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Jurisdiction	Netherlands
Tribunal	Netherlands Commercial Court
Date of the decision	19 March 2025
Case no./docket no.	NCC C/13/736825
Case name	*Coöperatieve Federatie van Edelpelsdierenhouders Nederasselt U.A. v. Ceva Santé Animale S.A.*

[…]

The Parties are referred to below as «CFE» and «Ceva» respectively. They are jointly referred to as «the parties». The term «lawyer» has the meaning as defined in Article 3.1.1 NCC Rules of Procedure (NCC Rules). The Netherlands Commercial Court is referred to as «The Court».

1 Central issue

1.1. 1
CFE is the Dutch umbrella organisation for mink breeders. Ceva is a multinational animal health company.

1.2. 2
Two agreements were concluded between (amongst others) CFE and Ceva.

Under these agreements, Ceva was to sell and deliver mink vaccines to CFE.

CFE asserts that Ceva failed to fulfill its obligations under these agreements and claims damages from Ceva.

1.3. 3
Ceva raises defences and argues *(inter alia)* that one of the agreements is subject to annulment due to fraud and/or error (*vernietigbaar op grond van bedrog en/of dwaling*). Additionally, Ceva relies on an impediment outside its control. Furthermore, Ceva argues that it has lawfully terminated both agreements. According to Ceva, its liability for damage suffered by CFE is contractually limited. Ceva contends that CFE has failed to mitigate its loss. Ceva disputes the extent of the loss that CFE claims to have suffered.

1.4. 4
The Court is of the opinion that Ceva has partially failed to fulfill its obligations under the agreements. CFE has sufficiently substantiated that it has suffered loss as a result of this failure. Ceva is liable for a part of the damages claimed by Ceva, the remainder of the damages claimed by CFE is dismissed. Ceva's argument that one of the agreements is subject to annulment fails, as well as Ceva's reliance on an impediment beyond its control

(force majeure). Ceva is correct in invoking the contractual limitation of its liability in one of the agreements. Ceva's termination of both agreements was unlawful.

1.5. 5
The Court awards a part of CFE's claims. The Court orders Ceva to compensate a part of the damages claimed by CFE. Ceva, as the more unsuccessful party, is ordered to pay the costs of proceedings of CFE.

2 Procedural history

2.1. 6
All submissions were made in eNCC under the NCC Rules.

2.2. 7
On 19 July 2023 CFE submitted a writ of summons. The exhibits referred to in the writ of summons were submitted on 2 August 2023.

2.3. 8
On 1 November 2023 Ceva filed its statement of defence. The exhibits were submitted separately on the same date.

2.4. 9
A hearing was scheduled for 21 March 2024 but was postponed at the request of the parties because of settlement negotiations. The negotiations between the parties did not result in an agreement.

2.5. 10
On 9 October 2024 CFE submitted a motion for increase of claims including further exhibits.

2.6. 11
By letter dated 23 October 2024, Ceva requested the Court to deny CFE's motion for increase of claims.

2.7. 12
On 1 November 2024, the Court informed the parties that it would allow CFE's motion for increase of claims and that Ceva could respond to the increased claims during the scheduled hearing. If Ceva were to request so at the end of the hearing, Ceva would also be allowed to submit a written statement of defence regarding the new claims within a reasonable time limit (e.g. four weeks) after the hearing.

2.8. 13
The Court held a hearing on 14 November 2024. Several persons representing the parties attended the hearing in person. The lawyers of the parties presented their cases and submitted notes. The Court made a record (*proces-verbaal*) of this hearing. By letters dated 9 December 2024 both parties submitted comments on the contents of the record, which the Court took note of.

2.9. 14
On 12 December 2024 Ceva submitted a statement of defence regarding CFE's increase of claims.

2.10. 15
By letter dated 19 December 2024 CFE objected to (part of) Ceva's additional statement of defence. On 23 December 2024 the Court informed the parties that it would disregard any communication since it had already set a date for judgment.

2.11. 16
The judgment was set for today.

3 Facts – background

3.1. 17
CFE is the Dutch umbrella organisation for mink breeders.

