

MPC ARBITRATION

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

[REDACTED] B.V.
a company with limited liability under Dutch law, with registered office in [REDACTED] the Netherlands;
represented by Mr M. van [REDACTED]
Applicant
hereafter also called "[REDACTED]"

and

[REDACTED] [REDACTED]
a company with limited liability under French law, with registered office in [REDACTED] France;
represented by Mr F.X. [REDACTED]
Defendant
hereafter also called "[REDACTED]"

1. Procedure

- 1.1 By letter of 24 July 2019 [REDACTED] has filed a request for arbitration under the MPC Arbitration Regulations (2018) against [REDACTED]
- 1.2 The dispute relates to the delivery and payment of products by [REDACTED] to [REDACTED]
- 1.3 The arbitration request was forwarded to [REDACTED] by registered letter of 26 July 2019.
- 1.4 By letter of 26 July 2019 parties were advised that mr. B. Niemeijer is appointed as secretary to the Arbitration Tribunal and both parties were requested to duly file a list of preferred persons to be appointed as arbitrators to the proceedings in accordance with the listing procedure of the MPC Arbitration Regulations (2018) (hereafter also referred to as "Arbitration Regulations").
- 1.5 By e-mail of 29 July 2019 [REDACTED] has disputed the competence of the Arbitral Tribunal and has requested to confirm that there shall be no proceedings opened.
- 1.6 [REDACTED] has provided a list of preferred persons by letter of 29 July 2019.
- 1.7 By letter of 30 July 2019, [REDACTED] was advised to provide a list of preferred persons before 9 August 2019. In the same letter [REDACTED] was allowed to further elucidate its filed claim within three weeks. After [REDACTED] would have filed its additional statement of claim, [REDACTED] would be allowed to file its statement of defence within three weeks. In the same letter, parties were requested to inform the Secretary whether they want to have an immediate hearing without any further exchange of statements in accordance with Article 13 sub 1 of the Arbitration Rules.

- 1.8 By letter of 10 September 2019 parties were informed that [REDACTED] did not file an additional statement of claim nor did parties inform the Arbitral Tribunal if they would prefer an immediate hearing without further exchange of written statements. [REDACTED] was allowed to file a statement of defence ultimately on 2 October 2019.
- 1.9 By letter of 24 September 2019 [REDACTED] has objected against the arbitral proceedings arguing that there is no agreement for arbitration nor any other agreement for the delivery of butter by [REDACTED].
- 1.10 By letter of 15 October 2019 parties were advised that a hearing would take place on 18 November 2019 and that in accordance with the Arbitration Regulations, Mr. Van [REDACTED] (domiciled in [REDACTED], the Netherlands), Mr. [REDACTED] (domiciled in [REDACTED], France) and Mr. [REDACTED] (domiciled in [REDACTED] the Netherlands) have accepted their appointment as arbitrators in these arbitration proceedings. Mr. Van [REDACTED] acted as chairman to the Arbitration Tribunal.
- 1.11 Parties were advised that the arbitration proceedings shall be conducted in the English language in accordance with article 12 sub 5 of the Arbitration Regulations.
- 1.12 Arbitrators have in accordance with article 11 of the Arbitration Regulations determined that the formal place of arbitration shall be The Hague, The Netherlands.
- 1.13 [REDACTED] appeared at the Arbitral Tribunal for the hearing. [REDACTED] did not appear.
- 1.14 After the hearing of 18 November 2019 the Arbitral Tribunal requested [REDACTED] by letter of 3 December 2019 to provide more information, ultimately on 17 December 2019. [REDACTED] was advised it would be allowed to respond to the documents filed by [REDACTED] within 14 days after submission.
- 1.15 By e-mail of 14 December 2019 [REDACTED] has submitted additional information to the Arbitral Tribunal. Copy of the documents were sent to [REDACTED]. The Arbitral Tribunal notified parties it by letter of 30 January 2020 it would take the additional filed information in to consideration. [REDACTED] did not submit any response to the documents filed.
- 1.16 In summary the following documents have been filed by the Parties:
- Arbitration request by [REDACTED] dated 24 July 2019;
 - Letter from [REDACTED] dated 24 September 2019 arguing there is no agreement between the Parties;
 - e-mail from [REDACTED] dated 14 December 2019 with additional information;

