

## MPC ARBITRATION

Arbitral judgment rendered by Messrs H. [REDACTED] [REDACTED] [REDACTED] and N. [REDACTED] in the arbitral proceedings between:

[REDACTED] B.V.

a company with limited liability under Netherlands law, with registered office in [REDACTED] the Netherlands;  
represented by mr. L. M. Ravestijn  
Applicant  
hereafter also called "[REDACTED]"

and

[REDACTED] [REDACTED]  
company with limited liability under foreign law, with registered office in [REDACTED] Oman;  
not represented  
Defendant  
hereafter also called "[REDACTED]"

1. **Procedure**
- 1.1 By letter of 8 May 2019 [REDACTED] has filed a request for arbitration under the MPC arbitration regulations (2013) against [REDACTED]
- 1.2 The dispute relates to the unpaid invoices of delivered products by [REDACTED] to [REDACTED]
- 1.3 The arbitration request was forwarded to [REDACTED] by registered letter of 9 May 2019.
- 1.4 By letter of 16 May 2019 parties were advised that mr. B. [REDACTED] 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 (2013) (hereafter also called the "**Arbitration Regulations**"). In the same letter [REDACTED] was allowed to 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.
- 1.5 [REDACTED] has provided a list of preferred persons by letter of 23 May 2019. [REDACTED] has not responded to the request.
- 1.6 By letter of 28 May 2020 [REDACTED] has requested the Arbitral Tribunal for an immediate hearing without allowing a written statement and announced that it would file the requested translation of its request for arbitration untimely 6 June 2020. By letter of 7 June 2020 [REDACTED] was sent a translation of the application for arbitration.

- 1.7 By letter of 10 July 2019 [REDACTED] was allowed to file a statement of defence ultimately before 30 July 2019.
- 1.8 In addition, parties were advised that a hearing would take place on 24 September 2019 and that in accordance with the Arbitration Regulations, Mr. [REDACTED] (domiciled in France), Mr. Van [REDACTED] (domiciled in The Netherlands) and Mr. [REDACTED] (domiciled in the United Kingdom) have accepted their appointment as arbitrators in these arbitration proceedings. Mr. [REDACTED] acted as chairman to the Arbitration Tribunal.
- 1.9 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.
- 1.10 Arbitrators have in accordance with article 11 of the Arbitration Regulations determined that the formal place of arbitration shall be The Hague, The Netherlands.
- 1.11 [REDACTED] has not confirmed receipt of the arbitration request, responded to any of the letters of the secretary nor did it file a statement of defence.
- 1.12 [REDACTED] has appeared at the Arbitral Tribunal for the hearing. [REDACTED] has not appeared for the hearing. [REDACTED] has filled a copy with the Arbitral Tribunal proof that the application for arbitration and the announcement for the hearing were formally served via a bailiff to [REDACTED]
- 1.13 In its application [REDACTED] has stated that the related agreement is governed by MPC Conditions and MPC Arbitration Regulations.
- 1.14 After the hearing of 24 September 2019 the Arbitral Tribunal has requested [REDACTED] by letter of 1 October 2019 to answer questions and file additional documents.
- 1.15 By letter of 5 November 2019 [REDACTED] has submitted answers to the questions of the Arbitral Tribunal together with exhibits numbered 1 to 9.
- 1.16 By letter of 2 December 2019 the Arbitral Tribunal has informed parties that [REDACTED] would be allowed to respond to the additional submitted documents submitted by [REDACTED] by letter of 5 November 2019. [REDACTED] did not respond.
- 1.17 By letter of 28 January 2020 was requested by the Arbitral Tribunal to answer questions of the Arbitral Tribunal following the submitted documents by letter of 5 November 2019.
- 1.18 [REDACTED] submitted by letter of 2 March 2019 answer to questions along with nine attachments. Again, [REDACTED] was allowed to respond but failed to do so.
- 1.19 After careful deliberation the Arbitral Tribunal has announced it would render judgement.

1.20 In summary the following documents have been filed by [REDACTED]

- arbitration request by [REDACTED] dated 8 May 2019;
- copy of the write of service by bailiff to [REDACTED] of the application for arbitration, including a copy of the letter dated 10 July 2019 of the secretary;
- letter dated 5 November 2019 with exhibits 1 to 9
- letter dated 2 March 2020 with attachments 1 to 7;

2. **The facts**

2.1 [REDACTED] and [REDACTED] have entered into two agreements for the sale and purchase of (2x) 50.000 kgs of full cream milk powder spray. [REDACTED] claims that there has also been one agreement for the sale and purchase of 25.000 kgs fat filled powder and another one for 50.400 kgs full cream milk powder spray. This all happened between December 2013 and November 2014.