3.2. 18
Ceva is a multinational animal health company.

Purchase of Verona Facility

3.3. 19
Until 2020, a subsidiary of CFE co-owned a mink vaccine production facility in Verona, Wisconsin, U.S.A. («the Verona Facility»).

3.4. 20
In 2020 the Verona Facility, which at that time was still under construction, ran into financial difficulties and was put on sale.

3.5. 21
By asset purchase agreement of 31 January 2020 («APA») CFE's subsidiary sold the Verona Facility to an affiliate of Ceva. Article 3.1 of the APA specifies a purchase price of $ 6,444,800.00.

Manufacturing Agreement

3.6. 22
Effective 22 March 2020 a manufacturing agreement («CMA») was concluded by, amongst others, Ceva and CFE. The CMA provides for the contract manufacturing of mink vaccines at the Verona Facility to the order of CFE in accordance with certain procedures and a certain pricing scheme.

3.7. 23
The CMA provided for the sale by Ceva and the delivery to CFE of inter alia the following vaccines: Distemink and Biocom-P.

Purchase of IDT Biologika GmbH

3.8. **24**
Around the time that Ceva acquired the Verona Facility, Ceva also acquired, via an asset deal, the animal health business of IDT Biologika GmbH («IDT»), and in particular IDT's mink vaccine business. Delivery of the assets for the production of the mink vaccines was scheduled to take place at a later stage.

3.9. **25**
The mink vaccine produced by IDT is Febrivac 3 Plus and Febrivac Dist.

Febrivac 3 Plus is an alternative for Biocom-P and Febrivac Dist is an alternative for Distemink (Febrivac 3 Plus and Febrivac Dist will hereinafter be referred to jointly as «Febrivac»).

Distribution Agreement

3.10. **26**
Effective 25 June 2020 (affiliates of both) CFE and Ceva concluded a distribution agreement («FDA») for the sale and delivery of the vaccines produced by IDT, in accordance with certain procedures and a certain pricing scheme.

Purchase orders 2022

3.11. **27**
In 2022 CFE placed orders with Ceva for Febrivac and Distemink for delivery no later than in May 2022. These orders were confirmed by Ceva.

3.12. **28**
In 2022 Ceva supplied certain quantities of Febrivac and Distemink to CFE, but did not fully deliver CFE's orders.

3.13. **29**
By letter dated 28 June 2022, CFE demanded that Ceva supply the missing quantities of Febrivac and Distemink within eight days.

3.14. **30**
By letter dated 5 July 2022, Ceva responded that IDT had discontinued the production of Febrivac. Ceva also informed CFE that it would deliver Distemink with delays due to technical problems in the Verona Facility.

3.15. **31**
By letter dated 18 July 2022, CFE declared the purchase orders for Distemink avoided (*ontbonden*) and informed Ceva that it holds Ceva liable for damages on account of Ceva's shortcomings.

Purchase orders 2023

3.16. **32**
In 2022 CFE placed orders with Ceva for Distemink and Biocom-P for delivery no later than in May 2023. The purchase orders with regard to Distemink were partially confirmed by Ceva.

3.17. **33**
By e-mail dated 8 June 2022, Ceva informed CFE, in response to its purchase order, that it cannot produce Biocom-P.

3.18. **34**
Ceva supplied certain quantities of Distemink to CFE.

3.19. **35**
Ceva failed to deliver any Biocom-P to CFE.

Termination *(opzegging)* of the CMA by Ceva

3.20. **36**
By letter dated 12 September 2022, Ceva notified CFE that it would immediately terminate the CMA with regard to Biocom-P. In its letter, Ceva stated that the termination was due to its inability to legally produce Biocom-P because of noncompliance of the Verona Facility. Ceva also notified CFE that it would terminate the CMA with respect to Distemink effective three years from the date of its letter, on 12 September 2025.

3.21. **37**
By e-mail dated 4 October 2022, CFE contested Ceva's termination of the CMA. CFE also informed Ceva that it would hold Ceva liable for damages on account of the termination of the CMA.