2. The facts

- 2.1 In so far as relevant for the current proceedings Parties have brought forward and have not or not with sufficient substantiation disputed the following facts.
- 2.2 [REDACTED] has argued that there is an agreement for the delivery of four trucks of fresh butter to [REDACTED]

2.3 By e-mail mail of 25 September 2018 [REDACTED] wrote to [REDACTED]

"Suite discussion, je te confirme notre accord pour : 4 camions de beurre doux lactique 82% [REDACTED] frais avec DLC sur carton 25kg en carton sur palette bois Livraison sur T4 – Si appels de commande tôt, les partis s'engagent à trouver un accord Appels de commande 7 jours ouvrés à l'avance minimum Prix : 4.82 €/kg CIP-Sites TG Obligation de moyen d'essayer de mettre la température sur les cartons de ma part (donc si impossible, [REDACTED] respectera le contrat de la même manière). J'attends ton accord par retour. Cdt,

(...)

The information contained in this communication is intended solely for the use of the individual or entity to whom it is addressed and others authorized to receive it. The contents of the information are not considered to be formally legally binding, and are "subject to contract" and internal approval of terms and conditions contained. Only once a formal contract is issued will terms and conditions be accepted to be binding. All our formal offers and contracts are based on M.P.C.-conditions and the M.P.C. arbitration regulation as filed at the District Registrar's Office in The Hague under number 53/2017 on 15 November 2017."

2.4 By e-mail of 25 September 2018 [REDACTED] has replied to the aforementioned e-mail of [REDACTED] as follows:

"Bonjour, Je te confirme le contrat ci-dessous avec les engagements de moyen sur la température. Merci"

2.5 In this respect [REDACTED] has sent [REDACTED] by e-mail of 28 September 2018 a Sales Confirmation S1018001226 (hereinafter referred to as the "Sales Confirmation"), dated 25 September 2018 together with the MPC Conditions as filed at the District Registrar's Office in The Hague under number 53/2017 on 15 November 2017 (the MPC Conditions (2018)). The Sales Confirmation contains the following:

(...)

SALES CONFIRMATION S1018001226
[REDACTED] 25 september 2018

Nous confirmons vous avoir vendu:

(...)

The Sales Confirmation was not signed by [REDACTED]

2.6 By e-mail of 16 October 2018 [REDACTED] has confirmed [REDACTED] call off the butter as stipulated in the Sales Confirmation.

2.7 By e-mail of 16 October 2018 [REDACTED] responded it was still waiting for elements on labelling in order to allowed to place the order for delivery.

2.8 By e-mail of 17 September 2018, 8 November 2018, 3 December 2018 and again on 13 February 2019 [REDACTED] has requested [REDACTED] to sign a *general framework agreement*.

- 2.9 By e-mail of 27 December 2018, 3 January 2019 and 17 January 2019 [REDACTED] has requested [REDACTED] to provide a planning for the call off for the butter.
- 2.10 By e-mail of 30 January 2019 [REDACTED] has provided [REDACTED] with a provisional schedule for delivery of 46.000 kg of butter.
- 2.11 By e-mail of 5 February 2019 [REDACTED] made the first call off with reference to the Sales Confirmation. Delivery of 22.000 kg butter was made by [REDACTED] on 14 February 2019 which was paid for by [REDACTED]
- 2.12 By e-mail of 15 March 2019 [REDACTED] requested [REDACTED] to provide clarity on the call offs since delivery dates in the Sales Confirmation had lapsed.
- 2.13 By e-mail of 5 April 2019 [REDACTED] has confirmed to [REDACTED] that it will not call off any more butter:

«Suite à notre échange téléphonique, je te confirme que nous n'allons pas honorer les stock engagés. Nous sommes encore sur le stock lièvre le 20/02/2019 et nous risquons de jeter produit.»

