MPC ARBITRATION

Arbitral judgment rendered in The Hague, the Netherlands by Mr. [redacted] (domiciled in [redacted], Netherlands), Mr. [redacted] (domiciled in [redacted]) and Mr. [redacted] (domiciled in [redacted], Netherlands) in the arbitral proceedings between:

[redacted]
with registered office at [redacted]
applicant;
hereafter also called "[redacted]

and

[redacted]
with registered office at [redacted]
defendant;
hereafter also called "[redacted]

1. Procedure

1.1. By letter dated 18 March 2024 [redacted] filed a request for arbitration under the MPC Arbitration Regulations (2018), hereafter also referred to as the "Arbitration Regulations" against [redacted] [redacted] claims compensation for damages and losses suffered due to a breach of contract by [redacted]. The request for arbitration was transmitted to [redacted] by a registered letter of 27 March 2024. In the same letter both parties were informed that Mr. B. [redacted] has been appointed as the secretary to the Arbitral Tribunal. Furthermore, the parties were requested to submit a list of preferred individuals to be appointed as arbitrators by 10 April 2024, following the listing procedure outlined in the Arbitration Regulations.

1.2. By letter dated 9 April 2024, the parties were informed that the arbitration was hereby deemed to be commenced and would be conducted in accordance with the MPC Arbitration Rules. Again, both parties were requested to submit the names of three potential arbitrators by 17 April 2024. In the same letter, [redacted] was given a period of three weeks to file a statement of claim. Each party was requested to inform Mr B. [redacted] whether it wished to proceed to an immediate hearing without further exchange of statements.

1.3. By letter of 25 June 2024, the parties were informed that Mr. [redacted] and Mr. [redacted] had been appointed as arbitrators and that Mr. [redacted] had been appointed as third arbitrator and chairman of the Arbitral Tribunal. By letter dated 2 July 2024, the parties were informed that an oral hearing would be held on 24 September 2024. However, by email of 16 September 2024, the parties were informed that due to the illness of [redacted] the hearing on 24 September 2024 would be postponed and that Mr. [redacted] would replace Mr. [redacted] By letter of 30 October 2024, the parties were informed that the oral hearing would take place on 16 January 2025. The parties were informed that Mr. [redacted] had withdrawn as arbitrator and that Mr. [redacted] had been appointed as third arbitrator.

1.4. The oral hearing took place on 16 January 2025 via video conference. Both [redacted] and [redacted] were represented and Mr. [redacted] acted as chairman.

1.5. The following documents were filed in the proceedings:

- - [redacted] Request for Arbitration dated 18 March 2024;
- - [redacted] Statement of Claim dated 30 April 2024;
- - [redacted] Statement of Defence dated 23 May 2024;
- - [redacted] Statement of Reply dated 13 August;
- - Statement of Rejoinder of [redacted] dated 17 September 2024; filed 18 September 2024;
- - [redacted] pleading notes with additional exhibits filed on 15 January 2025 at 14:34 CET..

2. The facts

2.1. [redacted] and [redacted] have entered into a Sale and Purchase Agreement dated 21 June 2021 for the supply of 3,000,000.00 KG of Skim Milk Powder ("SMP") by [redacted] to [redacted] (the "Contract"). The agreed specifications are "To Supplier's Specification". The Contract is subject to the MPC Conditions. Under the Contract, [redacted] is required to purchase 200 MT of SMP per month during the period October 2021 to December 2022. From August 2022, [redacted] ceased to purchase the agreed monthly volume of SMP. The contract states that the price of SMP for each delivery will be USD 220 per MT above the monthly average Final Skim Milk Product Settlement price on the European Energy Exchange for the two months prior to the expected delivery date. Products will be delivered CIF China Main Port each month..

2.2. By email of 9 June 2022, [redacted] informed [redacted] about the updated packaging of the producer of SMP ([redacted]) (the "Updated Packaging"). By email of 10 June 2022, [redacted] informed [redacted] that 100 MT of the delivery of 336 MT in June 2022 would already be delivered with the Updated Packaging.

2.3. By email dated 23 September 2022, [redacted] informed [redacted] that it could no longer take delivery of product due to changes in specification and packaging as a result of discussions with its downstream customer(s). In the same email, [redacted] made a proposal to resolve the issue, which was not accepted by [redacted]. The parties continued to discuss possible commercial solutions, resulting in a proposal by [redacted] to replace the contract with a new contract under which [redacted] would purchase 1185 MT at a price of USD 3,120 per MT and pay [redacted] an additional compensation of USD 200 per MT (the "Settlement Agreement"). According to the parties, this proposal did not become effective.

2.4. By letter of 1 November 2002, [redacted] held [redacted] liable for non-performance of the contract because it had not taken delivery of the remaining quantity (1.000 MT) under the Contract.

2.5. By e-mail of 18 November 2023, [redacted] contested the allegations and stated that its customers had cancelled their orders because of the Updated Packaging and that [redacted] could therefore not be held responsible for not taking delivery of the remaining volume.

