

MPC ARBITRATION

Arbitral judgment rendered by Messrs A.P. de [REDACTED] P. [REDACTED] and M. [REDACTED] in the arbitral proceedings between:

[REDACTED] B.V.,
registered in [REDACTED] The Netherlands
represented by Mr S. [REDACTED]
Applicant
hereafter also called "[REDACTED]";

and

[REDACTED]
registered in [REDACTED] Italy
represented by mr. M. [REDACTED]
Defendant
hereafter also called "[REDACTED]"

1. Procedure

- 1.1 By letter of 3 November 2017 [REDACTED] filed a request for arbitration under the MPC arbitration regulations (2013) against [REDACTED]. The dispute relates to a claim for payment of damages due to a breach of contract by [REDACTED] under two sale and purchase agreements S65011 and S70499 for skimmed milk [REDACTED]. [REDACTED] has asked that [REDACTED] would be ordered to pay the damages resulting to the said breach of contracts for a total amount of EUR 514,259.73.
- 1.2 The representative of [REDACTED] Mr [REDACTED] confirmed receipt of the arbitration request by letter of 20 November 2017 on behalf of [REDACTED]. In said letter [REDACTED] advised that it intends not to adhere to the arbitral proceedings in summary on the basis of contesting jurisdiction of the arbitral tribunal.
- 1.3 In its application [REDACTED] stated that the related agreements are governed by MPC Conditions and MPC Arbitration Regulations.
- 1.4 By registered letter of 22 November 2017 parties are advised that Mr R.W. La Gro is appointed secretary to the arbitration procedure. [REDACTED] is advised that [REDACTED] by registered letter of 20 November 2017 had brought forward three names to appoint arbitrators and [REDACTED] is requested to bring forward three names to appoint arbitrators to the proceedings in accordance with the listing procedure of the MPC Arbitration Regulations (2013) (hereafter also called the "Arbitration Regulations"). In the same letter [REDACTED] is advised that if it does not state before 6 December 2017 at least three persons from the list, it will be assumed that all persons on the list are equally acceptable as arbitrator to [REDACTED]. Parties are advised that if a defending party is not formally present or represented in the proceedings and has not notified the arbitral tribunal of its defence the claim of the applicant shall be allowed, unless the Arbitral Tribunal considers the claim unjustified or unfounded.

██████████ and ██████████ are advised that in accordance with the Arbitration Regulations, A. P. de ██████████ (domiciled in ██████████, The Netherlands, P. ██████████ (domiciled in ██████████, France) and M. ██████████ (domiciled in ██████████, Ireland) have accepted their appointment as arbitrators in these arbitration proceedings. Mr ██████████ acted as chairman to the Arbitration Tribunal.

- 1.5 By letter of 22 November 2017 parties are advised that the arbitration proceedings shall be conducted in the English language in accordance with article 12 sub 5 of the Arbitration Regulations.
- 1.6 The Arbitral Tribunal determined in accordance with article 11 of the Arbitration Regulations that the formal place of arbitration shall be The Hague, The Netherlands.
- 1.7 In accordance with the Arbitration Regulations parties are given the opportunity by letter of 22 November 2017 to ask for an immediate hearing in case both parties wished to do so without further exchange of statements.

██████████ advised the Arbitral Tribunal that it wishes to exchange statements first before a hearing was to be scheduled.

- 1.8 ██████████ has filed a (additional) statement of claim dated 14 December 2017.
- 1.9 By letter of 14 December 2017 ██████████ is advised that it now had the opportunity to file a statement of defence on 4 January 2018 at the latest, in accordance with article 13 sub 3 of the Arbitration Regulations. To ensure that ██████████ duly and completely received the request for arbitration the following documents are sent to ██████████ and its representative Mr ██████████ by registered mail and per e-mail of 19 December 2017:
- (i) the request for arbitration of 3 November 2017;
 - (ii) the specification filed by Interfood with its request; and
 - (iii) the additional statement of claim by letter dated 14 December 2017.

- 1.10 In summary the following documents have been filed by parties until the hearing of 13 June 2018:

- (i) arbitration request (██████████ dated 3 November 2017 and specification with the request;
- (ii) further specification of the claim of ██████████ by letter dated 14 December 2017.

