

MPC ARBITRATION

Arbitral judgment rendered by Messrs A.M. [REDACTED] R. de [REDACTED] and Mr. C. [REDACTED] in the arbitral proceedings between:

[REDACTED] [REDACTED] **Sp. z.o.o. Sp.K.**,
registered in [REDACTED] Poland
represented by mr. M. [REDACTED]
Applicant in the original claim and defendant in the counterclaim
hereafter also called "[REDACTED] Polska";

and

[REDACTED] [REDACTED] **B.V.**
registered in [REDACTED] The Netherlands
represented by mr. R. van der [REDACTED]
Defendant in the original claim and applicant in the counterclaim
hereafter also called "[REDACTED]";

1. Procedure

- 1.1 By letter of 7 December 2017 [REDACTED] [REDACTED] filed a request for arbitration under the MPC arbitration regulations (2013) against [REDACTED]. The dispute relates to the payment of an invoice dated 6 September 2016 for an amount of EUR 49,350.00 issued by [REDACTED] for the supply and delivery of unsalted pasteurized lactic butter to [REDACTED]. [REDACTED] claims in addition extrajudicial expenses of EUR 1,270.30 and contractual interest. [REDACTED] [REDACTED] has asked that [REDACTED] be ordered to pay the costs of the arbitration proceedings including costs of legal assistance on the side of [REDACTED] [REDACTED].
- 1.2 [REDACTED] has filed a counterclaim in summary for payment of damages in the amount of EUR 40,410, -- with interest in accordance with article 6:119a Dutch Civil Code (DCC) from 13 December 2016, or 27 December 2016 or the date of the statement of defense of [REDACTED] being 20 February 2018 and that [REDACTED] be ordered to pay the costs of the arbitration proceedings including costs of legal assistance on the side of [REDACTED].
- 1.2 [REDACTED] has confirmed receipt of the arbitration request by letter of 21 December 2017.
- 1.3 In its application [REDACTED] [REDACTED] has stated that the related agreement is governed by MPC Conditions and MPC Arbitration Regulations.
- 1.4 By registered letter of 8 December 2017 parties have been advised that Mr R.W. La Gro was appointed secretary to the arbitration procedure and parties were requested to bring forward three names to appoint 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 of 8

December 2017 copy of the arbitration request of [REDACTED] [REDACTED] of 7 December 2017 was forwarded to [REDACTED]. Both parties have duly filed a list of names in accordance with the Arbitration Regulations. [REDACTED] [REDACTED] and [REDACTED] have been advised that in accordance with the Arbitration Regulations, Mr A.M. [REDACTED] (domiciled in [REDACTED], Belgium), Mr R. de [REDACTED] (domiciled in [REDACTED], The Netherlands) and Mr. C. [REDACTED] (domiciled in [REDACTED], Poland) have accepted their appointment as arbitrators in these arbitration proceedings. Mr [REDACTED] acted as chairman to the Arbitration Tribunal.

- 1.5 Parties were by letter of 10 January 2018 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 10 January 2018 to ask for an immediate hearing in case both parties wished to do so without further exchange of statements. In its letter of 24 January 2018 [REDACTED] [REDACTED] has advised the Arbitral Tribunal that it wished to exchange statements first before a hearing was to be scheduled.
- 1.8 [REDACTED] [REDACTED] has filed its English version of the arbitration request on 12 July 2017. After having been allowed to file a further (additional) statement of claim [REDACTED] [REDACTED] has advised the Arbitral Tribunal that it did not wish to file a statement of claim in addition to the claim set out in the arbitration request as translated into English and filed on 12 July 2017.
- 1.9 Subsequently [REDACTED] has filed a statement of defense and counterclaim on 20 February 2018. In summary the counterclaim [REDACTED] pertains to the payment of compensation for costs and damages in the amount of EUR 40,410,-- with interest in accordance with article 6:119a DCC and that [REDACTED] [REDACTED] be ordered to pay the costs of the arbitration proceedings including costs of legal assistance to [REDACTED].
- 1.10 In summary the following documents have been filed by parties prior to the hearing of 29 May 2018:
- arbitration request ([REDACTED] [REDACTED] dated 7 December 2017;
 - translation arbitration request ([REDACTED] [REDACTED] dated 12 July 2018;
 - statement of defense and counterclaim ([REDACTED] [REDACTED] dated 20 February 2018;
 - statement of reply and answer to the counterclaim ([REDACTED] [REDACTED] dated 5 April 2018;
 - additional Exhibits 19 to 25 ([REDACTED] [REDACTED] dated 7 May 2018;
- 1.11 On 29 May 2018 a hearing was held in The Hague. [REDACTED] [REDACTED] was represented by mr. M. [REDACTED] [REDACTED] was represented by mr. R.S. van der [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.

