

MPC ARBITRATION

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

[REDACTED] B.V.

A private limited company established under Netherlands law and registered in [REDACTED] the Netherlands

represented by mr. M. [REDACTED]

Applicant in the original claim and defendant in the motion for the Arbitral Tribunal to decline jurisdiction

hereafter also called "[REDACTED]";

and

[REDACTED] Sp. Z.O.O.

a private limited company established under Polish law and registered in [REDACTED], Poland

represented by mr. K.C. [REDACTED]

Defendant in the original claim and applicant in the motion for the Arbitral Tribunal to decline jurisdiction

hereafter also called "[REDACTED]";

1. Procedure

1.1 The course of the procedure is shown by the following:

- the interlocutory judgment of 20 August 2019;
- letter of 21 August 2019 of [REDACTED] with additional exhibits 6 until 12;
- letter of 21 August 2019 of [REDACTED] with additional exhibits 10 until 14;
- the pleadings of 5 September 2019 and the pleadings of [REDACTED] submitted;

1.2 Finally, the judgment has been further determined today.

2. Additional facts

2.1 The definitions laid down in the judgment of 20 August 2019 shall have the same meaning in this judgment.

2.2. Insofar as relevant parties have brought forward and have not or not with sufficient substantiation disputed the following facts.

2.3 [REDACTED] and [REDACTED] have entered into two agreements for the sale and purchase fat filled milk powder as set out in the judgment of 20 August 2019.

2.4 [REDACTED] has delivered 116,500 kilograms of milk powder to [REDACTED] which has been paid for by [REDACTED] 933,500 of milk powder were not delivered under the said agreements.

2.5 [REDACTED] is a supplier and not a manufacturer of milk powder and has sourced the milk powder related to the said agreements from [REDACTED] Sp. Z.O.O.

(PPHU) domiciled in Poland. [REDACTED] has stated that the milk powder has unique features in respect to the composition and an alternative product is not available.

2.6 [REDACTED] received delivery of similar milk powder from [REDACTED] directly in the months March, April and May 2019.

3. The claim of [REDACTED]

3.1 [REDACTED] demands performance of the said agreements for delivery of 933,500 kilograms fat filled milk powder (instant, 28% fat) subject to a penalty for non-performance. In addition, [REDACTED] asks that [REDACTED] will be ordered to pay the costs of the arbitration, including costs of its legal assistance.

3.2 [REDACTED] argues that it has concluded two agreements (Purchase confirmation '49 and Purchase confirmation '95) and that [REDACTED] is in default by non-delivery of the purchased milk powder. According to [REDACTED] the delivery of the milk powder was agreed for in December 2018, January 2019 respectively February 2019. [REDACTED] failed to deliver on due time without proper cause.

4. Defence of [REDACTED]

4.1 [REDACTED] contest the claim of [REDACTED] and argues that any delay in delivery cannot be contributed to [REDACTED] as [REDACTED] has not delivered the milk powder to [REDACTED]. [REDACTED] claims there is case of force majeure due to the inability of [REDACTED] to deliver the milk powder to [REDACTED]. [REDACTED] advances the argument that the factory of [REDACTED] was shutdown multiple times.

4.2 In addition [REDACTED] argued in its pleadings that [REDACTED] did not make the call offs under the agreements and failed to provide specific information in order for [REDACTED] to perform and make the delivery.

4.3 Furthermore, [REDACTED] argued in its pleadings that Mrs. [REDACTED] and Mr. [REDACTED] were never employed by [REDACTED].

5. Considerations of the Arbitral Tribunal

5.1 The Arbitral Tribunal will hereinafter assess whether [REDACTED] was justified to suspend its delivery to [REDACTED] by invoking force majeure and if [REDACTED] is obligated to perform under the said agreements the delivery of 933,500 kilograms of milk powder to [REDACTED].

5.2 Based on the laws of the Netherlands, specifically article 6:75 Dutch Civil Code (DCC) there is a situation of force majeure (*overmacht*) if the non-performance may not be attributed to a party that is obliged to perform because it is not at fault, nor accountable for it by virtue of law, a legal act or generally accepted standards (common opinion).

5.3 The Arbitral Tribunal finds that in the given situation it has not been established that [REDACTED] could not deliver the milk powder to [REDACTED]. The Arbitral Tribunal finds that [REDACTED] has chosen not to use all the means at its disposal to have

deliver the milk powder to . In the pleadings stated that it would start or had started legal proceedings against due to the non-delivery. Nor would such proceedings necessarily relieve of its obligations. However, no proof of such proceedings was presented. has also chosen not to add as third party to the arbitration proceedings.