- 2.14 By e-mail of 10 April 2019 [REDACTED] has stated that [REDACTED] is obligated to take delivery of the remaining butter in reference to the agreement.
- 2.15 By e-mail of 10 April 2019 [REDACTED] states there is no signed agreement between parties that obligates [REDACTED] to take of the remaining butter:

«Malheureusement, nous ne pouvons donner une suite favorable a ta demande. En Effet, il n'y a eu aucun contrat signé entre les Parties. Nous avons donc procédé a commandes successives au fur et à mesure de nos besoins, commandes facturée au prix proposes par tes soins au moment de chacune de nos commandes. »

- 2.16 By e-mail of 15 July 2019 [REDACTED] summons [REDACTED] to take delivery of the agreed amount of butter and by e-mail of 18 July 2018 [REDACTED] confirms it will not call off the butter. By e-mail of 19 July 2019 [REDACTED] announces that it will start arbitration procedures against [REDACTED].

3. The Claim of [REDACTED]

- 3.1 [REDACTED] claims payment from [REDACTED] in the amount of EUR 75.000,20 (seventy-five thousand euro's and twenty cents) for the non-performance.
- 3.2 The claim is based on the difference between the original sales price (EUR 4.820/mt) and the 'current market price' EUR 3500/mt. In addition, [REDACTED] claims payment for storage in the amount 43.64 per mt. The claim is calculated by [REDACTED] as follows: EUR 1.320/MT + EUR 43.64. = EUR 1.363,64 * 55 mt = EUR 75.000,20).

4. **Defence of [REDACTED]**

4.1 [REDACTED] contests the claim of [REDACTED] and argues that there has never been a confirmation for the order of 4 trucks of butter.

4.2 [REDACTED] claims that [REDACTED] only uses purchase orders and never makes an order by e-mail, and thus there is no contract signed by parties and [REDACTED] is not obliged to receive and pay for the trucks of butter.

4.3 [REDACTED] in addition contested the jurisdiction of the Arbitral Tribunal, stating that there is no agreement for arbitration.

5 **Competence of the Arbitral Tribunal**

5.1 The Arbitral Tribunal will assess whether it has competence in the presented dispute.

5.2 Based on the laws of the Netherlands, specifically article 1051 DCCP the Arbitral Tribunal shall have the power 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 this regard, a written document which provides for a choice for arbitration, and which was (implicitly) accepted by the opposing party suffices.

5.2 The first question to be answered is if there is an agreement to arbitrate between [REDACTED] and [REDACTED]. The question of whether there is an agreement to arbitrate first needs to be assessed in accordance with 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 their place of business in different member states to the CISG, being the Netherlands and France.

5.3 Under the CISG interpretation rules 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.

5.4 The Arbitral Tribunal considers that [REDACTED] and [REDACTED] have entered into an agreement on 25 September 2018. An agreement is concluded by offer and acceptance. The Arbitral Tribunal finds that the e-mail 25 September 2018 at 10:17 hours of [REDACTED] to [REDACTED] qualifies as an offer which was accepted by [REDACTED] by e-mail of 25 September 2018 at 10:18 hours.

5.5 In addition the Arbitral Tribunal considers that in the e-mail of 25 September 2018 [REDACTED] has referred to the applicability of the MPC Conditions and the MPC Arbitration Regulations. This is also confirmed by [REDACTED] in its Sales Confirmation. The Arbitral Tribunal finds that the Sales Confirmation was not rejected by [REDACTED]. Moreover, [REDACTED] called-off and paid 22.000 kg of the butter in question. The request of [REDACTED] for [REDACTED] to sign the framework agreement, can not be considered as an explicit rejection of the

applicability of the offer made on 25 September 2018 and the reference to the MPC Conditions.

5.6 Based on the above 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 proof that the MPC Conditions, including the MPC Arbitration Regulations were sent to [REDACTED] on 26 June 2018. This was before the conclusion of the agreement on 25 September 2018. The Arbitral Tribunal considers that the MPC Conditions and the MPC Arbitration Regulations shall apply and that therefore parties have an agreement to arbitrate as presented under article 15 of the MPC Conditions. The Arbitral Tribunal therefore has jurisdiction.

6. **Considerations of the Arbitral Tribunal on the claim**

6.1 The Arbitral Tribunal will hereinafter assess whether [REDACTED] is entitled to the payment of the claim submitted in these proceedings.