- 1.11 On 13 June 2018 a hearing was held in The Hague. ██████████ was represented by Mr S. ██████████ ██████████ was not present. ██████████ was duly notified of the hearing by registered letter and e-mail to ██████████ and its representative Mr ██████████

It was communicated at the hearing by the Arbitral Tribunal no formal report of the hearing would be made. It is also noted that Mr ██████████ has delegated Mr de ██████████ Mr ██████████ and the secretary, Mr La Gro to conduct the hearing on his behalf, in accordance with article 1037(3) Dutch Code of Civil Procedure (DCCP) (*Wetboek van Burgelijke Rechtsvordering*).

In summary parties were given the opportunity to plead their case and to answer questions of arbitrators.

As a result of the hearing [REDACTED] was asked to file the following additional documentation:

- Translation of the e-mail correspondence between [REDACTED] and [REDACTED] dated 19 and 20 September 2017;
- Evidence that [REDACTED] sent [REDACTED] the MPC Conditions before or on closing of the said agreements;
- Evidence of the damages claimed;

By e-mail of 27 June 2018 [REDACTED] filed additional documentation. By letter and e-mail of 28 June 2018 [REDACTED] and its representative Mr [REDACTED] are advised [REDACTED] had the opportunity to respond to these documents within two weeks.

[REDACTED] nor its representative have – aside from the letter of 20 November 2017 – responded to the arbitral request or filed a defence.

2. The facts

2.1 In so far as relevant for the current proceedings [REDACTED] has brought forward the following facts.

2.2 [REDACTED] and [REDACTED] entered into two agreements dated 23 November 2016 (**Contract S65011**) and 1 February 2017 (**Contract S70499**) for the sale and purchase spray skimmed milk powder, The MPC-Conditions are applicable. Under both agreements the following relevant clauses are incorporated:

"SALES CONFIRMATION S65011

(...)

PRICE EUR 1.940 / mt

(...)

DELIVERY 330.000,00 kgs January 2017
330.000,00 kgs February 2017

PAYMENT 100% payment in advance by telegraphic transfer (...)

REMARKS See next page

(...)

REMARKS 1. All our offers and contracts are based on M.P.C.-conditions and the M.P.C. arbitration regulation as field at the District Registrar's Office in The Hague under number 9/2013 on 28 January 2013.

(...)."

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"SALES CONFIRMATION S70499

(...)

PRICE EUR 1.940 / mt

(...)

DELIVERY 960.000,00 kgs March – May 2017

PAYMENT 100% payment in advance by telegraphic transfer (...)

REMARKS See next page

(...)

REMARKS 1. All our offers and contracts are based on M.P.C.-conditions and the M.P.C. arbitration regulation as field at the District Registrar's Office in The Hague under number 9/2013 on 28 January 2013.

(...)"

- 2.3 The sales conformation S65011 is sent by e-mail of 23 November 2016 to [REDACTED] together with the MPC Conditions and a Proforma invoice. The sales conformation S74099 is sent by e-mail of 2 February 2017 to [REDACTED]. The MPC Conditions and a Proforma invoice are attached to the e-mail of 2 February 2017. Both sales confirmations of [REDACTED] are signed by [REDACTED] including the second page on which reference is made to the MPC Conditions that shall apply.
- 2.4 After conclusion of S65011 [REDACTED] placed under Contract S65011 an order for delivery of 6 truckloads by e-mail of 22 December 2016 (delivery S65011-1 until S65011-6). By e-mail of 25 January 2017 [REDACTED] provided a new delivery schedule for the next thirteen deliveries (S65011-7 until S65011-20) in the period of 2 February 2017 and 28 February 2017.
- 2.5 By e-mail of 16 February 2017 [REDACTED] requested [REDACTED] to stop delivery for the deliveries planned on 24 February, 27 February and 28 February (deliveries S65011-18 until S65011-20) because its warehouse would be full at the moment.
- 2.6 By e-mail of 23 February 2017 delivery of S65011-18 is scheduled by [REDACTED] on 6 March 2017. By e-mail of 28 February 2018 [REDACTED] informs [REDACTED] it is unable to accept the delivery at its warehouse. Ultimately the deliveries S65011-18 until S65011-20 are all made and paid for on 31 May 2017.
- 2.7 On 31 May 2017 [REDACTED] placed new delivery orders with [REDACTED]. The deliveries S65011-21 until S65011-25 were made ultimately 6 June 2017.
- 2.8 By e-mail of 21 July 2017 [REDACTED] requested [REDACTED] call off the remainder of the purchased skimmed milk [REDACTED] under Contract S65011, in total 92.000 kilograms. By e-mail of 21 July 2017 [REDACTED] responded that it would provide a new delivery schedule for the remaining truckloads in week 35 of 2017. [REDACTED]

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requested earlier delivery as parties also concluded Contract S70449 for the delivery of 960.000 kilograms in the period March to May 2017.