Summary proceedings Distemink 2023

3.22. **38**
On 1 September 2023 CFE served a writ on Ceva with notice to appear at the NCC in summary proceedings, to be held on 18 September 2023. In these proceedings, CFE ordered Ceva to comply with the 2023 purchase orders for Distemink. Ceva appeared in the summary proceedings and raised a defence.

3.23. **39**
By its judgment of 2 October 2023, the Court partially granted CFE's claims and ordered Ceva to deliver 1,500,000 doses of Distemink no later than 15 December 2023.[1]

3.24. **40**
CFE appealed the Court's judgment in summary proceedings before the Netherlands Commercial Court of Appeal («NCCA»). By its judgment of 19 January 2024, the NCCA partially

[1] NCC 2 October 2023, ECLI:NL:RBAMS:2023:6473.

set aside the Court's judgment and ordered Ceva to deliver 1,700,000 doses of Distemink for the North American market no later than 1 June 2024.[2]

Purchase orders 2024

3.25. **41**
In 2023 CFE placed an order with Ceva for the delivery of Distemink, to be completed no later than in June 2024.

3.26. **42**
In response to CFE's order, Ceva informed CFE that the parties had to agree on a selling price first. CFE responded to Ceva that the CMA already provides an ordering and pricing systematic.

3.27. **43**
Ceva did not deliver any Distemink to CFE in 2024.

Purchase orders 2025

3.28. **44**
In 2024 CFE placed an order with Ceva for the delivery of Distemink to be completed no later than in May 2025.

3.29. **45**
In response, Ceva informed CFE again that the parties had to agree on a selling price first.

3.30. **46**
CFE responded to Ceva once more that the CMA already provides an ordering and pricing systematic. In response, Ceva invited CFE for negotiations on selling prices for 2025.

4 The claims

4.1. **47**
CFE requests the Court, by judgment, enforceable notwithstanding any remedies, to:

4.1.1. **48**
declare:

(i) that Ceva was, based on the firm orders (Exhibit 15, Exhibit 16, Exhibit 17 and Exhibit 18), contractually obliged to supply 14,000,000 ml Febrivac 3 Plus and 9,000,000 ml Febrivac Dist ultimately in May 2022,

(ii) that Ceva. Heb alleen in het failed in this contractual obligation by supplying only 4,354,250 ml Febrivac 3 Plus and 1,347,250 ml Febrivac Dist,

[2] NCCA 19 January 2024, ECLI:NL:GHAMS:2024:131.

(iii) that CFE by its letter dated 18 July 2022 dissolved the individual purchase agreements between the parties with regard to the undelivered quantities of Febrivac 3 Plus and Febrivac Dist, while holding Ceva liable for its shortcoming, so that,

(iv) Ceva being the party whose shortcoming has given rise to a ground for dissolution, is obliged to compensate CFE, being its counterparty, for the damage suffered by it, as a result of no mutual performance but dissolution of the agreement;

4.1.2. **49**
declare:

(i) that Ceva was, based on agreed firm/binding orders (Exhibit 8, Exhibit 9 and Exhibit 10), contractually obliged to supply 2,600,000 ml Distemink ultimately in May 2022,

(ii) that Ceva imputably failed in this contractual obligation by supplying only 1,202,552 ml Distemink,

(iii) that Ceva has already indicated that it will not (timely) supply the ordered quantities of Distemink (see for example Exhibit 12 and Exhibit 20) and,

(iv) that Ceva is obliged to compensate CFE for the damage suffered as a result of this failure to fulfil its contractual obligation to supply 2,600,000 ml Distemink ultimately in May 2022;

4.1.3. **50**
declare that Ceva has breached its contractual obligations under the CMA towards CFE by:

(i) not having Biocom-P available for purchase from 1 January 2022 onwards,

(ii) exercising no or too little effort into making Biocom-P available for purchase and supply, and/or,

(iii) unlawfully terminating the CMA with regard to Biocom-P per 12 September 2022;

4.1.4. **51**
declare that Ceva was not entitled to terminate the CMA regarding Distemink per 12 September 2025;

4.1.5. **52**
declare:

