighets AB and issues concerning the ownership of a number of inventions that Mr. P had made during 2011 and 2012, but for which VFT had applied for a patent. This was the case, because the arbitral tribunal should be in a position to decide on issues under the Shareholders' Agreement made relevant during the arbitration.

Thus, it was within the arbitral tribunal's mandate to review, for instance, whether the decision of the general meeting of International to acquire the shares in Stubbarp Fastighets AB violated the provisions of the Companies Act and whether the rights to certain inventions had been transferred to VFT despite the fact that they were already

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owned by the International group of companies. It is disputed that the arbitral tribunal decided on issues not eligible for arbitration.

Moreover, the circumstances surrounding International's acquisition of Stubbarp Fastighets AB and the inventions for which patent applications had been submitted by VFT did not constitute legally relevant circumstances in the arbitration. They were evidentiary facts, or interpretation data, of indirect relevance to the legally relevant circumstances upon which Krono based its case.

Krono's case was based upon the Shareholders' Agreement and it is only questions under the Shareholders' Agreement which have been finally decided by the arbitral tribunal.

Even if the arbitral tribunal would have exceeded its mandate, the outcome of the arbitration was not affected. The arbitral tribunal concluded that numerous breaches of contract had been established beyond those connected to International's acquisition of Stubbarp Fastighets AB and VFT's patent applications for inventions made by Mr. P during 2011 and 2012. Particularly as regards International's acquisition of Stubbarp Fastighets AB, the arbitral tribunal concluded that it breached the provisions of the Shareholders' Agreement, irrespective of whether it constituted an unlawful distribution under the Companies Act.

Further, the arbitral tribunal's review of the acquisition of Stubbarp Fastighets AB and the ownership to a number of patents was not a prerequisite for the arbitral tribunal's decision that VFT committed a material breach of contract.

There are no legal grounds for the Court of Appeal to amend the arbitral tribunal's decision on the allocation of costs of the arbitration.

## **THE PARTIES' FURTHER DETAILS**

### **VFT**

*The arbitral tribunal's review of International's acquisition of Stubbarp Fastighets AB*

In the arbitration award the arbitral tribunal reviewed whether the consideration for the shares in Stubbarp Fastighets AB was equal to the market value of the property Höganäs Stubbarp 39:3. The arbitral tribunal concluded that the market value of the

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property was substantially lower than the consideration agreed upon between International and Invest and that the transaction thus constituted an unlawful distribution. In order to reach this conclusion, the arbitral tribunal was required to interpret the purchase price provisions of the share purchase agreement. The share purchase agreement concerns a legal relationship separate from that governed by the Shareholders' Agreement and involves other parties than the parties to the Shareholders' Agreement.

Thereafter, the arbitral tribunal reviewed whether the relevant transaction, despite the assumed discrepancy in value, nevertheless could be deemed a reasonable business decision. Also in this review, the arbitral tribunal based its decision on the provisions and effects of the share purchase agreement.

In the review of the transactions of 2012, the arbitral tribunal referenced its conclusions on the transaction of 2011. Thus, also in these respects, the decision of the arbitral tribunal was based on a review of the share purchase agreement.

Thereafter, the arbitral tribunal investigated whether the option agreement meant that International received additional consideration for Stubbarp Fastighets AB and whether the transfer therefore did not decrease International's equity. Here, the arbitral tribunal considered the provisions and effects of the option agreement. The arbitral tribunal noted that Krono was not a party to the option agreement, and that the option agreement was consequently not binding on Krono. Yet again did the arbitral tribunal stray outside the scope of the arbitration agreement.

The next step in the reasoning of the arbitral tribunal was an analysis of whether the annulment agreement as such included a distribution from International. Irrespective of whether the arbitral tribunal concluded this to not have been the case, the review of the arbitral tribunal is based on an analysis and review of the provisions of the annulment agreement. Also the annulment agreement falls outside the legal relationship governed by the Shareholders' Agreement and it was entered between other parties than the parties to the Shareholders' Agreement.

All three of the now relevant agreements contain arbitration clauses.

*The arbitral tribunal's review of the intellectual property*

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In the arbitration award, the arbitral tribunal stressed its mandate to draw conclusions based on Mr. P's employment agreement with respect to the merits of the case. However, the arbitral tribunal did not merely provide statements on the existence of a certain chain of events. It reviewed the legal relevance of certain facts to the employment relationship between Mr. P and Innovation. This, in its turn, influenced the ownership to the intellectual property. Despite its statement to the opposite, the arbitral tribunal reviewed a legal relationship outside the scope of the Shareholders' Agreement.

