

**THE DISTRICT COURT OF SÖDERTÖRN**

**RECORD**

File ref. 36

26 January 2009

Case no.

Proceedings in  
Huddinge

T 5511-08

Proceedings in the parties' absence

**THE DISTRICT COURT**

Judges A.-L.S., M.N. and L.W.

**RECORDING CLERK**

A.-L.S.

**PARTIES**

**CLAIMANT**

Concorp Scandinavia AB, Reg. No. 556588-6990

[address]

Counsel : *Advokat* Stefan Bessman

Baker & McKenzie Advokatbyrå KB

[address]

**DEFENDANT**

Karelkamen Confectionary AB (formerly Xcaret Confectionary Sales AB), Reg. No. 556293-5972

[address]

Counsel: *Advokat* Christer Håkansson and *advokat* Lars Perhard

Wersén & Partners Advokatbyrå KB

[address]

**MATTER**

Claim: currently pertaining to dismissal

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The following is noted.

In its writ of summons, Concorp Scandinavia AB (Concorp) has moved that Xcaret Confectionary Sales AB (Xcaret) should be ordered to pay SEK 12 million to Concorp plus interest pursuant to sections 4 and 6 of the Swedish Interest Act from 25 February 2008. As the basis for its claim, Concorp has alleged that it has a claim under a loan against Xcaret amounting to SEK 12 million and has requested repayment of the loan.

Pursuant to the salient part of its statement of defence, Xcaret moved that the action should be dismissed. The ground for the motion for dismissal is that a cooperation agreement was

entered into between Concorp and Xcaret Confectionary Holding AB, that claim under the loan is covered by section 2 of the agreement and that the agreement stipulates that disputes arising of or in connection with the agreement shall be settled by arbitrators pursuant to the Arbitration Act. In substance, the following has been stated. By agreement, Xcaret Confectionary Holding AB acquired Xcaret from Concorp in order to include Xcaret in the cooperation which was regulated in the agreement; the agreement is thus binding for all the parties – *inter alia*, the parties in this case – which are affected by the agreement. The Agreement was entered into expressly by the parties in this case or, in any event, by implication. Xcaret was only an operational organ for the parties joint commercial activities under the cooperation agreement and it is evident from the agreement that a “management team” would be set up and the parties would have representatives in, *inter alia*, Xcaret. One of Concorp’s board members was also a member of Xcaret’s board when the cooperation agreement was entered into and subsequently performed. All decision during the relevant time period were made jointly by the aforementioned “management team” which consisted of authorised representatives for the parties in the cooperation agreement as well as the other companies which were included as operational companies in the project, including Xcaret. The circumstances regarding funding obligations, capital contributions, etc. are so well integrated under the cooperation agreement, etc. that the main claim in this dispute thus falls for this reason within the scope of the arbitration agreement.

In the event the action is tried on the merits, Xcaret has contested the claim on the basis, *inter alia*, that the claim under the loan has been settled by way of set off. The basis for the set off motion is that, according to the agreement, the parties would contribute to the funding required for the business in equal parts, which however Concorp failed to do and as a consequence of which Xcaret Confectionary Holding AB had, according to the cooperation agreement, a claim amounting to SEK 12,200,000 which has been assigned to Xcaret. The set off which has been made by Xcaret is thus based on a counterclaim that arises from the cooperation agreement and dispute in connection with Xcaret’s alternative substantive objection relating to set off is also covered by the arbitration agreement. Xcaret has invoked as documentary evidence the cooperation agreement, the assignment of the claim as well as the statement of set off. In case the District Court dismisses the action, compensation for litigation costs has been claimed in the amount of SEK 78,000 regarding 26 hours of work.

Concorp has disputed the motion for dismissal of the action and argued that Xcaret is not a party to the cooperation agreement and that agreement has not been entered into between Concorp and Xcaret implicitly or in any other way due to the fact that the agreement provides that any amendments or supplements must be in writing. Concorp has also disputed that the claim under the loan exists in the cooperation agreement and argued that the loan precedes the agreement. As regards the motion for set off, Concorp has moved that this should be dismissed since, for present purposes, it is stated to be based on the cooperation agreement and thus covered by the arbitration clause.

Concorp has invoked as evidence the loan agreement, the cooperation agreement and the documents which Xcaret has submitted relating to the purchase of the counterclaim. Concorp has confirmed 15 hours of work equivalent of SEK 45,000.

Xcaret has disputed the motion for dismissal of the set off objection.

The District Court makes the following

**DECISION** (to be handed down on 29 January 2009)

*Judgment*

1. The District Court dismisses Xcaret's motion for dismissal.
2. The District Court dismisses Xcaret's set off objection.

*Reasons*

The cooperation agreement was entered into between Concorp and Xcaret Confectionary Holding AB. Xcaret is thus not a contracting party. It is a fundamental principle of the law of contract that an agreement is binding between the parties and cannot bind a third party. In the agreement in question there is nothing in the wording of the agreement which shows that a third party is to be bound. One of the contracting parties, Concorp, has expressly disputed that such an intention exists. Furthermore, it can be noted that two companies, Concorp B.V. and Xcaret Invest AB, in the agreement have declared that they are bound by a particular provision specified therein. The fact that obligation for a third party has been specifically regulated in that case also indicates that Xcaret has not been bound. The District Court dismisses the motion for dismissal of the action.

Chapter 10, section 17 paragraph 3 of the Code of Judicial Procedure provides that a motion for set off of a claim cannot be tried by a court pursuant to the provisions of the first paragraph – which, *inter alia*, refers to lack of jurisdiction in case the dispute will be settled by arbitrators – which is not competent to try a dispute regarding the claim (see also for instance Lindskog, Skiljeförfarande, p. 160). It is evident from Xcaret's own information that the claim which is invoked relating to set off has been assigned from Xcaret Confectionary Holding AB and is directly connected to the cooperation agreement. The District Court is thus not competent to try the set off motion and such motion is accordingly dismissed.

There is therefore no reason for assessing Xcaret's claim for compensation for costs in the case.

The decision under item 1: Notice of appeal must be submitted to the District Court within a period of one week following service. In the absence thereof, the right to appeal against the decision will be forfeited.

The decision under item 2: Notice of appeal, addressed to the Svea Court of Appeal, must be submitted to the District Court on 19 February 2009 at the latest. Permission to appeal is required.

Date as above

[Signature]

A.-L.S.