(i) that Ceva was, based on CFE's orders (Exhibit 30, Exhibit 32, Exhibit 35, Exhibit 36), contractually obliged to supply 6,000,000 ml Distemink ultimately in May 2023,

(ii) that Ceva imputably failed in this contractual obligation by supplying only 4,435,500 ml Distemink,

(iii) that Ceva has already indicated that it will not (timely) supply the ordered quantities of Distemink (see for example Exhibit 37 and Exhibit 38) and,

(iv) that Ceva is obliged to compensate CFE for the damage suffered as a result of this shortcoming (causing CFE not receiving 1,564,500 ml Distemink in compliance with its orders and/or the CMA);

4.1.6. **53**
declare:

(i) that Ceva was, based on CFE's order (Exhibit 42) and the agreed provisions in the CMA, contractually obliged to supply 6,000,000 ml Distemink ultimately in May 2024 – or at least to provide valid reason(s) for its order rejection – in compliance with the CMA,

(ii) that Ceva imputably failed in this contractual obligation,

(iii) that Ceva has already indicated that it will not (timely) supply the ordered quantities of Distemink, nor provide valid reason(s) for its order rejection in compliance with the CMA (see for example Exhibit 43 and Exhibit 45) and,

(iv) that Ceva is obliged to compensate CFE for the damage suffered as a result of this shortcoming (causing CFE not receiving 6,000,000 ml Distemink in compliance with its order and/or the CMA);

4.1.7. **54**
declare:

(i) that Ceva is, based on CFE's order (Exhibit 49) and the agreed provisions in the CMA, contractually obliged to supply 6,000,000 ml Distemink ultimately in May 2025 – or at least to provide valid conditions to acceptance/execution of the order – in compliance with the CMA,

(ii) that a(n) (anticipatory) breach exists regarding this contractual obligation,

(iii) that Ceva has already indicated that it will not supply the ordered quantities of Distemink or accept/execute the order under conditions in compliance with the CMA (see for example Exhibit 50 and Exhibit 54) and,

(iv) that Ceva is obliged to compensate CFE for the damage suffered as a result of this shortcoming (causing CFE not receiving 6,000,000 ml Distemink in compliance with its order and/or the CMA);

4.1.8. **55**
order Ceva to fulfil its obligation to compensate CFE for the damage suffered by CFE and the damage CFE continues to suffer as a result of Ceva's shortcomings, whereby the damage is to be estimated by the Court at the following amounts, or at least other amounts to be determined in good law:

i) EUR 9,469,000.00 (loss of profit);

ii) EUR 1,426,000.00 (lost commission under the CMA);

iii) EUR 324,000.00 (lost commission under the FDA);

iv) EUR 390,000.00 (goodwill compensation under the CMA);

v) EUR 319,530.00 (goodwill compensation under the FDA);

vi) EUR 304,985.15 (costs incurred to assess liability/damages); and

vii) the costs of the legal proceedings (P.M.);

whereby the claims awarded must be increased by the statutory interest from the date of default, or at least the date of occurrence of the loss, until the day of full payment.

4.2. **56**
CFE substantiates its claims by asserting that it has placed purchase orders with Ceva for the delivery of Febrivac, Distemink and Biocom-P. Ceva did not and/or will not fully deliver to CFE and is in default. CFE suffered and/or will suffer damage as a result of Ceva's shortcomings. Ceva is liable for CFE's loss.

4.3. **57**
Ceva contests CFE's claims by asserting that the CMA is subject to annulment due to fraud and/or error. Ceva was unable to meet certain obligations under the CMA due to no fault of its own. IDT's non-performance is a force majeure which cannot be attributed to Ceva.

Also, Ceva lawfully terminated the FDA and CMA.

Furthermore, the FDA contains a contractual limitation of liability, which prevents CFE from claiming damages under the FDA.

CFE has also failed to mitigate its loss.

CFE's claims for commission and goodwill compensation find no legal basis.

CFE's alleged damages are baseless, unrealistic and overestimated. CFE's claim for provisional enforceability should be denied.