First, the arbitral tribunal decided on the issue as to when Mr. P's employment had been terminated. Thereafter, the arbitral tribunal reviewed, for instance, issues as to when a valid termination had occurred and, if it had occurred, if any notice period had applied. Thus, the arbitral tribunal reviewed a legal relationship between other parties than the parties to the Shareholders' Agreement and which was not governed by the Shareholders' Agreement.

Thereafter, the arbitral tribunal reviewed who of Mr. P and Innovation that had the better claim to the intellectual property. The arbitral tribunal concluded that at least the majority of the intellectual property belonged to Innovation. In so doing, the arbitral tribunal was forced to decide on the contents of the employment agreement between Mr. P and Innovation.

*The arbitral tribunal lacks jurisdiction to decide on preliminary issues concerning matters outside the scope of the arbitration clause of the Shareholders' Agreement*

There is nothing in the arbitration agreement to support the arbitrators' conclusion that the arbitration agreement could be deemed to cover other legal relationships than the Shareholders' Agreement as such. The only support of the arbitrators' opinion in this respect is the following statement by Lars Heuman.

*“Arbitrators are also authorised to decide a preliminary or incidental issue which does not come under the arbitration agreement and which they would not be competent to decide as a main issue.”*

However, this quote is aimed at preliminary issues which form part of the legal relationship between the *parties*, but which the arbitrators do not have jurisdiction to

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decide on as a main issue, since it is not eligible for arbitration. Thus, Heuman's statement does not support the conclusion that the jurisdiction of the arbitral tribunal can be extended to cover also preliminary issues which fall outside the scope of the legal relationship between the parties.

*The procedural dealing with the case by the arbitral tribunal influenced the outcome*

The arbitral tribunal concluded that VFT had breached the Shareholders' Agreement through its involvement in, for instance, the transactions concerning Stubbarp Fastighets AB and the intellectual property. The conclusion of the arbitral tribunal was based on the fact that these transactions constituted distributions from International. If the tribunal had refrained from reviewing these preliminary issues, it would not have been in a position to decide that VFT had committed a breach of contract in the now relevant manner. As a consequence, the arbitral tribunal would have been unable to award Krono compensation in relation to the acquisition of Stubbarp Fastighets AB. The arbitral tribunal's excess of mandate has thus affected the outcome of items 4 c and 5 c of the operative part of the arbitration award.

Beyond the arbitral tribunal's review of whether the aforementioned transactions constituted unlawful distributions, the arbitral tribunal concluded that VFT had committed further breaches of contract. The arbitral tribunal merely stated that breaches of contract had been committed without providing whether each individual breach had been material or not. Thus, it is not possible to gather whether the arbitral tribunal considered that the breaches of contract related to the acquisition of Stubbarp Fastighets AB and the intellectual property were sufficiently grave to constitute a material breach of contract either separately or together. Thus, the arbitral tribunal's review of legal relationships that fell outside the scope of the arbitration agreement had immediate effect on items 2 and 3 of the operative part of the arbitration award.

*Invalidity due to ineligibility for arbitration*

In the arbitration award, the arbitral tribunal has reviewed whether the provisions on protection of the rights of minority shareholders concerning distributions had been breached. The effects of a provision on distributions having been breached is that the distribution is invalid. The effect applies irrespective of whether it is a provision to

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protect shareholders or creditors that was breached. The involved limited liability company is not able to decide on the reason for the invalidity. The fact that the shareholders (i.e. third parties) may remedy the situation is a different matter. For these reasons, disputes involving the provisions on protection of minority shareholder rights in the Companies Act are considered ineligible for arbitration.

*Allocation of costs for the arbitration*

A review of the merits of the allocation of the costs for the arbitration, or the size of the costs, is not possible. However, it is possible to annul the allocation of the costs made by the arbitral tribunal to the extent it relates to the portions of the arbitration award annulled by the Court of Appeal. The compensation awarded to the arbitral tribunal will not be affected as such, merely the liability as between the parties. The basis of the calculation, which is based on the value and complexity of the matter of dispute, does not prevent the granting of the motion concerning the allocation of costs.

Krono

*The arbitration agreement covered the preliminary issues reviewed by the arbitral tribunal*

The arbitral tribunal did not expand its jurisdiction to cover other legal relationships than those covered by the Shareholders' Agreement. The preliminary issues formed part of the legal relationship which the arbitral tribunal had jurisdiction to review, i.e. the Shareholders' Agreement.