2.2 In this respect [REDACTED] has sent [REDACTED] two sales confirmations dated 31 December 2013 no. S305633 (hereinafter referred to as the **Sales Confirmation 1**) respectively dated 8 August 2014 no. S403667 (hereinafter referred to as the **Sales Confirmation 2**) which have been signed by [REDACTED]. According to [REDACTED] [REDACTED] has also sent [REDACTED] five sales confirmations dated 10 February 2014 no. S305633 (Rev) (hereinafter referred to as the **Sales Confirmation 3**) respectively dated 18 March 2014 no. S401347 (hereinafter referred to as the **Sales Confirmation 4**) respectively dated 14 November 2014 no. S403729 (hereinafter referred to as the **Sales Confirmation 5**) and no. S403729 (Rev) (hereinafter referred to as the **Sales Confirmation 6**) which may or may not have been signed by [REDACTED].

2.3 The Sales Confirmation 1 contains the following:

"(...)

**SALES CONFIRMATION S305633**  
[REDACTED], 31 december 2013

*We confirm having sold to you:*

<b>PRODUCT:</b>	full cream milk powder spray, min. 26% butterfat, regular type, medium heat
<b>GN CODE:</b>	040221189900
<b>QUANTITY:</b>	about 50.000,00 kgs
<b>PRICE:</b>	USD 4.750,00 / mt
<b>ORIGIN:</b>	INDIA
<b>DESTINATION:</b>	OMAN
<b>CONDITIONS:</b>	CFR Muskat Incoterms: 2010
<b>SHIPMENT:</b>	50.000,00 kgs January 2014
<b>PAYMENT:</b>	net cash not later than 90 days from date of B/L by telegraphic transfer into our account No. [REDACTED] with ABN Amro Bank, Amsterdam, Holland. SWIFT Address: [REDACTED]

PACKING: moreply, pre-printed paperbags with poly liner of 25 kgs  
net each, heat-sealed  
REMARKS: See next page.

2.4 The Sales Confirmation 2 contains the following:

**SALES CONFIRMATION S403667**

██████████, 08 August 2014

We confirm having sold to you:

PRODUCT : full cream milk powder spray, min. 28.1% butterfat,  
instant type, medium heat, fit for human consumption,  
██████████ production.  
GN CODE: 040221999200  
QUANTITY : about 50.000,00 kgs  
PRICE : USD 3.185,00 / mt  
ORIGIN: NEW ZEALAND  
DESTINATION: OMAN  
CONDITIONS: CFR Sohar Incoterms 2010  
SHIPMENT: 50.000,00 kgs October 2014  
PAYMENT: net cash not later than 90 days from date of B/L by  
telegraphic transfer into our account No. ██████████  
with ABN Amro Bank, Amsterdam, Holland. SWIFT  
Address: ██████████ ██████████ ██████████  
PACKING: noreply, pre-printed paperbags with poly liner of 25 kgs  
net each, heat-sealed  
REMARKS: See next page.

2.5 The Sales Confirmation 3 contains the following:

**SALES CONFIRMATION S305633 (Revised)**

██████████ 10 February 2014

We confirm having sold to you:

PRODUCT : full cream milk powder spray, min. 26% butterfat, regular  
type, medium heat  
GN CODE: 040221189900  
QUANTITY : about 50.000,00 kgs  
PRICE : USD 4.750,00 / mt  
ORIGIN: INDIA  
DESTINATION: OMAN  
CONDITIONS: CFR Muskat Incoterms 2010  
SHIPMENT: 50.000,00 kgs first half February 2014  
PAYMENT: net cash not later than 90 days from date of B/L by  
telegraphic transfer into our account ██████████  
with ABN Amro Bank, Amsterdam, Holland. SWIFT  
Address: ██████████ ██████████ ██████████  
PACKING: noreply, pre-printed paperbags with poly liner of 25 kgs  
net each, heat-sealed

REMARKS: See next page.

[...]