4.4. **58**
Ceva concludes that the Court should declare CFE's claims inadmissible, or, in any event, should deny those claims, and order CFE to pay the costs of the proceedings, as well as the usual subsequent costs (both without and with service of process), to be increased by the statutory interest referred to in Article 6:119 of the Dutch Civil Code («DCC») from fourteen days after the date of the judgment.

5 Discussion

5.1. 59
Parties are in dispute about the performance of two agreements: the CMA and the FDA. Under these agreements Ceva was to supply mink vaccines to CFE.

CFE – in essence – claims that Ceva has failed to fulfill its obligations under both agreements and is claiming damages from Ceva. Ceva raises various defences.

5.2. 60
The dispute between the parties concerns the following mink vaccines: Febrivac 3 Plus, Febrivac Dist, Distemink and Biocom-P. CFE's claims will be assessed hereafter per year for each different vaccine.

5.3. 61
Before assessing CFE's claims, the Court will first establish its jurisdiction and the applicable law.

Jurisdiction and applicable law

5.4. 62
In so far as relevant here, both parties acknowledge that Article 16.2.b in both the CMA and the FDA designates the Court to take cognisance of the dispute at hand. This means that the Court has jurisdiction under Article 25(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012. All other requirements for the Court to have authority to deal with this case, as referred to in the Dutch Code of Civil Procedure (DCCP) and in Article 1.3.1 of the NCC Rules, are met.

5.5. 63
CFE bases part of its claims on the assertion that there exists an agency between the parties. Pursuant to Article 93(c) DCCP, the subdistrict court has exclusive jurisdiction to hear such a claim. Ceva contests the existence of an agency agreement. After considering the case law on this point, the Court decides that the claims at hand will not be referred to the subdistrict court.[3]

5.6. 64
The parties also acknowledge that Article 16(1), both in the CMA and the FDA, contains a choice of law for the laws of the Netherlands. Additionally, the Convention for the International Sale of Goods (CISG) applies because this case regards a sale of goods between parties whose places of business are in different states, the Netherlands is a member state to

[3] The Hague District Court 10 January 2018, ECLI:NL:RBDHA:2018:171, paragraph 4.30; Utrecht District Court 10 November 2010, ECLI:NL:RBUTR:2010:BO3674, paragraph 2.2; The Hague District Court 1 April 2009, ECLI:NL:RBSGR:2009:BI1952; Arnhem District Court 26 March 2008, ECLI:NL:RBARN:2008:BC8823, paragraph 3.7.

the CISG and the parties have not excluded the applicability of the CISG. To the extent that the CISG does not (fully) apply, Dutch national law applies.

Febrivac 2022

Has Ceva failed to fulfill its contractual obligations?

5.7. **65**
CFE asserts that Ceva was obliged to supply 14,000,000 doses of Febrivac 3 Plus and 9,000,000 doses of Febrivac Dist no later than in May 2022. CFE also asserts that Ceva has imputably failed in this obligation by supplying only 4,354,250 and 1,347,250 doses of the respective vaccines.

5.8. **66**
Pursuant to Article 35 CISG a seller must deliver goods which (among other things) are of the quantity, quality and description required by the contract.

5.9. **67**
It is not in dispute that CFE ordered 14,000,000 doses of Febrivac 3 Plus for 2022, nor that Ceva has delivered only 4,354,250 doses. It is likewise undisputed that CFE ordered 9,000,000 doses of Febrivac Dist while CFE only delivered 1,347,250 doses of Febrivac Dist.

5.10. **68**
To that extent, the Court establishes that Ceva failed to fulfill its contractual obligations by not delivering the agreed doses of Febrivac 3 Plus and Febrivac Dist in 2022.

Is Ceva's failure to perform due to an impediment beyond its control (force majeure)?

5.11. **69**
Ceva asserts that its failure to deliver Febrivac 3 Plus and Febrivac Dist in 2022 is due to force majeure. According to Ceva, IDT's non-performance of its obligations towards Ceva has led to shortages, which cannot be attributed to Ceva.