The arbitration clause of the Shareholders' Agreement does not contain any limitations as regards what issues are covered by the arbitration agreement. Thus, it is not possible to interpret into the agreement any will of the parties to the effect that the arbitration clause would exclude issues under the Companies Act or any other type of issue. The wording indicates that the parties intended for the arbitration agreement to have the widest possible scope, particularly considering that the parties opted to incorporate the provisions of the Companies Act in the Shareholders' Agreement.

The Shareholders' Agreement does not deviate from what is customary for such agreements. This means, for instance, that the contracting parties through the Shareholders' Agreement sought to, by way of agreement, regulate issues both directly

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linked to the shareholding as well as to the operations carried out by the International group of companies.

The fact that the parties have agreed on an order to govern the operations carried out by the International group of companies implies that the Shareholders' Agreement covers all legal relationships between members of the International group of companies and third parties. Further, the parties have agreed that the Companies Act shall be applied with respect to issues of decision making, which means that the parties have agreed to incorporate the Companies Act into the agreement. The Shareholders' Agreement also provides that intellectual property may not be transferred from Innovation without Krono's prior written consent.

The legal relationship governed by the arbitration agreement of the Shareholders' Agreement also governs obligations between VFT and Krono as regards the operations of the International group of companies, including agreements and other relationships of the International group with third parties. The legal relationship governed by the arbitration agreement thus covers the agreements entered by International with Invest concerning the acquisition of Stubbarp Fastighets AB as well as the employment agreement between Innovation and Mr. P. In addition, the acquisition of Stubbarp Fastighets AB was preceded by resolutions by a general meeting in International.

*The jurisdiction of the arbitral tribunal is not affected by the fact that preliminary issues may be reviewed also in other proceedings*

The arbitration agreements contained in the agreements governing the transfer of Stubbarp Fastighets AB and Mr. P's employment agreement are binding only on the parties to those agreements and have no effects on the arbitration agreement of Shareholders' Agreement between VFT and Krono.

Jurisdiction for matters under the Companies Act is not limited to a specific court. The question of whether a certain course of action complies with the provisions of the Companies Act can thus be reviewed by several courts at the same time, without the review in one case becoming binding on the other cases.

*Did the arbitral tribunal's review of the preliminary issues relate to the grounds referenced by Krono?*

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In the arbitration, Krono moved that the arbitral tribunal should decide on several legal effects under the Shareholders' Agreement. Of direct relevance to the requested legal effects was that VFT in several ways, referenced by Krono, had breached the Shareholders' Agreement. The various breaches of contract referenced by Krono thus constituted circumstances directly relevant to the legal effects, i.e. legally relevant circumstances, in the case. Other agreements than the Shareholders' Agreement were of importance to the legal effect but did not constitute legally relevant circumstances as such, but rather constituted evidentiary facts or interpretation data in the case.

*The issues are eligible for arbitration*

Krono disputes that the issues relating to the Companies Act were ineligible for arbitration. The provisions on distributions of the Companies Act serve the purpose of protecting the interests of shareholders as well as creditors. This means that a transaction which involves a distribution pursuant to Section 1 of Chapter 17 of the Companies Act is permitted even if the requirements of form posed on distributions were not complied with, provided that all shareholders agree but only to the extent the peremptory provisions for the protection of creditor rights under Section 3 of Chapter 17 of the Companies Act are complied with. The arbitration award provides that the arbitral tribunal reviewed only whether the transactions had breached the waivable provisions on the protection of shareholders' rights.

Even if the provisions on protection of shareholders' rights of the Companies Act are waivable by the parties, this relates only to claims which the company might have as a result of a breach of the provisions. The arbitral tribunal did not review any such claims. Instead, claims relating to various sanctions for breach of contract were reviewed.

The dispute resolved by the arbitral tribunal was such that the parties could have settled the dispute in its entirety, since it concerns an agreement, the Shareholders' Agreement, and the effects of breaches of that agreement. Moreover, nothing would have prevented Krono and VFT to reach a settlement to the effect that the transfer of Stubbarp breached certain provisions of the Companies Act.

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The Companies Act formed part of the Shareholders' Agreement. Consequently, the arbitral tribunal's review of whether a distribution occurred in breach of the provisions of the Companies Act was made within the scope of the agreement. The entirety of the Shareholders' Agreement is eligible for a settlement between the parties.

Even if the Companies Act would not have formed part of the agreement between the parties, the arbitral tribunal's review was undisputedly based on the provisions on the protection of the interests of minority shareholders.

*No effect on the outcome of the arbitration*

In the arbitration, Krono referenced two alternative grounds concerning the acquisition of Stubbarp.

