MPC ARBITRATION

Arbitral judgment rendered by Messrs P. van [redacted] B. [redacted] and A.M. [redacted] in the arbitral proceedings between:

[redacted] **Co.**,
registered in [redacted], Iran
represented by the Hague Center for Law and Arbitration
Applicant in the original claim and defendant in the counterclaim
hereafter also called "[redacted];

and

[redacted] **B.V.**,
registered in [redacted], The Netherlands
represented by mr. S. [redacted] and mr. E.A.J. [redacted]
Defendant in the original claim and applicant in the counterclaim
hereafter also called "[redacted]

1. **Procedure**

1.1 By letter of 16 November 2017 [redacted] has filed a request for arbitration under the MPC arbitration regulations (2013) against [redacted]

The dispute relates to a claim of [redacted] on [redacted] for the payment of damages and losses suffered by [redacted] in the amount of EUR 294.164,65 due to the cancellation by [redacted] of a purchase agreement between parties for the delivery of lactic butter by [redacted] to [redacted] In addition, [redacted] has asked that [redacted] would be ordered to pay the costs of the arbitration proceedings including costs of legal assistance and that [redacted] would be ordered to pay interest on the amount of damages and losses and arbitration costs and costs of legal assistance.

1.2 The arbitration request was forwarded to [redacted] by registered letter of 17 November 2017. [redacted] has confirmed receipt of the arbitration request.

1.3 In its application [redacted] has stated that the related agreement is governed by MPC Conditions and MPC Arbitration Regulations.

1.4 By registered letter of 5 December 2017 parties have been advised that Mr R.W. La Gro was appointed secretary to the arbitration procedure and both parties duly have filed 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**").

[redacted] and [redacted] have been advised that in accordance with the Arbitration Regulations, Mr A.M. [redacted] (domiciled in [redacted], Belgium), Mr P. van [redacted] (domiciled in [redacted], The Netherlands) and B. [redacted] (domiciled in [redacted] Northern Ireland, United Kingdom) have accepted their appointment as

6

arbitrators in these arbitration proceedings. Mr [redacted] acted as chairman to the Arbitration Tribunal.

1.5 Parties were by letter of 5 December 2017 also 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 Arbitrators have in accordance with article 11 of the Arbitration Regulations determined that the formal place of arbitration shall be The Hague, The Netherlands.

1.7 In accordance with the Arbitration Regulations parties were given the opportunity by letter of 5 December 2017 to ask for an immediate hearing in case both parties wished to do so without further exchange of statements. In its letter of 6 December 2017 [redacted] advised the Arbitral Tribunal that it wished to file a statement of claim.

1.8 [redacted] has filed its statement of claim on 10 January 2018.

1.9 Subsequently [redacted] has filed a statement of defence 14 February 2018.

1.10 On 18 April 2018 a hearing was held in The Hague. [redacted] was represented by Mr K.H. [redacted] and Mr A.Z. [redacted]. [redacted] represented by mr. S.P. [redacted] and mr. E.A.J. [redacted]
It was communicated at the hearing by arbitrators that no formal report of the hearing would be made. In summary parties were given the opportunity to plead their case and to answer questions of arbitrators.

1.11 Subsequently to the hearing parties have filed the written pleading notes which were presented at the hearing.

1.12 In response to the instructions of the Arbitration Tribunal [redacted] has filed a statement of submission of additional documents requested on 23 May 2018.

1.13 On 7 June 2018 [redacted] has filed a statement on the submitted documents.

1.14 After receipt of the statement on the submitted documents by [redacted] the Arbitral Tribunal has informed parties that it will render its judgement.

1.15 In summary the following documents have been filed by parties:

- arbitration request ([redacted] dated 16 December 2017;
- statement of claim ([redacted] dated 10 January 2018
- statement of defence ([redacted] dated 14 February 2018;
- pleading notes ([redacted] dated 18 April 2018;
- pleading notes ([redacted] dated 18 April 2018;
- statement of submission of additional documents ([redacted] dated 23 May 2018;
- statement on the submitted documents ([redacted] dated 7 June 2018.

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] and [redacted] have entered into an agreement for the sale and purchase of unsalted lactic butter from Solarec with Belgian origin. Country of destination was Iran.

In this respect [redacted] has sent by e-mail of 12 May 2017 [redacted] a sales order S00361534 (hereinafter referred to as the **Sales Order**). Paragraph 2.4 will clarify the dating on the Sales Order. The Sale Order contains the following:

"(...)