5.12. **70**
CFE contests that Ceva's failure to perform qualifies as force majeure. According to CFE, a shortage of Febrivac falls under the risk and responsibility of Ceva. CFE also asserts that Ceva has failed to provide any substantiation or proof with regard to the existence of force majeure.

5.13. **71**
Pursuant to Article 79(1) CISG, a party is not liable for a failure to perform any of its obligations if it proves that the failure was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

5.14. 72
The following is relevant for the assessment of Ceva's reliance on force majeure.

Article 5(2) of the FDA states, in short, that all orders of Febrivac are subject to acceptance by Ceva. It also states that the availability of Febrivac depends on the continuation of production by IDT and that this production probably will not continue beyond 30 June 2024.

The article reads, insofar as relevant, as follows:

> *«(…)* ***Article 5. ORDERS AND DELIVERY OF THE PRODUCTS***
>
> *(…)*
>
> 2. *All orders are subject to acceptance by Supplier, but orders will normally be accepted subject to the availability of the Products and compliance with the terms and conditions of this Agreement. For clarification, availability of the Products shall be contingent upon the continuation of Supplier's Manufacturing and Supply Agreement with IDT, which in no event is anticipated to extend past June 30, 2024. (…)»*

5.15. 73
Article 11(1) of the FDA states, in short, that neither party shall be liable for failure to perform when such failure is due to force majeure. Article 11(2) of the FDA states that the FDA shall end by right (by which the Court understands «automatically terminates», *van rechtswege eindigt*) where force majeure persistently prevents fulfillment which lasts for more than 180 days, in which case the parties shall have no right to fulfillment or compensation. The article reads, insofar as relevant, as follows:

> *«(…)* ***Article 11. FORCE MAJEURE***
>
> 1. *Neither Party shall be liable for failure to perform its part of this Agreement when such failure is due to fire, explosion, flood, hurricane, typhoon, earthquake, war, acts of terrorism, riots, governmental acts or orders or restrictions, strikes, lockouts, epidemic, pandemic, or any cause beyond the reasonable control of the Parties, to the extent such events make performance of a Party's obligations under this Agreement impossible or impracticable.*
> 2. *In case of temporary force majeure the mutual obligations of the Parties shall be suspended until the hindrance is eliminated. Where force majeure persistently prevents fulfilment, which lasts for more than 180 days, the Agreement shall end by right. The Parties shall then have no right to fulfilment, compensation for this reason and/or postponement. (…)»*

5.16. 74
The Court is of the opinion that Ceva's reliance on force majeure, with regard to CFE's order of Febrivac for 2022, fails. That Ceva has accepted CFE's order for Febrivac in 2022 is undisputed between the parties. The mere fact that IDT ceased producing Febrivac after the formation of this order is a circumstance that is falls within the risk of Ceva. Ceva asserts it complained to IDT after receiving notice that IDT was ceasing production but it has furnished

insufficient evidence of this assertion, while CFE specifically argues that Ceva should have done more to urge IDT to continue producing.

5.17. **75**
Furthermore the Court agrees with CFE that Ceva cannot hide behind IDT.

Ceva entered into the FDA for the production and delivery of Febrivac, being fully aware that the delivery of Febrivac was important for CFE's business and its clients. Ceva fully relied on its agreement with IDT for the delivery of the Febrivac to CFE. CFE could therefore reasonably expect that Ceva included some degree of security in its agreement with IDT in order to prevent IDT from terminating its agreement with Ceva rashly.

Ceva merely argues that IDT stopped delivering Febrivac and that it was entitled to terminate the FDA as a result. From this argument, the Court infers that the agreements between Ceva and IDT (which have not been submitted by Ceva) apparently did not contain any provisions preventing IDT to terminate the agreement without stating a reason.

In the contractual relation between Ceva and CFE, this falls within the risk and expense of Ceva and cannot constitute force majeure. It was not until its statement of defence regarding CFE's increase of claims that Ceva referred to COVID-19 as a reason for IDT's cessation of Febrivac production. Ceva failed to provide further elaboration on this point. This assertion by Ceva is therefore insufficiently substantiated and, moreover, was submitted too late. As a result, it has not become clear to the Court what exactly happened in 2021 and 2022 concerning COVID-19 and what impact this had on IDT.