- (1) VFT breached the Shareholders' Agreement because the acquisition of Stubbarp breached provisions of the Companies Act (unlawful distribution and breaches of the general clause of the Companies Act etc.).
- (2) Through the Shareholders' Agreement the parties have agreed on how the profits of International shall be allocated. This means that the parties have undertaken not to withdraw assets or funds from International or any of its subsidiaries, which would otherwise have formed part of the profits available for distribution. An acquisition of a property at a price exceeding market value thus violated the Shareholders' Agreement, because it decreased the profit available for distribution.

It is correct that the question of whether the acquisition of the shares in Stubbarp Fastighets AB violated provisions of the Companies Act constituted a preliminary issue. However, the arbitral tribunal was not required to resolve that issue to conclude that a breach of the Shareholders' Agreement had occurred, since Krono had referenced two alternative grounds. Thus, to grant Krono's case it was sufficient for the arbitral tribunal to conclude that International's profit was decreased by International's paying a purchase price which substantially exceeded the market value of the shares in Stubbarp Fastighets AB. Consequently, the outcome would likely have been the same even if the arbitral tribunal had refrained from reviewing the preliminary issues.

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*Allocation of costs for the arbitration*

A party's right to compensation for litigation costs in arbitration proceedings are considered part of the merits of the review. Thus, it is solely for the arbitral tribunal to decide, following a motion thereon from a party, on the allocation of costs for the arbitration. A party who is dissatisfied with the arbitral tribunal's allocation of costs has no means to have the allocation reviewed. There are no legal grounds to adjust the cost allocation.

Even if the arbitration award would be partially annulled, the arbitral tribunal's decision on cost allocation shall remain. The parts of the operative part of the arbitration award that would be annulled did not alone decide the outcome of the arbitration. This is the case, because the arbitral tribunal concluded that VFT had committed several breaches of the Companies Act as well as the Shareholders' Agreement.

The compensation to the arbitral tribunal cannot be adjusted since the compensation to the arbitral tribunal was based on the value and complexity of the dispute.

**THE INVESTIGATION**

The case has been decided following a main hearing. VFT has referenced documentary evidence.

**FOUNDATIONS**

*Shall the arbitration award be declared invalid?*

Item 1 of the first paragraph of Section 33 of the Swedish Arbitration Act provides that an arbitration award shall be declared invalid if it involves a decision on an issue which is not eligible for arbitration under Swedish law.

Undisputedly, the arbitral tribunal has reviewed, for instance, whether Section 2 of Chapter 17 of the Companies Act was breached through alleged distributions from International. VFT has maintained that this issue is not eligible for arbitration under Swedish law.

The Court of Appeal notes the following.

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The first paragraph of Section 1 of the Swedish Arbitration Act provides that the outer framing of the issues that may be resolved by arbitration is limited to disputes about which the parties may reach a settlement. Which type of issues that are eligible is not set forth in the Swedish Arbitration Act, but this must be decided based on provisions of other legislation (Government Bill 1998/99:35 p. 50).

In the Shareholders' Agreement, the parties have agreed that all decisions at general meetings as well as board meetings in International shall be made pursuant to the provisions of the Companies Act, i.e. also with respect to the provisions on distributions set forth in Chapter 17 of the said Act. Thus, the provisions of the Companies Act forms part of the contents of the Shareholders' Agreement. In general, shareholders' agreements are binding only on the parties to the agreement, and is not binding on the relevant company, in this case International (see, e.g., NJA 2011 p. 429). Thus, the shareholders' agreement and all of its provisions are matters on which the parties may reach agreements. Therefore, the question of whether unlawful distributions have occurred from International is thus an issue on which the parties may agree freely and which is eligible for arbitration. The parties' agreement thereon has, just as a decision by an arbitral tribunal, no legal effects outside the scope of the parties' agreement.

Even if the provisions of the Companies Act had not been incorporated into the Shareholders' Agreement, the question whether Section 2 of Chapter 17 of the Companies Act had been breached would have been eligible for arbitration. The provision, which governs the ways in which distributions may be made, is peremptory for the benefit of the minority shareholders. However, general principles of company law provide that provisions which exist solely for the benefit of shareholders may be waived if all shareholders agree (Government Bill 2004/05:85 p. 373). The parties in the present case constitute all of the shareholders in International. Therefore, they could decide on the issue whether Section 2 of Chapter 17 of the Companies Act had been breached.

Therefore, the dispute is eligible for arbitration, and VFT's motion for invalidity cannot be granted.