Amendment 12/5

Sales-Order: S00361534
FM1 *09.02.2017*

We herewith confirm having sold to you,

Quantity:	*100,0 mt*
Description:	*Unsalted lactic butter, butterfat min 82%, moisture max 16%, food grade [redacted] production, frozen, 24 months*
Origin:	*Belgium*
Shipment:	*June 2017* *100,0 MT*
Price:	*EUR 4.360.00 per MT CFR Bandar Abbas -Incoterms® 2010 Net weight, packing including, containerized, taxes excluded*
Packing:	*Block of 25 kg*
Payment Conditions:	*Against irrevocable and confirmed letter of credit with a Dutch bank, 180 after B/L. Opened within 2 weeks*
Remarks:	*Applicable are the MPC conditions filed at the Registry of the District Court in The Hague under number 9/2013 on 28 January 2013, as well al the additional conditions printed on the back. Any and all contracts entered into by and between parties shall be governed by the laws of the Netherlands – the exclusion of the United Nations Conventions on Contracts for the International Sale of Goods (CISG). Both the MPC conditions and the additional conditions can also be consulted on our website www.[redacted]nl.*

This document is being sent by e-mail only. Please return a copy duly signed and stamped by e-mail.

For acceptance,

[redacted] *Co.*
authorized signature

Yours Truly,

[redacted] *international bv*
authorized signature"

2.3. By e-mail of 13 May 2017 [redacted] informed [redacted] as follows:

"*(...) Thank you for the documents;*
Attached please find the Proforma Invoice draft based on your data; please sign it and send it back to us.
Besides, please clarify what you mean by word "Amendment" written in red in the sales order.
Also, please consider that after LC opening, no action can be taken by us; anyway we will send a draft of LC open recently for you attention tomorrow; LC opening procedure will take 2 weeks. (...)"

2.4 By e-mail of 14 May 2017 [redacted] responded to [redacted]

"(...) *Amendment refers to the fact we amended the previous GTC contract as per our new agreement.*

Is it maybe possible for you to work with the PFI we provided? This in order to keep thinks as simple as possible? (...)"

2.5 [redacted] responded by e-mail of 15 May 2017:

"(...) Got it, the "amendment" is ok.

As for the PFI, we don't have any problem with our format and even without it on trusty basis; but the point is that when registering the order, we have to submit it with the international format an yours will be rejected.
Thanks for understanding"

2.6 [redacted] has signed a Proforma Invoice dated 15 May 2017 which was sent to [redacted] by e-mail of 22 May 2017 as presented below:

6

2.7 By e-mail of 17 May [redacted] sent [redacted] remarks on the Letter of Credit presented by [redacted]

"(...) In regard to the example of LC you send us, I have some remarks.
Partial shipment/transhipment should read ALLOWED
Documents:
BL + Commercial invoice - okay
Packing list: we can issue ourselves, so no problem
Shipment advice to insurance company - is it possible to send by email (instead of fax message)
Inspection certificate: will not be issued by SGS as you know - samples of what can and will be issued by Control Union have been sent to you already
Freight invoice: we will NOT issue an additional freight invoice, only a commercial invoice as usual
In regard to the Health documents; CoO and Analysis certificate will be issued same as for your previous order - we cannot change anything to the official text - pls see copies of previous shipment attached
Therefore, please make sure LC will be opened accordingly otherwise we will need to refuse it.
(FYI: Original Health certificate will be legalized by Iranian Embassy in The Netherlands)
Name of Bank, LC No and Iranian customs number. please state that these details are to be mentioned on BL: Packing list and Commercial invoice ONLY
LC must have a tolerance in Quality and amount of 10%, in case of any damaged cartons, supplier will need to load less and of course inspection company took several boxes out of this lot for testing purposes
Confirmation instruction to EIH Bank Hamburg must read: CONFIRM or MAY ADD
Also, in the example LC you mention that eventual cancellation charges will be for account of beneficiary?
(...)"

2.8 By e-mail of 30 May 2017 [redacted] informed [redacted] on the status of the letter of credit:

"(...) We have already made registration and we have to wait till receiving the industry ministry approval upon which we will open LC: on the ground, whole next week nothing will done because on the holidays on Saturday and Monday in Iran; so early the week after will be hopefully possible to get the approval for usance and submit it to the bank for LC opening.(...)"

2.9 By e-mail of 9 June 2017 [redacted] wrote to [redacted]

"Just had a further discussion internally and must give you our formal deadline; we need the LC by next week or we need to cancel the contract. It has been 3 months now since original contract agreement (march) and we cannot keep it any longer... Think this is not unreasonable. Sorry, need to be strict, please let me know by return the status. (...)"