- 2.9 By e-mail of 19 September 2017 [REDACTED] asked for the call off of the remaining stock under Contract S65011.
- 2.10 By e-mail of 19 September 2017 [REDACTED] has presented [REDACTED] with three options to resolve the issue of the remaining quantity of skimmed milk powder under Contract S65011 and Contract S74099 yet to be called off by [REDACTED]. One of the options was that [REDACTED] would supply [REDACTED] with a complete and final delivery schedule of the delivery of the remaining volume under said contracts.
- 2.11 By e-mail of 20 September 2017 [REDACTED] responded and rejected the proposal by stating it was already purchasing from other suppliers because it would not have received any skimmed milk [REDACTED] in the period of March - May 2017 from [REDACTED]. [REDACTED] has not claimed to have made any (pre)payments other than the payments made for the delivered amount of product by [REDACTED].
- 2.12 By e-mail of 2 November 2017 [REDACTED] announced – after a meeting with [REDACTED] on 12 October 2017 – that it would sell the remaining stock under said contracts (92,000 kilograms under Contract S65011 and 960,000 kilograms under Contract S70499) and charge [REDACTED] for the difference of the market price, storage and interest.

3. The claim

- 3.1 [REDACTED] has requested payment of damages from [REDACTED] due to the breach of contract under Contract S65011 and Contract S74099. The damages requested to be paid by [REDACTED] are based on the difference between the market price for sprayed milk powder in November 2017 and the original purchase price as agreed to under the Contracts S65011 and S74099. In addition [REDACTED] has claimed storage costs of € 10,- p/ month and 2% interest per annum. [REDACTED] has sent [REDACTED] two invoices for the damages dated 2 November 2017. Invoice F1715486 for the amount of € 466,800 relates to the damages in respect to Contract S74099. Invoice F1715485 for the amount of € 47,459.73 relates to the damages in respect to Contract S65011. The difference of the market price in November 2017 and the original purchase price is calculated by [REDACTED] on the reference value presented by the EEX Skimmed Milk Powder Future. In November 2017 according to [REDACTED] the EEX Settlement Price for Skimmed Milk [REDACTED] was € 1,470 / MT (Ex Works). [REDACTED] adjusted its original purchase price in its calculation of its damages to a price of € 1,880 / MT (Ex Works) as its original price of € 1,940 was based on CIP Incoterms. According to [REDACTED] the price difference is € 410 / MT and the damages relating to Contract S65011 would be 92MT * € 410 = € 37,720 (excluding storage costs € 10 p/month = € 7,360 and 2% interest per annum = € 2,379.73). The damages relating to Contract S74099 would be 960MT * € 410 = € 403,200 (excluding storage costs € 10 p/month = € 48,000 and 2% interest per annum = € 15,600).
- 3.2 The claim of [REDACTED] is based in summary on the non-performance by [REDACTED] by not calling off the agreed quantities under Contract S65011 and S74099. [REDACTED] states that [REDACTED] failed to call off the product within in the agreed delivery periods without cause. [REDACTED] argues that [REDACTED] has admitted that it

was purchasing skimmed milk powder as from the latest delivery on 6 July 2017 from other suppliers as the market price for milk powder dropped significantly at that time and apparently [REDACTED] was able to purchase the milk powder for a lower price than under the Contract S65011 and Contract S74099. As a result, the breach of contract is attributable to [REDACTED]

4. Defence against the claim

- 4.1 [REDACTED] has not raised any defence against the claim of [REDACTED] apart from the letter of Mr [REDACTED] of 20 November 2017 in which is stated that [REDACTED] will not adhere to the arbitral request and contests the jurisdiction of the Arbitral Tribunal.
- 4.2 [REDACTED] argued in said letter that the second page of the sales confirmation S70499 was not signed by [REDACTED] and therefore the MPC Conditions that are mentioned on the second page would not be applicable.
- 4.3 [REDACTED] also contests the jurisdiction of the Arbitral Tribunal on the basis of the Council Regulation (EC) No 44/2001.
- 4.4 Furthermore [REDACTED] argues that it is [REDACTED] that is at fault by not delivering the milk powder in the agreed delivery period.