*Should the arbitration award be annulled?*

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It is undisputed that the arbitral tribunal has reviewed agreements between parties other than the parties to the Shareholders' Agreement and also based its decision thereon. VFT has maintained that the arbitral tribunal thereby reviewed legal relationships that fall outside the scope of the arbitration agreement of the Shareholders' Agreement and that the arbitration award shall, as a consequence thereof, be annulled pursuant to items 1, 2 and 6 of the first paragraph of Section 34 of the Swedish Arbitration Act. The referenced provisions provide that an arbitration award shall be wholly or partially annulled *if* the arbitration award is not covered by a valid arbitration agreement between the parties, *if* the arbitral tribunal exceeded its mandate or *if* procedural errors occurred that were not caused by the parties and likely affected the outcome.

The Court of Appeal notes the following.

The second sentence of the first paragraph of Section 1 of the Swedish Arbitration Act provides that an arbitration agreement may relate to future disputes concerning a legal relationship set out in the agreement. Thus, the arbitration agreement must govern a specific legal relationship (see SOU 1994:81 p. 256 f. and Government Bill 1998/99:35 p. 212).

The arbitration clause in the Shareholders' Agreement defines the disputes that may be submitted to arbitration as follows: "*Any dispute of any kind arising out of this Agreement [...]*". The wording does not imply that there would be any limitation as regards the nature of the disputes that could be submitted to arbitration, except that they must arise out of the Shareholders' Agreement. It has not been asserted, let alone established, in the present case that the intention of the parties had been different than as provided by the wording of the clause. Therefore, the Court of Appeal initially concludes that the arbitration agreement covers all disputes between the parties related to the legal relationship that is expressed by the Shareholders' Agreement.

In order to be able to determine whether distributions that were unlawful under the Companies Act, and whether consequently a breach of contract occurred, the arbitral tribunal undisputedly reviewed legal relationships between other parties than the parties to the Shareholders' Agreement. The legal relationships reviewed were the agreements between International and the VFT-controlled Invest concerning the transfer of the shares in Stubbarp Fastighets AB and Mr. P's employment agreement with Innovation.

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The circumstances referenced by Krono which relate to these legal relationships – for instance that the shares in Stubbarp Fastighets AB were overpriced and that Innovation was the rightful owner of Mr. P's inventions for which VFT had submitted patent applications – constituted, contrary to what VFT has maintained in the present case, *evidentiary facts and interpretation data* for the legally relevant circumstance breach of contract as referenced by Krono.

The fact that the arbitral tribunal in its *evaluation of the evidence* has reviewed legal relationships outside the scope of the arbitration agreement does not entail that the arbitral tribunal exceeded its mandate. An arbitral tribunal has jurisdiction (just like a public court in a civil dispute) to review legal relationships beyond those within the scope of the arbitration agreement provided that those relationships are relevant as evidence for the review of the legal relationship governed by the arbitration agreement (see Heuman, Översyn av lagen om skiljeförfarande, JT 2014-15 p. 456 f.). As noted above, the entirety of Krono's case is based on the Shareholders' Agreement. Thus, VFT's challenge cannot be granted.

Finally, the Court of Appeal deems it appropriate to briefly touch upon VFT's arguments concerning so-called mixed competence. That which in jurisprudence has been labelled as *mixed competence* is at hand when a party in support of its motion references several grounds and only one or a few of them are covered by a joint arbitration agreement (see Lindskog, Skiljeförfarande. En kommentar, 2<sup>nd</sup> ed., 2012, p. 204). When this is the case, the main rule is that the grounds covered by the joint arbitration agreement shall be reviewed by arbitrators in a joint arbitration and the remaining grounds shall be reviewed by public courts or in other arbitration proceedings (Government Bill 1998/99:35 p. 71 f.). Above, the Court of Appeal has concluded that the legal relationship upon which Krono has based its review is the Shareholders' Agreement and that disputes arising out of the Shareholders' Agreement are covered by the arbitration agreement therein. Thus, the jurisprudence on mixed competence is not relevant in the present case.

*Summary*

In sum, the Court of Appeal has concluded that the dispute is eligible for arbitration and that the tribunal did not exceed its mandate in any manner that could lead to the

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arbitration award being declared invalid or being annulled. Therefore, the claimant's motions shall be rejected.

*Litigation costs*

Upon this outcome, VFT shall be ordered to compensate Krono for its litigation costs before the Court of Appeal. The claimed amount is reasonable.

**Pursuant to the second paragraph of Section 43 of the Swedish Arbitration Act the judgment of the Court of Appeal may not be appealed.**

[ILLEGIBLE SIGNATURES]

The decision has been made by: Judges of Appeal KÅ and CS, reporting Judge of Appeal, and Deputy Associate Judge KRZ.