2.10 By e-mail of 10 June 2017 [redacted] replied to [redacted]

6

"(...) As formerly mentioned, the reason of this delay is that public holidays we faced last week which limited our time a lot: anyway, we have made all preparations and definitely this week the LC will be opened."

2.11 On 22 June 2017 [redacted] received the Letter of Credit from [redacted] By e-mail of 27 June 2017 [redacted] wrote to [redacted] the following:

"(...) For us it is very frustrating to see that nothing was done with the remarks [redacted] sent on May 17! There is still Netherlands origin in the LC, without confirmation, SGS vs Controlunion, etc. etc. Do absolutely not understand how this has happened.
We are now again 1 month further and we still can't ship...
Meanwhile we have to pay again 1 month storage and finance cost AND we will have about e1000 legalization costs (as requested in your LC, if you delete we don't need to charge) AND we have amendment costs from the EIH bank (which we tried to avoid by replaying to your example LC last month...)

So; [redacted] will send again all items that need to be amended; please follow closely; if we don't have a 100% workable LC by next week, we can and will NOT proceed with this contract.

Please add EUR45 to the price to compensate for the extra storage, finance and amendment costs.

This is taking much to long, please confirm we will get this done next week.

Very sorry, I really want to try and make this work (as well for future business) but the delay is ridiculous and most of my company feels no obligation to keep this contract alive anymore."

2.12 By e-mail of 27 June 2017 [redacted] specified the required amendments to the letter of credit. By e-mail of 28 June 2017 [redacted] informed [redacted]

"Please be informed that in many of the items you mentioned, LC is opened based on the latest version of UCP 600 and then after opened, the LC will be amended; also this is a time consuming procedure."

In same e-mail [redacted] commented on the requested amendments by [redacted]

2.13 By e-mail of 2 July 2017 [redacted] informed [redacted] that the amendments requested by [redacted] and accepted by APY were sent to the bank. By e-mail of 12 July 2017 [redacted] sent [redacted] the amended letter of credit. By e-mail of 19 July 2017 [redacted] responded to [redacted] as follows:

"We have 1 big problem; we cannot guarantee that all documents will have the LC number as formally Belgian Veterinarian Authorities do NOT put LC number on their documents. If you get this amended we have a chance to proceed.

6

*A7A-6: The information such as bank name, LC number, applicant's full name and address and Iranian customers tariff number must be indicated on all documents and the bank doesn't accept to ignore in any way ***.*

Sorry to insist; if we are not sure we can deliver compliant documents, we cannot get confirmation nor our LC discounted, so this is very important."

2.14 By e-mail of 21 July 2017 [redacted] sent [redacted] the following message:

"Regardless this item is a necessary requirement or not, discrepancies will be penalized USD 50 and for sure the German bank will discount the LC.

2.15 [redacted] responded by e-mail of 21 July that the matter of a penalty was not the problem but the risk of losing confirmation by the bank in case of a discrepancy is what concerned [redacted].

2.16 On 24 July 2017 at 11:55 am [redacted] informs [redacted] as follows:

"Further to our call below:
A74-6: as informed before this information can only be guaranteed to be stated on: BL; Packing list and commercial invoices"

So Health Cert, Analysis and inspection this is not possible.

Please reconfirm you can arrange this so I can have a final meeting here internally if we can proceed or not. (...)"

2.17 By e-mail of 24 July 2017 at 3:42 pm [redacted] responds to [redacted] stating that:

"We have started negotiations with the bank and will inform you about the result consequently."

2.18 By e-mail of 24 July 2017 at 6:23 pm [redacted] informs [redacted] as follows:

"We will have final meeting tomorrow, can you make sure to get a reply first thing tomorrow?

Just to avoid confusion or miscommunication; in principle we have decided to cancel the contract as you are too late in arranging payment/LC. We will however have one final meeting tomorrow if there is anything we can do."

2.19 By e-mail of 25 July 2017 at 10:36 am [redacted] responded [redacted]

"We got the confirmation from the bank today, but:

The important matter is the necessity of mentioning "Iranian customs tariff number" in the certificate of inspection, however it is much better to be mentioned in the other documents as well; obviously mention all required items in BL, packing list and commercial invoice is still firmly required as you guaranteed to do that."