As a result of the hearing parties have filed written pleadings at the hearing. Both parties have confirmed that the MPC Conditions 2013 and the Arbitration Regulations 2013 are applicable.

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] [REDACTED] and [REDACTED] entered into two agreements respectively dated 15 March 2016 (**Contract 205112**) and 14 April 2016 (**Contract 205109**) for the sale and purchase of in total 5 truckloads each approximately 22 tons of "unsalted pasteurized lactic butter". The MPC-Conditions are applicable. In both agreements the following relevant clauses were incorporated:

"(...)

QUALITY *UNSALTED PASTEURIZED LACTIC BUTTER
Fat 82% mini. – moisture 16% max. – non fat 2% max.- Fresh
production, chilled – Origin GERMANY (exclude ALLGAU
MILCH) – Healthy and good merchantable quality.*

(...)

PAYMENT *NET AT 14 DAYS from the collecting date, BY SWIFT, in to
seller's bank*

(...)"

Under Contract 205112 the following delivery terms are stated:

"PROGRAM APRIL, 2016"

Under Contract 205109 the following delivery terms are stated:

*"PROGRAM about 22 tons: APRIL, 2016
 about 22 tons: MAY, 2016
 about 22 tons: JUNE, 2016"*

2.3 [REDACTED] [REDACTED] delivered 64,2 tons of unsalted pasteurized lactic butter to [REDACTED] which deliveries [REDACTED] accepted. 21.600 kg was delivered on 26 April 2016 and 21.600 kg was delivered on 13 May 2016 both at the contracted price of EUR 2,340 per 1000 kg. On 8 September 2016 21.000 kg was delivered to [REDACTED] at the contracted price of EUR 2,350 per 1000 kg.

2.4 [REDACTED] [REDACTED] issued three invoices dated 29 April 2016, 30 May 2016 and 6 September 2016. [REDACTED] paid the invoices of 29 April 2016 and 30 May 2016. [REDACTED] has not paid the invoice of 6 September 2016 in the amount of EUR 49,350.

2.5 By letter of 7 November 2016 Atradius summoned [REDACTED] to pay the invoice of 6 September 2016 whilst stating on behalf of [REDACTED] that [REDACTED]

was in default of payment.

- 2.6 By letter of 11 November 2016 mr. Van der [REDACTED] the attorney of [REDACTED] summoned [REDACTED] [REDACTED] to fulfil its contractual obligations under Contract 2015112 and Contract 205109 by delivering the remaining quantities of product as per the said agreements at the latest on 18 November 2016. In said letter [REDACTED] informed [REDACTED] [REDACTED] that it suspended payment of the invoice of 6 September 2016 due to the non-delivery by [REDACTED] [REDACTED]
- 2.7 By letter of 23 November 2016 [REDACTED] announced it was dissolving the agreements and it would set off its damages against the outstanding invoice of 6 September 2016 and claim additional damages.
- 2.8 By e-mail of 25 November 2016 [REDACTED] [REDACTED] claimed that [REDACTED] had refused without cause a delivery from Jaeger on 1 June 2016 (**Jaeger Delivery**) and a delivery from Bayernland on 21 June 2016 (**Bayernland Delivery**).
- 2.9 By letter of 1 December 2016 [REDACTED] informed [REDACTED] [REDACTED] that it would purchase the remaining 44 tons of unsalted lactic butter on the market.
- 2.10 On 9 December 2016 [REDACTED] purchased 44 tons of unsalted lactic butter from **Arion** [REDACTED] Products for a purchase price of 4,385 per kg.