2.6. By letter of 12 December 2023, [redacted] lawyer asked the [redacted] to make a satisfactory proposal to resolve the matter, while reserving its rights.

3. The claim of [redacted]

3.1. [redacted] is claiming damages in the amount of USD 1,146,787.20 (the "Claimed Amount"). The Claimed Amount is calculated by [redacted] on the basis of the market difference between the agreed contract price from August 2022 to December 2022 and the prevailing market prices at the time of the not executed Settlement Agreement in February 2023.

4. Competence of the Arbitral Tribunal

4.1. The Arbitral Tribunal shall first determine whether it has jurisdiction over the dispute submitted to it. Pursuant to Dutch law, in particular Article 1052 of the Dutch Code of Civil Procedure (DCCP), the Arbitration Tribunal has the power to decide on its own jurisdiction. The Arbitral Tribunal shall have jurisdiction if an arbitration agreement is proven in accordance with Article 1021 of the DCCP. For this purpose, it is sufficient to have a written document which provides for the choice of arbitration and which has been (implicitly) accepted by the opposing party.

4.2. The Arbitral Tribunal considers that the Convention on Contracts for the International Sale of Goods (CISG) applies to the contract of sale concluded between the parties, as both parties are domiciled in a member state of the CISG. Whether the MPC Conditions, including the arbitration agreement, have become part of the contract is determined in accordance with the rules of the CISG. Standard terms are included in the contract if the parties have expressly or tacitly agreed to their inclusion at the time of the formation of the contract and the other party has had a reasonable opportunity to take note of the terms.

4.3. The Arbitral Tribunal considers that the MPC Conditions are incorporated into the contract between the parties by way of reference. The Confirmation of Sale refers to the MPC Conditions, which were filed with the Registry of the District Court of The Hague on 15 November 2017 under number 53/2017. The Arbitral Tribunal considers that ██████ had the opportunity to take note of the MPC Conditions, i.e. the agreement to arbitrate under the MPC Rules. Furthermore, ██████ has not challenged the jurisdiction of the Arbitral Tribunal. In view of the foregoing, the Arbitral Tribunal considers that the parties have agreed to arbitrate under the Arbitration Rules and that the Arbitral Tribunal therefore has jurisdiction.

5. Procedural considerations on late submissions ██████

5.1. The Arbitral Tribunal will first consider ██████ formal objections to the untimely filing of ██████ Statement of Rejoinder. The deadline for filing the rejoinder was set for 17 September. Although the rejoinder is dated 17 September 2024, it was not filed until 18 September 2024 and was therefore late. ██████ has formally objected to this delay.

5.2. The Arbitral Tribunal has considered ██████ objection but will allow the Rejoinder for the following reasons. First, the delay was very short (one day). Second, the Rejoinder is only seven pages long, does not contain any new material, and ██████ had ample opportunity to respond to it at the hearing. Accordingly, the Arbitral Tribunal does not see how ██████ position could have been prejudiced by this minimal delay.

5.3. ██████ also filed written submissions and additional exhibits on 15 January 2025, within 24 hours of the hearing, although the Arbitral Tribunal had instructed that such submissions be made before the hearing on 14 January 2025 at 09:30 CET. At the hearing, ██████ representative read the pleading notes verbatim. The Arbitral Tribunal will admit the pleading notes as they were recited during the hearing; however, the additional exhibits are rejected by the Arbitral Tribunal as untimely. ██████ had the opportunity to submit these exhibits from the commencement of the proceedings in March 2024, and the Arbitral Tribunal sees no justification for ██████ waiting until the last moment before the hearing to submit them, particularly when neither the Arbitral Tribunal nor ██████ had the opportunity to review the exhibits beforehand..

6. Considerations of the Arbitral Tribunal on the claim

6.1. The Arbitral Tribunal will now consider whether ████ claim can be upheld. ████ has challenged ████ liability claim, arguing that ████ caused the products to be delivered with Updated Packaging. According to ████ this Updated Packaging caused its downstream customers to reject the products and forced ████ to reject the Settlement Agreement in February 2023. ████ further alleges that the changes related to the Updated Packaging caused the delivered products not to comply with the relevant legal requirements, which led ████ to reject the Updated Packaging.

6.2. ████ further contends that the parties implicitly agreed to use the original packaging, making the Updated Packaging a change to the contract and therefore a breach. ████ also argues that the packaging is crucial and of significant importance in determining the parties' obligations under the contract. In addition, ████ disputes the losses claimed by ████ and claims that these losses are not supported by any (financial) evidence. Finally, ████ challenges ████ use of the date of the so-called Settlement Agreement (February 2023) as the reference date for the calculation of price differentials, arguing that this use is unfounded.

6.3. ████ has challenged this defence, arguing that the Updated Packaging do not constitute a material change and only affect the artwork. Updates to artwork are common practice and do not compromise the integrity of the product and were not of such a nature as to cause a disruption to ████ procurement process. In particular, ████ has a contractual relationship only with ████ and not with ████ (downstream) customers. Any disruption in the distribution of the product due to the terms of the agreement between ████ and its customers is not a matter for which ████ is responsible.