2.20 By e-mail of 26 July 2017 at 17:04 pm [redacted] informed [redacted] the following:

"*Just finished long meeting and discussion here.*

Conclusion; we can NOT keep the contract as it is now; there has been too many delays and market has changed significantly.
(...)"

2.21 [redacted] received an updated letter of credit, dated 29 July 2017 on 2 August 2017. The amended of the letter of credit dated 29 July 2017 shows that A7A-6 should read: *"only invoice and B/L and packing list should indicate the name of our bank, L/C No, Applicant's full name and address, Iranian customs tariff no."*

3. **The claim**

3.1 [redacted] claims damages and losses in the amount of EUR 294.165,65 due the cancellation by [redacted] In addition, [redacted] asks that [redacted] be ordered to pay the costs of the arbitration proceedings including costs of legal assistance and that [redacted] will be ordered to pay interest on the amount of damages and losses and arbitration costs and costs of legal assistance.

3.2 The claim of [redacted] is based in summary on the non-performance by [redacted] due to its cancellation of the agreement for the delivery of the purchased lactic butter.

3.3 [redacted] argues that [redacted] has cancelled the agreement without cause. According to [redacted] it was not in breach of contract at the time of cancellation nor was it in default by operation of law or by notice of default. [redacted] argues that it provided [redacted] with a letter of credit in accordance with the agreement and within the given time. Moreover, [redacted] argues that [redacted] has waived its right, if any, in respect to ultimate date on which the letter of credit should have been issued to [redacted] as well as to the initial shipping date (June 2017). Furthermore, [redacted] has argued that the Proforma Invoice (**PFI**) dated 15 May 2017 has replaced the Sales Order and therefore the PFI constitutes the entire agreement of sale and purchase between [redacted] and [redacted]

3.4 According to [redacted] the cancellation by [redacted] results in a breach of contract and [redacted] is to be held liable for the damages and losses suffered by [redacted] due to the breach of contract. The claimed losses and damages relate to in summary loss of profit, increase in costs due to increase of market prices, bank charges in relation to opening the letter of credit, surcharges for import permission and interest.

4. **Defence against the claim**

4.1 [redacted] has stated that the claim [redacted] is to be dismissed. [redacted] has based its defence in summary on the following.

4.2 [redacted] claims that [redacted] is in default. [redacted] did not provide in line with [redacted] specific instructions within the agreed time period and furthermore

because the letter of credit which was provided on 24 July 2017 respectively 26 July 2017 was not adequate nor satisfactory to [redacted]

4.3 According to [redacted] is in default because it failed to perform under the Sale Order in which it is stated that [redacted] would open a letter of credit within two weeks from 12 May 2017. In the view of [redacted] the PFI does not replace the Sale Order which was agreed between parties. According to [redacted] the PFI is only drawn up as a formality to facilitate the opening of the letter of credit. Furthermore, the terms set out in the PFI are in line with the Sales Order. [redacted] also argues that the agreed shipment date is June 2017 and therefore the letter of credit should have been provided before said shipment.

4.4 [redacted] argues that pursuant to section 6 (2) of the MPC conditions it was entitled to suspend its delivery as [redacted] was obligated to provide a letter of credit and [redacted] therefore was entitled to cancel the contract under section 4 (2) without written notice and had indeed already cancelled the contract on 24 July 2017.

4.5 [redacted] disputes the claim of damages and losses. [redacted] claims that [redacted] has not provided the Arbitral Tribunal with enough and convincing factual evidence that there are real damages, on the amount of the damages and losses claimed. According to [redacted] the causal link between the cancellation and the claimed damages and losses does not exist. In addition, [redacted] states that the main amount of damages is to be dismissed on the basis of its terms and conditions as stipulated in the Sale Order which exclude consequential damage, loss of profit or revenues. [redacted] refers to section 4 (3) of the MPC conditions which states that the costs caused by the drafting and delivery of the required documents shall be borne by the buyer.

4.6 [redacted] also claims that [redacted] can be held liable for contributory negligence and has failed to mitigate its claimed damages and losses.

4.7 [redacted] request that [redacted] would be ordered to pay the costs of the arbitration including [redacted] internal and management costs and legal costs.

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 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 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. The Arbitral Tribunal is obligated to asses its own jurisdiction in the matter even though both parties have not objected to the jurisdiction of the Arbitral Tribunal.