3. The claim

- 3.1 [REDACTED] [REDACTED] has requested payment of the invoice of 6 September 2016 of EUR 49,350.00 from [REDACTED] for the supply and delivery of unsalted pasteurized lactic butter to [REDACTED] [REDACTED] [REDACTED] claims in addition extrajudicial expenses of EUR 1,270.30 and contractual interest. [REDACTED] [REDACTED] has asked that [REDACTED] be ordered to pay the costs of the arbitration proceedings including costs of legal assistance on the side of [REDACTED] [REDACTED]
- 3.2 In summary, [REDACTED] [REDACTED] claim is that [REDACTED] did not perform by not timely paying and subsequently refusing to pay and is therefore in default of paying the invoice of 6 September 2016.
- 3.3 With regard to the argument of [REDACTED] that [REDACTED] [REDACTED] was in default of delivery and therefore could suspend payment and compensate damages with the outstanding amount of the invoice, [REDACTED] [REDACTED] has argued that it did offer [REDACTED] unsalted lactic butter in accordance with the quality requirements of the said contracts, but [REDACTED] failed to take off the offered butter and therefore is in default in accordance with article 6:58 DCC.
- 3.4 According to [REDACTED] [REDACTED] [REDACTED] refused delivery of two truckloads of butter without cause. It is not contested that the **Jaeger Delivery** contained six different production codes and a pH-value between 5.6 and 6.0. But [REDACTED] [REDACTED] has claimed that the **Jaeger Delivery** fulfilled the requirements of the Contract 205112 and Contract 205109. The **Bayernland Delivery** also fulfilled the given requirements and delivery was denied without cause. [REDACTED] has argued that it was authorized to deny the **Bayernland Delivery** because [REDACTED] could not

find a buyer for the product within the given time and because it consisted of three different production codes.

4. **The counterclaim**

4.1 In the counterclaim [REDACTED] requests payment of an amount of EUR 40,410 increased with legal interest ex. Art 6:119a Netherlands Civil Code, as from 13 December 2016 or alternatively 27 December 2016 or the date of the statement of defense and counterclaim of [REDACTED] being 20 February 2017, to be increased with (extra judicial) costs to the amount of EUR 2,741,03, and the costs of the arbitration proceedings.

4.2 The claim of [REDACTED] is based in summary on the non-performance by [REDACTED] of Contract 205112 and Contract 205109. The principal obligation under these Contracts was to deliver the total amount of the purchased unsalted lactic butter within the "program" as set out in the said contracts. According to [REDACTED] [REDACTED] did not meet its obligation to supply because it failed to offer the remaining volume under the said contracts in due time. [REDACTED] says it offered [REDACTED] butter, but according to [REDACTED] the Jaeger Delivery and the Bayerland Delivery did not comply with the quality and/or specifications as set out in the said contracts. [REDACTED] subsequently dissolved Contract 205112 and Contract 205109 and incurred damages which it wants to be compensated by [REDACTED]

5. **Defense against the claim**

5.1 [REDACTED] stated that the claim of [REDACTED] should be dismissed. [REDACTED] has based its defense in summary on the following.

5.2 [REDACTED] does not dispute the delivery for which the invoice of 6 September 2016 was sent. It however disputes that it is obligated to pay such invoice as it had dissolved the agreements with [REDACTED] [REDACTED] and has set off its damages of EUR 89,760,-- with its payment obligation.

5.3 According to [REDACTED] [REDACTED] is in default because [REDACTED] failed to perform under Contract 205112 and Contract 205109. [REDACTED] was obligated to deliver the remainder of the volume under the said Contracts within the term of the agreements being April 2016, May 2016 and June 2016. Because [REDACTED] failed to deliver the remainder of the purchased butter, [REDACTED] was in breach of contract.