Also, during the hearing it became clear that Ceva concluded an asset deal with IDT. Thus, in the Court's opinion, it is neither unreasonable nor unrealistic to assume that Ceva had some degree of influence over IDT.

5.18. **76**
Under these circumstances, Ceva has failed to demonstrate that it was unable to deliver Febrivac to CFE in 2022 as a result of force majeure.

Has CFE lawfully avoided (ontbonden) the order for Febrivac in 2022?

5.19. **77**
Pursuant to Article 49(1)(b) CISG, a buyer may, in case of non-delivery, declare the contract avoided if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 CISG or declares that he will not deliver within the period so fixed. Article 47(1) CISG states that the buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

5.20. **78**
CFE asserts that it avoided the orders for Febrivac with its letter dated 18 July 2022. To substantiate this, CFE argues that Ceva was required to deliver the orders by May 2022 at the latest, but failed to do so. Furthermore, CFE states that by letter dated June 28 2022, it

requested Ceva to deliver the missing doses of Febrivac within eight days, but Ceva also failed to do so.

5.21. **79**
Ceva has not disputed these submissions. It argued that its failure to perform qualifies as force majeure, but as considered above, this argument fails.

5.22. **80**
The foregoing implies that CFE lawfully avoided the orders for Febrivac for 2022 by its letter dated 18 July 2022. The non-delivery is a fact in itself and CFE fixed an additional period of time for performance by Ceva. It has not been asserted nor is there any evidence that this additional period of time was unreasonable.

Is Ceva obliged to compensate CFE for damage suffered by avoidance of the order?

5.23. **81**
Pursuant to Article 76(1) CISG, if a contract is avoided, the party claiming damages may *(inter alia)* claim further damages recoverable under Article 74 CISG.

In addition, Article 6:277(1) DCC states that where an agreement is cancelled (*ontbonden*) in full or in part, the party whose failure to perform was the cause of the cancellation must compensate any loss suffered by the counterparty resulting from the cancellation of the agreement.

5.24. **82**
As previously considered by the Court, CFE was entitled to declare the orders for Febrivac for 2022 avoided and it has been established that CFE indeed did so. CFE has undisputedly argued that Ceva's default was the reason for declaring the orders avoided. This means that Ceva is obligated to compensate the damage incurred by CFE resulting from the cancellation of the agreement, subject to the considerations set forth below.

To what amount should CFE be compensated by Ceva?

5.25. **83**
CFE is claiming damages from Ceva for loss of profit, lost commission, goodwill compensation and costs incurred to assess liability/damages. Ceva disputes (the extent of) the damages claimed by CFE and asserts that Ceva's liability is contractually limited.

5.26. **84**
Pursuant to Article 74 CISG, damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

5.27. **85**
The following is relevant for the assessment of CFE's claim for damages.

Article 10(1) of the FDA states, in short, that the parties' liability is contractually limited and that the parties shall not be liable for *(inter alia)* consequential and indirect loss, such as lost profits, loss of customers and loss of goodwill. The article reads, insofar as relevant:

> *«(…)* ***Article 10. LIABILITY, IDEMNIFICATION AND INSURANCE***
>
> 1. *In no event shall the Parties be liable towards each other for any special, consequential, indirect, criminal or incidental loss, including but not limited to losses caused by delays, lost profits, lost savings, increased operational costs, damages caused by customers, loss of customers, loss of goodwill, etc., howsoever caused, regardless of the basis of liability, and regardless of whether it was advised in advance of the possibility of such damages arising in any way from the Agreement or otherwise, without prejudice to anything expressly provided for herein, with the exception of claims with regard to (i) termination of the Agreement without complying with the term and/or termination clauses of the Agreement (breach of contract), (ii) indemnification, (iii) infringement of Intellectual Property, (iv) product recall, or (v) gross negligence or willful misconduct. (…)»*

5.28. **86**
From this contractual provision, it follows that the parties have limited their liability to a high degree. The damage for which CFE is currently seeking compensation falls within the scope of the provision, as this is explicitly stated in the text of the provision. For this reason, the damages claimed by CFE are in principle not eligible for compensation.