ISO 22000: 1. Allergens: the product contains (traces of) milk protein and lactose and possible other allergens  
2. All liability concerning legislation of the raw material in its use i.e. application has been excluded

REMARKS: 1. All our 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 90/2013 on 28 January 2013.  
2. Radio activity is in accordance with limits of country of destination  
3. Subject to available limit under credit insurance at date of delivery  
4. We kindly request you to return a copy of this contract, duly signed and stamped by you within 2 working days. If we do not receive the contract signed and stamped within the time limit mentioned before, we reserve the right to cancel the contract.  
5. Overdue payments are strictly subject to 1% interest per month  
6. Volumes +/- 5% seller's option

2.6 The Sales Confirmation 4 contains the following:

**SALES CONFIRMATION S401347**

18 March 2014

PRODUCT : IPRO Multimilk P12C19; fat filled powder (as per specification attached)  
GN CODE: 190190  
QUANTITY : about 25.000,00 kgs  
PRICE : USD 3.300,00 / mt  
ORIGIN: NETHERLANDS  
DESTINATION: OMAN  
CONDITIONS: CIF Muskat Incoterms 2010  
SHIPMENT: 25.000,00 kgs May 2014  
PAYMENT: net cash not later than 90 days from date of B/L by telegraphic transfer into our account No. [REDACTED] with ABN Amro Bank, Amsterdam, Holland. SWIFT Address: [REDACTED]

PACKING: moreply, pre-printed paperbags with poly liner of 25 kgs net each, heat-sealed

REMARKS: See next page.

2.7 The Sales Confirmation 5 contains the following:

**SALES CONFIRMATION S403729**

14 November 2014

**PRODUCT :** full cream milk powder spray, min. 28.1% butterfat, instant type, medium heat, fit for human consumption, [redacted] production.  
**GN CODE:** 040221999200  
**QUANTITY :** about 50.000,00 kgs  
**PRICE :** USD 3.185,00 / mt  
**ORIGIN:** NEW ZEALAND  
**DESTINATION:** OMAN  
**CONDITIONS:** CFR Sohar Incoterms 2010  
**SHIPMENT:** 50.000,00 kgs November/December 2014  
**PAYMENT:** net cash not later than 90 days from date of B/L by telegraphic transfer into our account No. [redacted] with ABN Amro Bank, Amsterdam, Holland. SWIFT Address: [redacted]  
**PACKING:** moreply, pre-printed paperbags with poly liner of 25 kgs net each, heat-sealed  
**REMARKS:** See next page.

[...]

**ISO 22000:** 1. Allergens: the product contains (traces of) milk protein and lactose and possible other allergens  
2. All liability concerning legislation of the raw material in its use i.e. application has been excluded

**REMARKS:** 1. All our 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 90/2013 on 28 January 2013.  
2. Radio activity is in accordance with limits of country of destination  
3. Subject to available limit under credit insurance at date of delivery  
4. We kindly request you to return a copy of this contract, duly signed and stamped by you within 2 working days. If we do not receive the contract signed and stamped within the time limit mentioned before, we reserve the right to cancel the contract.  
5. Overdue payments are strictly subject to 1% interest per month  
6. Volumes +/- 5% seller's option  
7. Production date and shelf life will comply with the Oman import regulations

2.7. The Sales Confirmation 6 contains the following:

**SALES CONFIRMATION S403729 (Rev)**

14 November 2014

*n*

**PRODUCT :** full cream milk powder spray, min. 28.1% butterfat, instant type, medium heat, fit for human consumption, [REDACTED] production.  
**GN CODE:** 040221999200  
**QUANTITY :** about 50,000,00 kgs  
**PRICE :** USD 3.185,00 / mt  
**ORIGIN:** NEW ZEALAND  
**DESTINATION:** OMAN  
**CONDITIONS:** CFR Sohar Incoterms 2010  
**SHIPMENT:** 50.000,00 kgs November/December 2014  
**PAYMENT:** net cash not later than 90 days from date of B/L by telegraphic transfer into our account No. [REDACTED] with ABN Amro Bank, Amsterdam, Holland. SWIFT Address: [REDACTED]  
**PACKING:** moreply, pre-printed paperbags with poly liner of 25 kgs net each, heat-sealed  
**REMARKS:** See next page.