5.4 [REDACTED] contests that it was obligated to cooperate with [REDACTED] [REDACTED]'s offers in respect to the Jaeger Delivery or the Bayerland Delivery as required by article 6:58 DCC. [REDACTED] argues that the Jaeger Delivery did not have the required pH-level and was also further non-compliant with the required quality because it contained six different production codes. [REDACTED] claims that it was authorized to refuse the Bayerland Delivery because due to short notice given by [REDACTED] [REDACTED] they were unable to find a buyer and because the delivery would have contained three production codes. Also they argued that the butter in question should have had a pH-value between 4.7 and 5.3. in order to be in line with the stipulated quality

norms which were i.a. that the butter had to be "unsalted pasteurized lactic butter".

6 Defense against the counterclaim

- 6.1 [REDACTED] [REDACTED] denies any breach of contract and contests the termination pursuant to article 6:265 DCC by [REDACTED] [REDACTED] [REDACTED] argues that is was [REDACTED] that failed to perform under Contract 205112 and Contract 205109. According to [REDACTED] [REDACTED] the butter pursuant to the said Contracts concerns German butter and therefore should have a pH-value of maximum 6.4. Also, there is no requirement in the said Contracts that the truckloads should have less than or no more than two production codes. Therefore, it denies all liability for the damages and costs claimed by [REDACTED]

7. Competence of the arbitral tribunal

- 7.1 Based on the laws of the Netherlands, specifically article 1021 of the Netherlands Civil Proceedings Code (*Wetboek van Burgerlijke Rechtsvordering*), an agreement to arbitrate is proven by a written document. In that regard, it is sufficient that a written document refers to general conditions which provide for a choice for arbitration, and this was (implicitly) or ad minimum accepted by both parties. The Contract 2015112 and Contract 205109 state that the MPC-conditions shall apply.
- 7.2 Parties have confirmed in the hearing of 29 May 2018 that they agree to the fact that pursuant to Contract 205112 and Contract 205109 the MPC-conditions 2013 are applicable, and the Arbitral Tribunal is competent. The competence of the Arbitral Tribunal has not been contested by either party. Therefore, the Arbitral Tribunal holds that parties have agreed to arbitrate under the Arbitration Regulations.

8. Considerations

- Claim of [REDACTED] [REDACTED]
- 8.1 The first question to be answered by the Arbitral Tribunal is whether [REDACTED] [REDACTED] is in breach of contract and if [REDACTED] [REDACTED] has a claim which can be set-off with the invoice of 6 September 2016 of [REDACTED] [REDACTED]
- 8.2 [REDACTED] [REDACTED] has argued that [REDACTED] [REDACTED] has not met its obligations under Contract 205112 and Contract 205109 since it refused the Jaeger Delivery and the Bayerland Delivery.
- 8.3 The Arbitral Tribunal considers that under Netherlands law and the MPC - conditions a party is in default as from the time that the performance has not been carried out in conformity with the obligation(s) incurred after it or they has or have become due and payable, provided that the requirements of Article 6:82 DCC and 6:83 DCC are met, except in so far as the delay cannot be attributed to him or it has become permanently impossible to perform the obligation.