5.2 The first question to be answered is if there is an agreement to arbitrate between parties. In this case the Sales Order states that the MPC Conditions 2013 and the additional conditions printed on the back of the Sales Order shall apply. The said Sales Order states that the contract(s) between parties shall be governed by the law of the Netherlands to the exclusion of the Convention on the International

a

Sale of Goods (**CISG**). The Arbitral Tribunal considers that – since Netherlands law shall apply and the CISG is excluded - the question if there is an agreement to arbitrate needs to be assessed in accordance with Netherlands law.

5.3 The Arbitral Tribunal finds that the MPC Conditions are included in the Sales Order by way of reference and parties have agreed to its inclusion at the time of the Sales Order was drawn up and agreed to. Parties have not contested the application of the MPC conditions. Moreover, the Arbitral Tribunal finds that in accordance with article 6:247 (1) and (2) DCC, section 6.5.3 Dutch Civil Code (**DCC**) on the standard terms of conditions does not apply in the case submitted for arbitration as [redacted] is domiciled in Iran. Furthermore, the CGIS does not apply. The Arbitral Tribunal finds that therefore the additional requirements for applicability of the MPC Conditions (standard terms) set out in section 6.5.3 DCC or the CGIS, do not apply and application of the MPC Conditions by reference as provided for in the Sales Order is sufficient to constitute an agreement to arbitrate in accordance with article 1021 DCCP.

5.4 The Arbitral Tribunal furthermore considers, in view of the discussion between parties leading up to and subsequent to the Sales Order, that parties have agreed to the Sales Order and the initial terms and that the conditions as set out in the Sale Order are not replaced by the PFI.
By e-mail of 15 May 2017 [redacted] responded to [redacted] in refence to the Sales Order: "*Got it, the "amendment" is ok*". In the opinion of the Arbitral Tribunal this constitutes acceptance of the Sales Offer. [redacted] however argues that the PFI replaces the Sales Order because it constitutes different conditions than the Sales Order and therefore is to be considered as a new offer which is accepted by [redacted] [redacted] does not deny the acceptance of the PFI but states that the PFI is not an agreement but an instrument to open the letter of credit. The Arbitral Tribunal finds that the PFI only differs from the Sales Offer on secondary issues and therefore is in no way constitutes a new offer as mentioned under article 6:225 (1) DCC. The price, quantity, shipment date, quality and origin of the butter do not differ from the Sales Order.
Furthermore, [redacted] has explicitly stated in its e-mail of 15 May 2017 to [redacted] that "*As for the PFI, we don't have any problem with your format and even without it on trusty basis; but the point is that when registering the order, we have to submit it with the international format and yours will be rejected.*" The Arbitral Tribunal finds that said e-mail gives reason to assume that [redacted] and [redacted] had no intentions to replace the Sales Order but only to complete a PFI for international registration.

5.5 In view of the above the Arbitral Tribunal considers that parties have an agreement to arbitrate as presented under article 15 of the MPC Conditions the Sales Order stipulated that all agreements between parties shall be governed by the MPC Conditions. The Arbitral Tribunal therefore has jurisdiction.

6. Considerations

6.1 The first question to be answered by the Arbitral Tribunal is if [redacted] was entitled to cancel the agreement with [redacted] as per 24 July 2017 respectively 26 July 2017.

6

6.2 [redacted] has argued that [redacted] has not met its obligations under the agreement as in the Sales Order [redacted] was obliged to open the letter of credit within 14 days. The letter of credit was not opened before the deadline and when opened was not adequate. Also, the letter of credit should have been opened before the agreed shipment date of June 2017.

6.3 The Arbitral Tribunal considers that [redacted] is obligated on the basis of the Sales Order and the applicable MPC Conditions under sections 6 (2) to open a letter of credit within the agreed timeframe. The Arbitral Tribunal finds that the initial agreed deadline for [redacted] to open the letter of credit was within two weeks from the dates of the Sales Order. By e-mail of 13 May 2017 [redacted] confirmed to [redacted] that opening a letter of credit would take two weeks. The Arbitral Tribunal finds that parties have worked together to open the letter of credit. [redacted] has not objected to the extension of the initial term of two weeks. Only by e-mail of 9 June 2017 did [redacted] send what could be construed as warning that a notice of cancellation might be issued to [redacted] in the future as it required the letter of credit by the next week or it would cancel the agreement. However, [redacted] decided not to cancel the agreement as it responded to the letter of credit on 22 June 2017 and extended the term for the letter of credit with a week by stating that *"if we don't have a 100% workable LC by next week, we can and will NOT proceed with this contract"*. The Arbitral Tribunal finds that after the provided extension of a week [redacted] still did not cancel the agreement but waited until 26 July 2017 for [redacted] to amend the letter of credit before cancelling the agreement. As from 22 June 2017 until 26 July 2017 [redacted] did not put [redacted] in default by formal notice of default nor has [redacted] explicitly reserved its right to cancel the agreement if the letter of credit was not presented before a given date. The Arbitral Tribunal finds that [redacted] has canceled the agreement by notice of 26 July 2017 and not on 24 July 2017. On 24 July 2017 [redacted] only announced that it would consider to cancel the contract but this was subject to a internal meeting at [redacted] The Arbitral Tribunal finds that a cancellation only takes effect if the other party is notified. The argument of [redacted] that no notice for cancellation to take effect would be required on the basis of section 8 of the MPC Conditions is dismissed. Section 8 of the MPC Conditions only constitutes a way of cancellation without giving a required notice of default if required by articles 6:83 jo 6:265 DCC. Section 8 does not stipulate a way to cancel or terminate the agreement without any legal act nor does it waive the requirements under article 3:37 (3) DCC which stipulates that a legal act only takes effect if the other party is notified.