5. Competence of the Arbitral Tribunal

- 5.1 Based on the laws of the Netherlands, specifically article 1051 DCCP the arbitral tribunal shall have the [REDACTED] to decide on its own jurisdiction. The arbitral tribunal shall have jurisdiction if an agreement to arbitrate is proven in accordance with article 1021 DCCP. In that regard, it is sufficient that a written document refers to general conditions which provide for a choice for arbitration, which was (implicitly) accepted by the opposing party.
- 5.2 The first question to be answered is if there is an agreement to arbitrate between [REDACTED] and [REDACTED]. In this case the Contract S65011 and Contract S74099 both state that the MPC Conditions and the MPC Arbitration Regulation 2013 shall apply. The said contracts do not exclude the Convention on the International Sale of Goods (CISG). The Arbitral Tribunal considers that CISG applies to contracts of sale of goods between parties whose places of business are in different states when the states are contracting states to the CISG. [REDACTED] and [REDACTED] both have its place of business in different member states to the CISG, being the Netherlands and Italy. The question if there is an agreement to arbitrate therefore first needs to be assessed in accordance with the CISG. Under the CISG interpretation rules shall apply in order to establish if standard terms are applicable. The CISG Advisory Council Opinion No. 13. states that standard terms are included in the contract where parties have expressly or impliedly agreed to their inclusion at the time of formation of the contract and the other party had reasonable opportunity to take notice of the standard terms.
- 5.3 The Arbitral Tribunal considers that [REDACTED] has had reasonable opportunity to take notice of the MPC Conditions and the Arbitral Regulations in which an agreement is constituted to arbitrate before the Arbitral Tribunal. [REDACTED] has provided the Arbitral Tribunal with a copy of the e-mails by which both contracts

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were sent to [REDACTED] for acceptance and signature. Contract S65011 was sent by e-mail of 23 November 2016 along with a copy of the MPC Conditions and the Arbitral Regulations. Contract S74099 was sent by e-mail 2 February 2017 for acceptance and signature by [REDACTED] along with a copy of the MPC Conditions and the Arbitral Regulations. The Arbitral Tribunal considers said Contracts have been entered into by parties as both agreements are signed and stamped by [REDACTED]. As a result, the Arbitral Tribunal considers that the MPC Conditions and the Arbitral Conditions shall apply.

- 5.4 The Arbitral Tribunal further considers that Regulation 44/2001 in this case does not apply. The arguments raised by [REDACTED] that Regulation 44/2001 would bring about a lack of jurisdiction are unfounded. The Arbitral Tribunal considers that Regulation 44/2001 is replaced by Regulation (EC) 1215/2012 on 12 December 2012 and is therefore no longer applicable in this given matter. More over Regulation 44/2001 and Regulation 1215/2012 in any event do not apply to any action or ancillary proceeding relating to the establishment of an arbitral tribunal, the [REDACTED] of the arbitrators or any other aspect of such a procedure.
- 5.5 In view of the above the Arbitral Tribunal considers that [REDACTED] and [REDACTED] have an agreement to arbitrate as presented under article 15 of the MPC Conditions as Contract S65011 and S74099 are both governed by the MPC Conditions. The Arbitral Tribunal therefore has jurisdiction. The Arbitral Tribunal furthermore considers that in accordance with article 16 of the MPC Conditions Netherlands law shall apply and the CISG is excluded.

6. Considerations

Claim of [REDACTED]

- 6.1 The first question to be answered by the Arbitral Tribunal is whether [REDACTED] is in breach of contract and is liable to [REDACTED] for the damages as a result thereof.
- 6.2 [REDACTED] has argued that [REDACTED] has not met its obligations under Contract S65011 and Contract S74099 since it has failed to call off the delivery of the remaining purchased milk powder under the said contracts.
- 6.3 [REDACTED] only argument raised by letter of 20 November 2017 to contest the claim of [REDACTED] in this respect is that it is [REDACTED] that has refused to deliver or had the obligation to deliver but has failed to do so. In its additional statement of 14 December 2017 [REDACTED] has contested such claim and stated that the correspondence with [REDACTED] evidenced in the annexes to the request for arbitration show that [REDACTED] requested [REDACTED] to take delivery and it was [REDACTED] that delayed the delivery and asked to postpone delivery.
- 6.4 The Arbitral Tribunal considers that under Netherlands law and the MCP-Conditions a debtor is in default during the time that the performance is not carried out in conformity with the obligation after it has become due and demandable, provided that the requirements of articles 6:82 DCC and 6:83 DCC are met, except as far as the delay cannot be attributed to him or it has become permanently impossible to perform the obligation.