- 2.8 [REDACTED] has sent [REDACTED] six invoices dated 16 February 2014 no. F4002046 for the amount of USD 237.500,00 (hereinafter referred to as the **Invoice 1**), 02 June 2014 no. F4006688 for the amount of USD 79.200,00 (hereinafter referred to as the **Invoice 2**), 25 October 2014 for the amount of USD 79.545,38 (hereinafter referred to as the **Invoice 3**), 25 October 2014 no. F4012733 for the amount of USD 80.262,00 (hereinafter referred to as the **Invoice 4**) and 16 December 2014 no. F4014765 for the amount of USD 179.676,00 (hereinafter referred to as the **Invoice 5**).
- 2.9 After the payment period expired [REDACTED] did not pay the invoices and until today has not done so.
- 2.10 On 2 November 2018 [REDACTED] started legal proceeding in Oman demanding payment of the outstanding invoices. The court in Oman has declared that it did not have jurisdiction as parties involved had agreed to arbitration. The proceedings were initiated at the request of the Credit Insurer of [REDACTED] Coface.
3. **The claim**
- 3.1 [REDACTED] argues that [REDACTED] has not fully paid its invoices. Therefore, [REDACTED] claims that [REDACTED] still has to pay an outstanding amount for the delivery of the products by [REDACTED]
- 3.2 [REDACTED] has filed a claim for the payment of the amount of USD 343,553.54 to be increased with 9% interest per month from 16 September 2014 until the day of full payment and furthermore with an amount of EUR 2,946.28 in (extra) judicial costs cf. the Wik (Incasso Costs Act).
- 3.3 In the proceedings in Oman, [REDACTED] took the position that it has a counterclaim on [REDACTED] for late delivery of goods.

4. **Nonappearance of [REDACTED]**

4.1 [REDACTED] did not appear in the arbitral proceedings and did not raise any defence against the claim of Interfood.

4.2 The Arbitral Tribunal confers default to [REDACTED]. The Arbitral Tribunal takes into consideration that [REDACTED] was sufficiently notified on the merits of the proceeding. Furthermore, it can be established that [REDACTED] was served with the request for arbitration by [REDACTED] including the call to appear in the proceedings and to attend the hearing of 24 September 2019 by writ of service of the bailiff. The Arbitral Tribunal is of the opinion that the service was affected in enough time to enable the defendant to appear in the proceedings and to raise a defence.

5. **Competence of the Arbitral Tribunal**

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

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.

5.3 The Arbitral Tribunal considers that it is not disputed that parties have entered into multiple sales agreements for the buy and sell of full cream milk powder spray.

5.4 The Arbitral Tribunal considers that the Convention on International Sale of Goods (CISG) in the given matter shall not apply as to the sales agreements concluded between parties, given the fact that Oman is not a contracting member state to the CISG. Whether MPC Conditions, including the agreement for arbitration have become part of the agreements is determined within the framework of Netherlands law according to the rules that apply to the conclusion and interpretation of agreements.  
The Arbitral Tribunal is of the opinion that the MPC Conditions, including the agreement for arbitration shall by reference form part of the agreements if at the time of the conclusion of the agreements the parties have explicitly or tacitly agreed on this.

5.5 The Arbitral Tribunal considers that [REDACTED] has referred in its confirmations that the MPC Conditions, including the MPC Arbitration Regulation shall apply.

5.6 The Arbitral Tribunal finds that [REDACTED] has sufficiently shown that the MPC Conditions are included in the aforementioned confirmations by way of reference and parties have agreed to its inclusion. In addition, the Arbitral Tribunal is of the opinion that the agreement for arbitration between parties also follows from the judgement of the court in Oman which denied jurisdiction on the basis that parties



had agreed to arbitration. The Arbitral Tribunal considers that 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 invoices and additional claims submitted in these proceedings.
- 6.2 The Arbitral Tribunal considers that the claim filed by [REDACTED] and explained in the hearing required additional evidence and explanation. Although [REDACTED] did not appear in the hearings, the Arbitral Tribunal is of the opinion that it can only establish if the claim of [REDACTED] does not appear to be unlawful and should be allowed if it has a full understanding of the evidence supporting the claim. Therefore, the Arbitral Tribunal has requested additional information and explanation by letters dated 1 October 2019 respectively 28 January 2020.
- 6.3 First consideration for the Arbitral Tribunal is to establish why several Sales Confirmations were revised and if parties eventually agreed to the Sales Confirmations S403729 and S403667 for which [REDACTED] had issued the invoice F4014765 related to Sales Confirmation S403729 and the invoices F4012727 and F4012733 related to Sales Confirmation S403667. By letter of 5 November 2019 [REDACTED] elucidated that the Sales Confirmations were indeed signed by both parties and in addition submitted the signed Sales Confirmations S403729 and Sales Confirmation S403667 showing [REDACTED] company stamp and signature.
- 6.4 The Arbitration Tribunal furthermore considers it is required to establish if the goods in relation to the invoices F4012727, F4012733 and F4014765 were in fact delivered to [REDACTED]. At the request of the Arbitral Tribunal [REDACTED] submitted by letter of 5 November 2019 additional documentation on the delivery. The documents on transportation of the goods submitted by [REDACTED] show that [REDACTED] LLC was appointed as consignee and not [REDACTED] Trading. By letter of 28 January 2020 the Arbitral Tribunal requested [REDACTED] to explain the relation between [REDACTED] LLC and for what reason [REDACTED] LLC was mentioned as consignee while the sales confirmations invoices were in name of [REDACTED]. By letter of 2 March 2020 [REDACTED] elucidated that [REDACTED] LLC is an affiliated entity of [REDACTED] and at the explicit request of [REDACTED] the transport documents were, for clearing purposes, drawn up in name of [REDACTED] LCC.
- 6.5 By letter of 1 October 2019 respectively 28 January 2020 the Arbitral Tribunal requested [REDACTED] to provide a comprehensive overview on the position of its credit insurer Coface in the given proceedings, as Coface took an active role in the proceedings in Oman and onward. By letter of 2 March 2020 [REDACTED] explained that 90% of its claim is covered and compensations of damages is granted by Coface to [REDACTED] after which Coface handed over (*lastgeving*) its claims of EUR 248.032,81 (the covered 90% of the total claim).