6.4 The Arbitral Tribunal finds that [redacted] did not act in accordance with its own stipulated deadlines as mentioned in the said e-mails of 9 June 2017 and 22 June 2017. [redacted] also did not explicitly reserve the right to cancel the agreement when the last deadline as mentioned in the e-mail of 22 June 2017 lapsed nor did [redacted] stipulated a new deadline or give a formal notice of suspension. In fact the Arbitral Tribunal finds that [redacted] continued to work with [redacted] in order to find a solution with [redacted] for the letter of credit.
[redacted] was not obligated to continue to work with [redacted] to find a solution for the letter of credit after passing of the initial two week term and the latter stipulated deadlines by [redacted] however as [redacted] continued to work with [redacted] and even after the shipment date of June 2017 continued, the Arbitral Tribunal finds that *acting as men in all reasonable and fairness* [redacted] waived

6

its initial right to terminate or cancel the agreement due to the earlier breaches of contract by [redacted] as the letter of credit was not opened within the given deadlines. From this point of view the Arbitral Tribunal finds that [redacted] should have warned [redacted] by formal notice of default before cancelling the agreement on 26 July 2017. The notice of default is a requirement by law in order to put the other party in default if there is no formal deadline agreed.
As [redacted] *de facto* waived its right to terminated or cancel based on the breach of contract due to the failure [redacted] to open the letter of credit within the initial term and the other stipulated deadlines by e-mails of 9 June 2017 respectively 22 June 2017, [redacted] was not in default on 26 June 2017. [redacted] even let the deadline for shipment pass without give a formal notice of default.

6.5 Moreover the Arbitral Tribunal finds that [redacted] was not in default on 26 July 2017. The Arbitral Tribunal finds that [redacted] opened a letter of credit which on 24 July 2017 was compliant with the reasonable instructions of [redacted] It is clear that parties on 24 July 2017 were only in discussion on the final issue of the letter of credit were the wording under of A7A-6 of the letter of credit should read according to [redacted] *only invoice and B/L and packing list should indicate the name of our bank, L/C No, applicant's full name and address, Iranian custom tariff number*". By e-mail of 25 July 2017 [redacted] confirmed to [redacted] that the bank agreed to the amendment of A7A-6. [redacted] has evidenced that the bank formalized the amendment on 29 July 2017. The Arbitral Tribunal finds, taking in to account the fact that [redacted] had waited and contributed to work with [redacted] on the letter of credit, that [redacted] in all reasonableness and fairness was not entitled to cancel the agreement with [redacted] without a formal notice of default. [redacted] should have waited for a reasonable period of time for the bank to confirm the amendment which previous to the cancellation on 26 July 2017 was already confirmed by [redacted] to [redacted]

6.6 In view of the above the Arbitral Tribunal finds that the notice of cancellation by [redacted] on 26 July 2017 constitutes a breach of contract and therefore brings [redacted] in default by operation of law. This brings about the fact that [redacted] is liable for the damages and losses in accordance with article 6:74 (2) DCC jo 6:96 DCC which are assessed hereinafter.

6.7 [redacted] has reduced its claim in the hearing of 18 April 2018. In its statement of claim [redacted] asked for payment of EUR 319,693.00. In the pleading notes [redacted] has asked for payment of EUR 294,165.65 for damages and losses suffered due to the breach of contract by [redacted] [redacted] has not objected to the amendment of the claim as presented by [redacted] on 18 April 2018. However, [redacted] has objected to the liability and the amount of liability for damages and losses under the said agreement.