6.2 The Arbitral Tribunal has requested [REDACTED] to provide the Arbitral Tribunal with additional information in accordance with article 9 (10) of the Arbitration Regulations, consisting of:

- Evidence that the MPC Conditions were sent to [REDACTED] before or at the time of the conclusion of the agreement on 25 September 2018;
- Evidence that shows when the Sales Confirmation (S1018001226) was sent to [REDACTED]
- The correspondence between [REDACTED] and [REDACTED] leading up to the conclusion of the agreement on 25 September 2018 and the correspondence directly thereafter until 21 November 2018;
- The complete and correct version of the event history index which is presented as annex (page 17) to the Application for Arbitration.

6.2 The Arbitral Tribunal considers that based on the evidence provided to the Arbitral Tribunal [REDACTED] committed itself to purchase from [REDACTED] the butter in accordance with the Sales Confirmation. [REDACTED] has taken delivery and made payment under the said conditions.

6.3 The Arbitral Tribunal cannot agree with [REDACTED] that there is no agreement for the delivery of the 88.000 kg of butter. As set out above the Arbitral Tribunal is of the opinion that parties have reached an agreement on 25 September 2018, which was confirmed by the Sales Confirmation. Furthermore, [REDACTED] did not explicitly object against the Sales Confirmation. The argument of [REDACTED] that it requested [REDACTED] to conclude the framework agreement as provided to [REDACTED], does not change the fact that [REDACTED] unconditionally – accepted the offer of [REDACTED] on 25 September 2018 and thereafter also acted according to the offer.

6.4 The Arbitral Tribunal considers that the claim of [REDACTED] is mainly based on so called abstract damages being the difference between the original sales price and the current market price. [REDACTED] has not objected against the amount claimed by [REDACTED] nor the calculation method leading up to the claim presented by [REDACTED]

- 6.5 When determining the damage, the Arbitral Tribunal has a certain degree of freedom to calculate damage in the most reasonable way. Pursuant to Article 6:97 of the Dutch Civil Code, the Arbitral Tribunal may also estimate the damage.
- 6.6 The Arbitral Tribunal considers that the damages can be calculated based on the price difference between the original purchase and market price at the time the agreement is considered to be terminated by [REDACTED]. The Arbitral Tribunal is of the opinion that by e-mail of 18 July 2019 of [REDACTED] it has become clear that it would not call of the remaining butter. In accordance with the public market quotation for butter the market price in July 2019 was EUR 3.580/mt. The difference is EUR 1.240/mt. The Arbitral Tribunal estimates – acting as reasonable persons with due care and in all fairness - that damage of [REDACTED] amounts to EUR 68.200 (*sixty-eight thousand two hundred euro*). This estimated is based on the price difference EUR 1.240/mt multiplied by the remaining butter (55 mt).
- 6.7 [REDACTED] also claims storage costs and costs of financing. However, these costs are not further substantiated and, as a result, cannot be awarded to the opinion of the Arbitral Tribunal.
- 6.8 [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 15.750 for the costs of the arbitration proceedings, including the costs of 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 15.750.

7. Decision

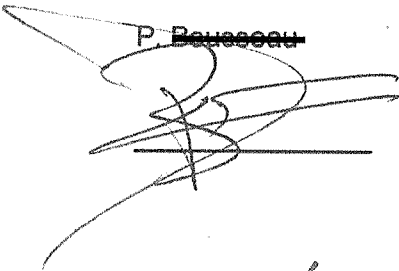
- 7.1 The Arbitral Tribunal, giving judgement, acting as reasonable persons with due care and in all fairness:
1. Orders [REDACTED] to pay to [REDACTED] the amount of EUR 68.200 (*sixty-eight thousand two hundred euro*) as damages within two weeks from the date of the arbitral judgment;
 2. Orders [REDACTED] to pay the costs of these proceedings, amounting to EUR 15.750 to [REDACTED], which are set off with the deposit made and administration costs paid by [REDACTED].
 3. Rejects all other claims;

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

- By Mr. [REDACTED] (domiciled in [REDACTED] France), mr. De [REDACTED] (domiciled in [REDACTED] the Netherlands), mr. Van [REDACTED] (domiciled in [REDACTED] the Netherlands) 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, 13 September 2021

P. Beussens



A. de [REDACTED]



P. [REDACTED]



B. Niemeijer