- 8.4 The Arbitral Tribunal considers that until the receipt of the letter of 11 November 2016 [REDACTED] had not sent [REDACTED] [REDACTED] a notice of default for the delivery under Contract 205112 or Contract 205109. Parties had also worked closely together without complaint for the delivery of the lactic butter for a longer period than the delivery schedule as set out in the said Contracts. The latest delivery accepted was on 8 September 2016.
- 8.5 In accordance with article 6:58 DCC the creditor defaults (gets in default himself) when the debtor is unable to perform the obligation because the creditor does not grant the necessary assistance for this purpose or because of another obstacle on the side of the creditor, unless the cause of the debtor's inability to perform cannot be attributed to the creditor.
- 8.6 The discussion between parties is what the quality requirements are under the said Contracts. [REDACTED] has argued that lactic butter must have a pH-value 4.7 and 5.3. It also argues that each truckload of butter in order to qualify as "good merchantable quality" must consist of one or two production codes, not more. [REDACTED] has contested such claims. This debate is relevant for assessing if [REDACTED] failed in its obligations by refusing to take delivery of the Jaeger Delivery and the Bayerland Delivery.
- 8.7 The Arbitral Tribunal finds - with due care and in all fairness - that parties agreed that [REDACTED] [REDACTED] would supply unsalted pasteurized lactic butter of German origin. Neither the requirements concerning pH-value nor a maximum amount of production codes per truckload are in the said Contracts
- 8.8 The Arbitral Tribunal finds -with due care and in all fairness – that the Jaeger Delivery did not meet the quality requirements due to a pH-level of 5.8 until 6.0. Such butter is not customarily considered in the [REDACTED] product trading sector as lactic butter because the pH-level of such a butter is too high. However, the Arbitral Tribunal considers that [REDACTED] demand that a truckload must not consists out of more than two production codes, is not a requirement under the said Contracts. Such requirement is, if not explicitly agreed to, not implied in the quality specification of the said Contracts under "good merchantable quality".
- 8.9 The Arbitral Tribunal considers that the Exhibits parties have filed in the arbitral proceeding, and in particularly Exhibit 17 [REDACTED] evidence that parties did work closely together in completing Contract 205112 and Contract 205109 for the delivery of unsalted lactic butter.
- 8.10 [REDACTED] [REDACTED] has requested that Exhibit 17 should be disregarded as [REDACTED] did not substantiate what claims it wishes to make with regards to the Exhibit. Although the Arbitral Tribunal by its Regulations decides this case in equity and not in law so that the case law of the Netherlands Supreme Court is not fully and automatically applicable, it has decided to address this subject nonetheless. The Arbitral Tribunal considers that Exhibit 17 is essential to the evidence and facts of these proceedings and is not detrimental to the position or defense of parties as parties have had time and opportunity to access said Exhibit and comment on it in preparation of these proceedings.
- 8.11 Exhibit 17 shows that [REDACTED] was calling off the goods with [REDACTED] [REDACTED] for ad hoc customers. It also shows that [REDACTED] was requesting possibilities for

delivery from [REDACTED] until 3 November 2016. The latest actual delivery was on 8 September 2016.

- 8.12 Exhibit 17 shows furthermore that by e-mail of 19 May 2016 [REDACTED] canceled an earlier delivery of 21.600 kg for butter from Bayerland, because the customer of [REDACTED] was "already foreseen in butter for 20th of May". It also shows that by e-mail of 25 May 2016 [REDACTED] considered calling-off the Jaeger Delivery for a new customer.
- 8.13 Furthermore parties do not dispute that the Bayerland Delivery fulfilled the requirement of the necessary pH-levels as requested by [REDACTED]. [REDACTED] has disputed that it was obligated to take delivery of the Bayerland Delivery because it would consist of more than two production codes. It also argued that it had no time to find a customer for the butter.
- 8.14 Taking all these points into consideration the Arbitral Tribunal finds that [REDACTED] has failed to fulfil its own obligation to call off goods in a proper fashion within a reasonable time. The Arbitral Tribunal takes in consideration that parties were trading in a rising market. As was known in the butter market, the butter quotation increased steeply over the time parties were working together to fulfill the Contracts. In this given situation [REDACTED] failed to timely call off delivery. Furthermore, the Arbitral Tribunal considers that [REDACTED] had no good cause not to accept the Bayerland Delivery.
- 8.15 The Arbitral Tribunal finds furthermore that [REDACTED] was in default by not paying the invoice of 6 September in due course. [REDACTED] had no right to suspend the payment of the invoice as [REDACTED] was at that time not in default nor had [REDACTED] sent a notice of default to [REDACTED]. Such notice of default was sent after the invoice became due. The Arbitral Tribunal finds that there was no justification for [REDACTED] to suspend payment as [REDACTED] has not provided the Arbitral Tribunal with substantiated evidence that [REDACTED] would not perform, and it was [REDACTED] that had earlier refused to accept delivery without cause. [REDACTED] has insufficiently proven that [REDACTED] as from the delivery of 8 September 2016 would not deliver the remaining volume. The risk and effort necessary to find available butter in September, October and November 2016 in the rising market is attributable to [REDACTED] not calling off the butter earlier (for in example in May 2016 and later in respect to the Bayerland Delivery).
- 8.16 The claim for set-off by [REDACTED] therefore shall be denied. The claim of [REDACTED] for payment of the invoice of 6 September 2016 shall be awarded.
- 8.17 [REDACTED] has claimed the extra judicial costs pursuant to Article 6:96 Netherlands Civil Code jo. "Besluit van 27 maart 2012, houdende regels ter normering van de vergoeding voor buitengerechtelijke incassokosten". The Arbitral Tribunal is of the opinion that given the nature of the procedure such costs should be denied pursuant to article 20 of the Arbitration Regulations.
- 8.18 In view of the evidence provided of the damages and all the facts, 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, that [REDACTED] [REDACTED] should be awarded payment of EUR 49.350,00 to be increased with contractual interest pursuant to article 8 (3) MPC-Conditions, as from 24 September 2016 (being the date [REDACTED] is in default) and further by the costs of the arbitration proceedings.