- 6.6 The Arbitral Tribunal furthermore takes into consideration that there is a considerable of time between the expiration date of the last invoice and the legal action taken by [REDACTED]. The trade between [REDACTED] and [REDACTED] that lies at the heart of this case took place between December 2013 and November 2014. The last payment term expired by the beginning of 2015. [REDACTED] has taken legal action by starting a legal procedure in Oman in 2017. According to [REDACTED] the subsequent delay was caused by the route through different departments of its credit insurer Coface. [REDACTED] argues that it has also tried to reach a settlement with [REDACTED] which has caused delay.
- 6.7 In view of the above the Arbitral Tribunal is of the opinion that [REDACTED] shall be allowed in its claim for payment of the outstanding invoices. The Arbitral Tribunal considers that based on the evidence provided by [REDACTED] it has been sufficiently established that [REDACTED] is obligated to pay the invoices F4014765 related to Sales Confirmation S403729 and the invoices F4012727 and F4012733 related to Sales Confirmation S403667 and that the goods in questions were delivered in accordance with the instructions of [REDACTED] representatives since Overseas Food Industries LLC was appointed by [REDACTED] as consignee. Furthermore, it can be established that Coface as credit insurance company has handed over (lastgeving) the claim to [REDACTED] and [REDACTED] therefore is authorized the collect and start given proceedings and the claim is admissible.
- 6.8 The Arbitral Tribunal shall deny the claim of [REDACTED] for the payment of 9% interest per month. The claim of [REDACTED] is based on the payment of the outstanding invoice F4014765 related to Sales Confirmation S403729 and the invoices F4012727 and F4012733 related to Sales Confirmation S403667. The Sales Confirmation S4403729 and Sales Confirmation mention an interest rate of 1% per month. Therefore, the requested 9% interest over the outstanding amount shall be limited to 1% interest per month. The Arbitration Tribunal is of the opinion that the interest shall only apply as from the expiration date of each invoice. Therefore, interest shall be allowed as from the expiration date of each invoice.
- 6.9 Furthermore, [REDACTED] has stated that it only claims the amount related to the outstanding invoices F4014765, F4012727 and F4012733. These invoices amount in total USD 339,483.38. This amount deviates from the requested amount by [REDACTED]. The Arbitral Tribunal shall therefore award the total amount related to the invoices F4014765, F4012727 and F4012733 in total USD 339,483.38.

## 7. **Decision**

- 7.1 The Arbitral Tribunal, giving judgement, acting as reasonable persons with due care and in all fairness:
1. Orders [REDACTED] [REDACTED] to pay to [REDACTED] within 14 days from the day of this arbitral award:
    - the total amount of USD 339,483.38 to be increased with 1% interest per month as from the expiration date of the outstanding invoices F4014765, F4012727 and respectively F4012733 over the amount of EUR 179,676.00 as from 16 March 2015, respectively over the amount of

80,262.00 as from 23 January 2015, and over the amount 79,545.38 as from 23 January 2015 until the day of full payment;

- EUR 2.946,28 in extra judicial costs;
- The costs of these proceedings, amounting to EUR 15.750,-- (excluding VAT), which are setoff with the deposit made and administration costs paid by [REDACTED] with the Arbitral Tribunal ordering [REDACTED] to pay EUR 15.750,-- (excluding VAT) to [REDACTED]

2. 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.

Signed on 13 August 2010

[Redacted]

[Handwritten signature]

D.N. [Redacted]

[Handwritten signature]

H.L. [Redacted]

[Handwritten signature]

[Redacted]

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