6.8 The most far-reaching defense of [redacted] is that its liability is excluded and limited as presented under the additional conditions as mentioned in the Sales Order. [redacted] has objected to applicability of the said conditions on the basis of reasonableness and fairness (article 6:248 (2) DCC). Also, [redacted] has pointed to the obligations under article 6:232 jo 6:233 DCC to provide a counterparty with reasonable opportunity to take knowledge of the content of the applicable standard terms and conditions. However, [redacted] has not stated that it had no reasonable opportunity to take notice of the additional conditions of [redacted]

Also the Arbitral Tribunal refers to article 6:247 DCC which states that articles as referred to by [redacted] (articles 6:232 and 6:233 DCC) do not apply as [redacted] is domiciled outside of the Netherlands. Since the Arbitral Tribunal finds that the Sales Order has not been replaced by the PFI and [redacted] has raised no further objections on the applicability of said conditions, the Arbitral Tribunal finds that the additional conditions of [redacted] shall apply.
Under article 5 (2) of the additional conditions of [redacted] it is stipulated that [redacted] shall not be liable for "*consequential damages, including without limitation, lost profits or revenues, trading loss or damages to the environment [however named] or immaterial damages (...)*".

6.9 [redacted] has stated that it seeks payment of EUR 81,750.00 for loss of profit. This is the amount that [redacted] did not make due to the cancellation by [redacted]

6.10 [redacted] also claims EUR 209,737.50 for replacement costs for the butter purchased from [redacted] the amount being the difference in purchase price with [redacted] and the new purchase price with [redacted] Cooperative.

6.11 [redacted] claims payment of banking and charges for the letter of credit in the amount of EUR 2,461.63 and the costs for the import license in the amount of EUR 217.40.

6.12 The Arbitral Tribunal is of the opinion that under Netherlands law there is no definition of consequential damages. In this respect the term "consequential damages" shall be interpreted in accordance with the given facts and circumstances as provided by the parties. It is clear to the Arbitral Tribunal that under consequential damages is included loss of profit as this is clearly stated in article 5(2) of the additional conditions of [redacted] However, it is not clear to the Arbitral Tribunal if the replacement costs as mentioned under paragraph 8.10 would be considered consequential in the meaning of article 5(2) of the additional conditions of [redacted] This is a matter of interpretation. As parties have not claimed to have discussed the terms set out in the additional conditions or more specifically article 5(2) of the additional terms, the Arbitral Tribunal shall interpret the term "consequential damages" in connection to the given circumstances and context of the given clause. The Arbitral Tribunal therefore finds that the wording consequential is to be interpreted as explained in article 5(2). Damages related to extra costs incurred for purchasing replacement goods are therefore not considered consequential damages. Also said interpretation that such costs would be excluded for the purpose of determining liability would be found conflicting with the standards of reasonableness and fairness.

6.13 The Arbitral Tribunal dismisses the arguments [redacted] that [redacted] cannot successfully rely on the limitation of liability under article 5(2). The Arbitral Tribunal finds that [redacted] had no willful intent to inflict damages. [redacted] clearly was of the opinion that it was entitled to cancel the agreement. The cancellation itself cannot be seen as the willful intent to conflict damage. [redacted] has not provided the Arbitral Tribunal with circumstances which show any willful intent of [redacted] Also the limitation of liability under article 5(2) of the additional conditions (see paragraph 8.12 above) is not considered as grossly unfair as it leaves [redacted] the opportunity to claim damages other than consequential damages, being in this case replacement costs and other direct costs.

6.14 As a result the Arbitral Tribunal dismisses the claim of [redacted] for payment in the amount of EUR 81,750.00 for loss of profit as these damages are clearly excluded under article 5(2) of the additional conditions. The Arbitral Tribunal therefore finds no reason to look into the evidence of said losses as claimed by [redacted]

6.15 In the matter of the replacement costs the Arbitral Tribunal is of the opinion that [redacted] had the obligation to mitigate losses but failed to do so. In accordance with the provided documents by [redacted] [redacted] apparently sold the butter purchased from [redacted] to Hero Trading. The Arbitral Tribunal finds that such transaction also clearly was concluded at the full and sole risk of [redacted] as [redacted] at the time of such sale to Hero Trading was still trying to open the letter of credit and was warned by [redacted] on 22 June 2017 that [redacted] would cancel the agreement if the letter of credit was not opened within a week.