- 5.4 Moreover, in contrary to what claims, the Arbitral Tribunal considers that it can be established that was able to deliver milk powder since delivered similar milk powder to directly in March, April and May 2019.
- 5.5 In view of the above, it cannot be established that there is a situation of force majeure. has not provided the Arbitral Tribunal with sufficient evidence that was not be able to supply while has provided substantial evidence that was able to supply and deliver. there for fails in its plea of force majeure.
- 5.6 Additionally, the Arbitral Tribunal finds also that the claimed non-delivery by as a subcontractor of is common business practice that is at the expense and risk of . Even if had not been able to deliver, there still would be no event of force majeure as the non-delivery by is at the risk of . In this respect it should be noted that the Arbitral Tribunal considers that did not give any notice to that it suspended its delivery due to force majeure, while under the MPC Conditions it would be obligated to do so.
- 5.7 The Arbitral Tribunal is of the opinion that the argument of , that did not make clear call offs and did not provide sufficient information on the specification of packaging and documents for shipment in order for to make a delivery - cannot succeed. has brought forward this argument in the pleadings but failed to substantiate this with evidence. has argued that it had requested delivery multiple times but in no event did request for additional information. presented to the Arbitral Tribunal several events in which it requested delivery. The Arbitral Tribunal therefore considers that the non-delivery by is not due to any fault of but can be attributed to itself.
- 5.8 The Arbitral Tribunal dismisses the defence of that Mrs. and Mr. were never employed by . The Arbitral Tribunal finds that it can be established that certain quantities of milk powder already is delivered under the agreements and that the execution of these deliveries directly implicated and required the intervention of Mrs. and/or Mr. the argument that Mrs. and Mr. were never employed by does not change the fact that had partly executed the agreements with the direct involvement of Mrs. and/or Mr. and did not sufficiently contest that said agreements were lawfully concluded. defence to this end cannot succeed.
- 5.9 Because there is no situation of force majeure nor any other justification for the non-delivery, the Arbitral Tribunal finds that must account for the attributable failure to perform under the said agreements and is obligated to deliver the remaining amount of milk powder in total 993,500 kilograms.

5.10 The Arbitral Tribunal considers that the requested delivery by [REDACTED] is according to the standards of reasonableness and fairness. [REDACTED] has alternatively demanded performance by delivery of the milk powder in three tranches of 300,000 kilograms, 400,000 kilograms and 233,500 kilograms within successive two-weeks periods. [REDACTED] has not made any objections towards the delivery scheme as requested by [REDACTED] nor to the performance of the delivery under conditions of a penalty payment. The Arbitral Tribunal shall therefore award the claim as requested in respect to the delivery in three tranches under the conditions of a penalty payment. However, the incremental penalty payment will be moderated to a penalty of EUR 1,000,-- per day of each day that [REDACTED] fails to deliver the milk powder and shall be reduced to the following maximum sum of EUR 500,000,--. Also, the first delivery will be ordered within 30 days from the day of this judgment. The second and third delivery will have the same delivery time of 30 days as the Arbitral Tribunal considers such a lead time of 30 days for delivery in conformity with the standards of reasonableness and fairness.

5.11 [REDACTED] is ordered, as being the party, which is denied its claims, to assume the costs of these arbitral proceedings. The costs of these proceedings are set at an amount of EUR 15,000,-- 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 (EUR 15,000) and administration fees (EUR 750) paid by [REDACTED] of EUR 10,750. As a result, [REDACTED] is ordered to pay to [REDACTED] the amount of EUR 15,750,--.

5.12 [REDACTED] has claimed costs of legal representatives. The Arbitral Tribunal is of the opinion that given the nature of the procedure such costs should be denied pursuant to art. 20 of the Arbitration Regulations.

6. Decision

6.1 The Arbitral Tribunal, giving judgment, acting as reasonable persons with due care and in all fairness:

1. Orders [REDACTED] to perform its obligation under the Purchase confirmation '49 and Purchase confirmation '95 and to deliver to [REDACTED] 933,500 kilograms of milk powder in three tranches of 300,000, 400,000 and 233,500 kilograms in accordance with the conditions of the said agreements, whereby the first tranche of 300,000 kilograms shall be delivered to [REDACTED] within 30 days after this arbitral judgment and the second tranche of 400,000 kilograms shall be delivered within 60 days after the arbitral judgement and the third tranche of 233,500 kilograms shall be delivered within 90 days after this arbitral judgment;
2. Orders [REDACTED] to pay a penalty to [REDACTED] in the amount of EUR 1,000 (one thousand euros) for each day that [REDACTED] fails to deliver the milk powder in accordance with the order as set out under 6.1.1 of this judgement, with a maximum of EUR 500,000 (five hundred thousand euros);
3. orders [REDACTED] to pay the costs of these proceedings, amounting to EUR 15,750 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 to [REDACTED];

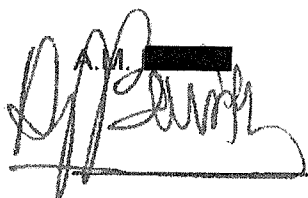
4. Rejects all other claims.

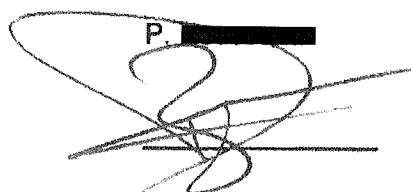
This arbitral judgment is drafted in four copies and duly signed:

- By Mr. S. [REDACTED] (domiciled in [REDACTED], The Netherlands), Mr. A.M. [REDACTED] (domiciled in [REDACTED], Belgium), Mr P. [REDACTED] (domiciled in [REDACTED], France) and Mr. B. Niemeijer (domiciled in Alphen aan den Rijn, The Netherlands).
- 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 December 2019.



A.M. [redacted]


P. [redacted]


S. [redacted]



B. Niemeijer