- 6.5 The Arbitral Tribunal finds that parties initially agreed to delivery of the milk powder under Contract S65011 in the period of January and February 2017. The delivery under Contract S74099 is due for the period March until and including May 2017. However, the facts brought forward by [REDACTED] evidence and show that parties have deviated from the delivery periods and worked together until the latest delivery of 6 July 2017, without any notice of default or complaint from [REDACTED] nor [REDACTED].
- 6.6 The Arbitral Tribunal also considers that in the period as from the latest delivery by [REDACTED] the market prices for skimmed milk powder dropped significantly. It shall therefore not be unlikely that – as [REDACTED] has stated – these circumstances contributed to the fact that [REDACTED] by e-mail of 19 September 2017 has refused to call off the remaining quantity of milk [REDACTED] under the said contracts and requested an adjustment of the originally agreed purchase price to the current market value or otherwise refused to call off the remaining volume under the said contracts.
- 6.7 The discussion between parties clearly comes down to the question if the decrease of the market prices is for risk of [REDACTED]. The Arbitral Tribunal considers that parties clearly have agreed to a fixed purchase price per metric ton. The Arbitral Tribunal is of the opinion that the purchase price is not subject to the increase or decrease of the market prices. It is of general knowledge that the market prices are subject to increase or decrease over time. The evidence provided by [REDACTED] clearly indicates that [REDACTED] requested [REDACTED] to call off the remaining stock several times and [REDACTED] delayed the delivery. [REDACTED] did not request delivery after the latest delivery of 6 July 2017 while [REDACTED] requested a new delivery schedule. [REDACTED] also did not make any pre-payments for other deliveries. Moreover, [REDACTED] stated it was already taking delivery from other suppliers while it was still obligated to take delivery of the remaining volume. The decrease of market prices of fresh milk powder is to the opinion of the Arbitral Tribunal for the risk of [REDACTED] as it failed to call off the milk powder within the agreed delivery period and waited as from 6 July 2018 to call off the next delivery. Because [REDACTED] made no pre-payment to [REDACTED] other than the payments made for the already delivered milk powder, [REDACTED] had no obligation to deliver to [REDACTED] as from the latest delivery.
- 6.8 The Arbitral Tribunal is of the opinion - with due care and in all fairness - that as from 19 September 2017 [REDACTED] is in default by giving notice that it would not call off any milk powder under the said contracts. As from that moment it would have been the responsibility of [REDACTED] to limit its damages. The damages claimed by [REDACTED] are based on the market price of 2 November 2017. As of the notice of 19 September 2017 of [REDACTED] [REDACTED] should have taken reasonable measures to limit damages. Therefore, the Arbitral Tribunal finds that the amount claimed by [REDACTED] based on the market price of 2 November 2017 is not admissible.
- 6.9 The Arbitral Tribunal finds that the damages are to be calculated by taking in to account the market price of 20 September 2017 in comparison with the normalized contracted purchase price set out in the said agreements. The Arbitral Tribunal finds that the damages resulting to the default are to be established on such grounds that the remaining amount of milk powder to be called off by [REDACTED] on 20 September 2017 were under Contract S65011 92,000 kilograms

(92 metric tons) and under Contract S70499 960,000.00 (960 metric tons). The market prices are estimated *ex aequo et bono* on 20 September 2017 for the said milk powder at EUR 1,653 per metric ton. [REDACTED] has converted its contracted DAP price of EUR 1,940 per metric ton under Contract S65011 to an EXW price of EUR 1,880 per metric ton and under Contract S70499 the DAP price of EUR 1,940 per metric ton is converted to EUR 1,890 EXW per metric ton. This results in a price difference under Contract S65011 of EUR 227 per metric ton and under Contract S70499 EUR 237 per metric ton. Therefore, the Arbitral Tribunal shall *ex aequo et bono* calculate the damages as follows. Under Contract S65011 the damages are EUR 20,884 (EUR 227 * 92 metric tons) and under Contract S70499 the damages are EUR 227,520 (EUR 237 * 960 metric tons) in total EUR 248,404.