6.16 [redacted] has disputed the authenticity of the evidence for the replacement costs. However, [redacted] has provided the Arbitral Tribunal with insufficient grounds why in this matter the claimed replacements costs would not have been incurred by [redacted] [redacted] has provided the Arbitral Tribunal with a signed Proforma Invoice dated 13 September 2017 with Diar Mandegar Cooperative for the purchase 99,875 kg unsalted lactic butter. The Arbitral Tribunal has no reason to question the authenticity of the document.

6.17 The Arbitral Tribunal shall therefore allow the claim of [redacted] for payment of the replacement costs by taking in to account that fact that [redacted] has also contributed to the negligence by [redacted] by entering into the purchase agreement with Hero Trading at the time it was still uncertain if [redacted] would continue to work with [redacted] [redacted] the opening of the letter of credit. The Arbitral Tribunal estimates ex aequo et bono [redacted] own liability (*eigen schuld)* in the matter 50% and the liability of [redacted] 50%. The damages to be paid for replacement costs by [redacted] shall amount to EUR 104,868.75 (50% of EUR 209,737.50). As the Arbitral Tribunal takes said negligence of [redacted] into account the Arbitral Tribunal dismisses the argument raised by [redacted] that any liability of [redacted] would be unfair to standards of reasonableness and fairness. The Arbitral Tribunal finds that its decision on the damages and liability is taken in view of all circumstances and aspects of the matter and the amount to be paid by [redacted] is given the circumstances to be found fair and reasonable. [redacted] has clearly wanted to let the agreement succeed, but in the opinion of the Arbitral Tribunal by extending the term of opening the letter of credit put itself in a position that it could not cancel the agreement without first putting [redacted] in default by a proper notice of default.

6.18 The Arbitral Tribunal finds that [redacted] is liable for the banking costs and the costs for opening the letter of credit, including the costs of the import license to the amount of 50% of the claimed costs by [redacted] being in total an amount of EUR 1,339.52 (EUR 1,230.82 and EUR 108.70). The argument raised by [redacted] that such costs would be for the buyer based on the MPC Conditions is dismissed as the MPC Conditions set out this as a rule general rule for in the situation that there is no breach of contract. As there is a breach of contract such costs are not

considered as consequential damages and therefore in part to be paid – taking in to account the own negligence of [redacted] = by [redacted]

6.19 [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.

6.20 [redacted] has also claimed payment of interest as from 1 September 2017 in accordance with article 6(3) MPC Conditions. The Arbitral Tribunal finds that [redacted] is to pay over the amount of EUR 106,208.27 the normal statutory interest rate (article 6:119 DCC) as from 1 September 2017. Since [redacted] is to the opinion of the Arbitral Tribunal in default as from 26 July 2017 the Arbitral Tribunal has no reason to deny the interest as from a later date being 1 September 2017.

6.21 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 men, taking into account the views of parties brought forward, the evidence and the contestation of the evidence, [redacted] should be awarded payment of EUR 106,208.27 to be increased with statutory interest pursuant to article 6:119 DCC, as from 1 September 2017 (being the date requested by [redacted] and the costs of the arbitration proceedings.

6.22 The Arbitral Tribunal is of the opinion that the costs of these arbitral proceedings shall be born equally by both parties as both parties are equally denied in their claims. 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 and administration fees paid by [redacted] of EUR 15,750.00. As a result, [redacted] is ordered to pay to [redacted] the amount of EUR 7.875.00 and [redacted] is ordered to pay 7,875.00 which amounts are set off with the already paid deposit [redacted]

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 106,208.27 to [redacted] increased with statutory interest pursuant to article 6:119 DCC, as from 1 September 2017 until the day of full payment;

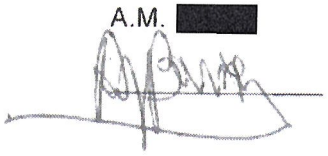
2. orders [redacted] pay 50% of the costs of these proceedings, amounting to EUR 7,875.00 and [redacted] to pay 50% of the costs of these proceedings, amounting to EUR 7,875.00 which are setoff with the deposit made and administration costs paid by [redacted] and with the Arbitration Tribunal ordering [redacted] to pay an amount of EUR 7,875.00 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.

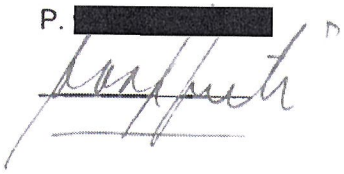
The Hague, 13 September 2018.

A.M. [redacted]



B. [redacted]

P. [redacted]



R.W. La Grouw, secretary