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

Counterclaim

- 8.20 With regard to the counterclaim for reimbursement of incurred damages by [REDACTED] the Arbitral Tribunal is of the opinion that [REDACTED] is itself in breach of Contract 205112 and Contract 205109 by not calling off the butter within a reasonable time and additionally by not paying [REDACTED] [REDACTED]'s invoice in due time. Since [REDACTED] [REDACTED] had fulfilled its obligations under Contract 205112 and Contract 205109, [REDACTED] was obligated to pay in due time.
- 8.21 The Arbitral Tribunal is of the opinion that the counterclaim of [REDACTED] shall be denied due to the fact that [REDACTED] [REDACTED] was not put in default until the letter of 11 November 2016 and therefore there is no breach of contract by [REDACTED] [REDACTED]. The counterclaim is therefore denied.

9. **Decision**

- 9.1 The Arbitral Tribunal, giving judgement, acting as reasonable men with due care and in all fairness:
1. in the proceedings on the claim of [REDACTED] [REDACTED] orders [REDACTED] to pay EUR 49.350,00 to [REDACTED] [REDACTED] increased with contractual interest pursuant to article 8 (3) MPC-Conditions, as from 24 September 2016 (being the date [REDACTED] is in default) until the day of full payment;
 2. In the proceedings on the counterclaim of [REDACTED] rejects all claims;
 3. In the proceedings on the claim of [REDACTED] [REDACTED] and the proceedings on the counterclaim of [REDACTED] orders [REDACTED] to pay the costs of these proceedings, amounting to EUR 10,750.-- which are setoff with the deposit made and administration costs paid by [REDACTED] [REDACTED] and with the Arbitration Tribunal ordering [REDACTED] to pay an amount of EUR 10,750.-- to [REDACTED]
 4. Rejects all other claims.

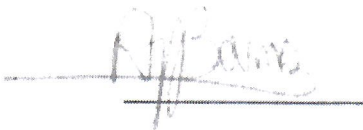
This arbitral judgement is drafted in four copies and duly signed:

- 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 [REDACTED] Wholesalers Association (VGM);

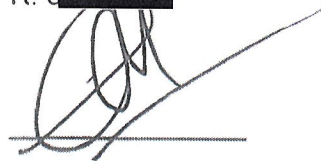
- One original copy will be filed with the court registry of the Court of The Hague.

The Hague, 27 August 2018.

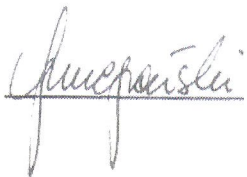
A.M. [REDACTED]



R. d [REDACTED]



C. [REDACTED]



R.W. La Gro, secretary