- 6.10 To the opinion of the Arbitral Tribunal -with due care and in all fairness – the requested payment of storages costs by [REDACTED] shall be denied. Storage costs would only be come due and payable on the moment after [REDACTED] is in default. This was per 20 September 2017. However, [REDACTED] has not, although requested by the Arbitral Tribunal to do so, presented the Arbitral Tribunal with real and actual storage costs nor has [REDACTED] claimed to have an agreement with [REDACTED] on the basis of which it would be allowed to charge [REDACTED] the claimed storage costs. Therefore, the Arbitral Tribunal sees no ground to allow the claim of [REDACTED] for payment of such costs.
- 6.11 [REDACTED] has also claimed interest of 2% per annum. [REDACTED] has not, although requested by the Arbitral Tribunal to do so, explained the Arbitral Tribunal on which ground said interest rate is based nor per which date the interest would be due. The Arbitral Tribunal shall therefore apply the statutory interest rate since the grounds for damages by [REDACTED] are based on the termination of the said contract and this is not a matter of payment of invoices. The Arbitral Tribunal finds that [REDACTED] is due statutory interest in accordance with article 6:119 DDC per 20 September 2017 until the day of full and final payment.
- 6.12 In view of the provided evidence of the damages and the above, the Arbitral Tribunal is of the opinion judging in all fairness and acting as good people, taking into account the views of parties brought forward, the evidence and the contestation of the evidence, [REDACTED] should be rewarded damages in the amount of EUR 248,404.00 increased with statutory interest pursuant to article 6:119 DCC, as from 20 September 2017 (being the date [REDACTED] is in default) and the costs of the arbitration proceedings.
- 6.13 [REDACTED] is ordered, as being the party which is denied its claims, in the costs of these arbitral proceedings. The costs of this proceeding are set at an amount of EUR 15,750.00 for the costs of the arbitration proceedings, including the costs for the Arbitral Tribunal and Administration costs. The amount of the order will be offset with the deposits and administration fees paid by [REDACTED] of EUR 15,000.00 As a result [REDACTED] is ordered to pay to [REDACTED] the amount of EUR 15,750.00.

7. Decision

- 7.1 The Arbitral Tribunal, giving judgement, acting as reasonable men with due care and in all fairness:

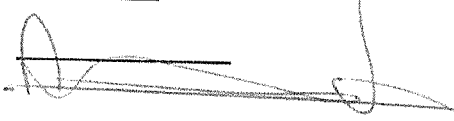
1. orders [REDACTED] to pay EUR 248,404.00 (two hundred forty-eight thousand four hundred and four euro's) to [REDACTED] increased with statutory interest pursuant to article 6:119 DCC, as per 20 September 2017 (being the date [REDACTED] is in default) until the day of full payment;
2. orders [REDACTED] to pay the costs of these proceedings, amounting to EUR 15,750.00 which are setoff with the deposit made and administration costs paid by [REDACTED] and with the Arbitration Tribunal ordering [REDACTED] to pay an amount of EUR 15,750.00 (fifteen thousand seven hundred fifty euro's) to [REDACTED]
3. Rejects all other claims.

This arbitral judgement is drafted in four copies and duly signed:

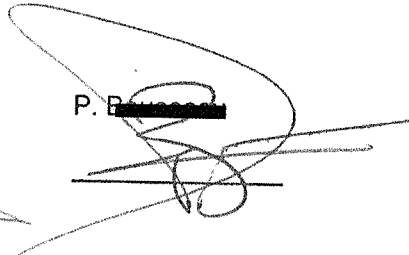
- Each party will receive one original copy;
- One original copy will be saved at the offices of the Body of Arbitration, being the offices of the Dutch Dairy Trade Association (Gemzu);
- One original copy will be filed with the court registry of the Court of The Hague.

The Hague, 4 September 2018.

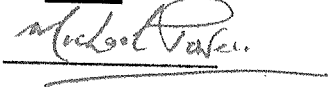
A. de [REDACTED]



P. [REDACTED]



M. [REDACTED]



R.W. La Gro, secretary