6.4. The Arbitral Tribunal considers that the first question to be answered is what the parties agreed upon with respect to packaging and specifications. The Arbitral Tribunal considers that the parties did not explicitly agree on the details of the packaging. As to the specifications, the parties agreed that they should be "in accordance with the supplier's specifications". Therefore, the Arbitral Tribunal considers that the Updated Packaging does not constitute a material modification of the Contract under the standards of reasonableness and fairness, as the parties did not explicitly agree on the packaging. In addition, it appears that the parties agreed that the specifications would be in accordance with the supplier's specifications, which may be subject to change. In view of these agreements, and according to both the standards of reasonableness and fairness and what is customary in the industry, the Updated Packaging does not materially alter the Contract. In addition, ████ has provided convincing evidence that the product specifications remain the same, including various Certificates of Analysis (COAs) showing that any changes are marginal.

6.5. Although ████ has stated that the Updated Packaging resulted in material changes to, inter alia, the product specifications, it has not provided any evidence to explain why the COAs as submitted by ████ would be factually incorrect. Therefore, the Arbitral Tribunal considers that ████ has not convincingly demonstrated how the Updated Packaging resulted in material deviations from the agreed specifications and that its defence is not valid.

6.6. Furthermore, the Arbitral Tribunal is not convinced by ████ argument that ████ could be held responsible for agreements that ████ made with its own customers, as this was not part of the agreement between ████ and ████. Consequently, the rejection of the product by ████ customers is not ████ risk. It is the obligation of ████ to deliver the products in accordance with the agreed specifications.

6.7. Having determined that the Updated Packaging does not constitute a material change, the Arbitral Tribunal will now determine whether ██████ is liable for the damages claimed by ████████ The Arbitral Tribunal considers that ██████ is in default because it did not purchase the products on a monthly basis as contractually agreed. The default appears without notice of default as parties have agreed to a monthly delivery of 200 metric tonnes. The Arbitral Tribunal is therefore of the opinion that ██████ is in default as per July 2022.

6.8. The Arbitral Tribunal considers that ████████ is obliged to minimise the damage it suffers as a result of this default. The estimated damage can be calculated in the abstract, but must take into account the circumstances of the case. In this particular case, the Arbitral Tribunal considers that it was █████████ duty to always proactively limit the damage and, if the product was not purchased, to market it in a different way. It would be unreasonable to calculate damages on the basis of the difference between the market price on the contractually agreed delivery date and the date when it became clear that the Settlement Agreement between the parties would not be accepted in February 2023. The Arbitral Tribunal considers that ████████ should have proactively offered the product to another buyer from the moment ██████ was in default (July 2022), also taking into account ███████ notifications that ██████ would not take delivery of the product, and that it consequently failed to do so.

6.9. As the contract price is based on the last EEX SMP settlement of the month + USD 220 per MT, it is unrealistic to hold ██████ responsible for the price decline in the market from August 2022 to February 2023. ████████ should have taken appropriate measures to avoid further losses after ███████ default. ████████ has not claimed that it was unable to sell the product to other customers and the Arbitral Tribunal considers that this would be very unlikely. Therefore, the Arbitral Tribunal considers and estimates that, in all fairness and reasonableness, █████████ recoverable actual damages amount to the margin of USD 220 per metric tonne (USD 220 x 1000 MT). This results in a total loss of USD 220,000 (two hundred and twenty thousand US dollars).

6.10. In view of the evidence provided and all the facts, the Arbitral Tribunal is of the opinion, judging in all fairness and acting as good persons, that █████████ should be awarded payment of USD USD 220,000 (*two hundred and twenty thousand US dollars*) to be increased further by the contractual interest rate as per date of this judgement and the costs of the arbitration proceedings.

6.11. ██████ is ordered, as being the losing party, to assume the costs of these arbitral proceedings. The costs of these 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 (EUR 15,000.00) and administration fees (EUR 750) paid by ████████ of EUR 15,750.00. As a result, ██████ is ordered to pay to ████████ the amount of EUR 15,750.00.

7. Decision

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

1. orders ████████████████████████████ to pay USD 220,000 (*two hundred and twenty thousand US dollars*) to ████████████████████████ increased with contractual interest pursuant article 6:119a Dutch Civil Code, as per date of the judgment until the day of full payment;

2. orders [redacted] to pay the costs of these proceedings, amounting to EUR 15,750.00 (*fifteen thousand seven hundred fifty euros and zero cents*) 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 euros and zero cents*) to [redacted]

3. grants this award provisionally enforceable notwithstanding any (arbitral) appeal;

4. Rejects all other claims.

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

- By Mr. [redacted] (domiciled in [redacted] Netherlands), Mr. [redacted] (domiciled in [redacted]) and Mr. [redacted] (domiciled in [redacted], Netherlands) and Mr. [redacted] (domiciled in [redacted], 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 office of the Dutch Dairy Trade Association (Gemzu);
- One original copy will be filed with the court registry of the Court of The Hague.

Date: 26 March 2025.