5.29. **87**
CFE asserts that the limitation of liability does not apply because there has been gross negligence or willful misconduct on behalf of Ceva. In support of its assertions, CFE argues that Ceva already knew as soon as August 2021 that IDT intended to terminate the production of Febrivac. To support this, CFE refers to IDT's termination letter to Ceva dated 31 August 2021. CFE asserts that Ceva did not inform CFE about this until July 2022. According to CFE, Ceva should have informed CFE much earlier about IDT's announced termination of the production of Febrivac. CFE asserts that by not doing so, Ceva has acted with gross negligence or willful misconduct. Also, given these specific circumstances, CFE argues that Ceva's reliance on the limitation of liability is unacceptable according to the standards of reasonableness and fairness.

5.30. **88**
The Court is of the opinion that this reasoning fails. A high threshold applies for a claim of gross negligence or willful misconduct to be successful. The arguments put forward by CFE do not meet this threshold. In this regard, it is important to note that Ceva argues that it discussed transferring the production of Febrivac to a suitable third party with CFE promptly after receiving IDT's termination letter. That Ceva did so becomes evident from the documents it has submitted. Furthermore, Ceva argues that it contacted CFE as early as 27 October 2021 to discuss possible shortages of mink vaccines and this too becomes evident from the documents

submitted by Ceva. Ceva also argues that a meeting about this topic with CFE took place on 17 November 2021, which is not contradicted by CFE. In addition, the Court finds that the contents of IDT's termination letter provide insufficient grounds to conclude that Ceva acted with gross negligence or willful misconduct by not promptly notifying CFE about this. IDT's termination letter states, after all, that IDT was indeed terminating the agreement, but it also mentions that IDT would release several more batches of Febrivac throughout 2022. Against this background, the Courts finds that there is insufficient reason to suppose that Ceva acted with gross negligence or willful misconduct after receipt of IDT's termination letter.

5.31. **89**
With regard to CFE's argument that Ceva's reliance on the limitation of liability is unacceptable according to the principles of reasonableness and fairness, the following is relevant.

5.32. **90**
Pursuant to Article 6:248(2) DCC, a rule binding upon the parties as a result of an agreement shall not apply to the extent that, in the given circumstances, this would be unacceptable according to standards of reasonableness and fairness. According to case law from the Dutch Supreme Court, this standard must be applied with restraint. The question of whether reliance on an limitation of liability clause is unacceptable according to the standards of reasonableness and fairness must be answered while taking all the circumstances of the case into account.[4]

5.33. **91**
The Court is of the opinion that CFE has insufficiently substantiated that Ceva's reliance on the limitation of liability is unacceptable according to the standards of reasonableness and fairness. Since CFE has brought forward the same arguments on this point as in its reliance on gross negligence and willful misconduct, the Court refers to what already has been considered in that regard. In addition, the Court notes that both CFE and Ceva are professional parties. Such parties may be presumed to be sufficiently aware of the implications of a limitation of liability, in which regard the Court additionally notes that the content of the clause does not appear unusual or unreasonable compared to commercial contracts in general business practices.

Conclusion with regard to Febrivac 2022

5.34. **92**
The interim conclusion from the foregoing is that Ceva has rightfully invoked the contractual limitation of its liability with regard to the non-delivery of Febrivac in 2022.

As a result, the damages claimed by CFE are not eligible for compensation. CFE's claims aimed at compensating these damages are dismissed.

[4] Supreme Court of the Netherlands 29 January 2021, ECLI:NL:HR:2021:153; Supreme Court of the Netherlands 24 March 2006, ECLI:NL:HR:2006:AU7492.

5.35. **93**
The declaratory judgment sought by CFE will be granted to the extent that:

(i) Ceva was contractually obliged to supply 14,000,000 ml Febrivac 3 Plus and 9,000,000 ml Febrivac Dist no later than in May 2022,

(ii) Ceva imputably failed in this contractual obligation by supplying only 4,354,250 ml Febrivac 3 Plus and 1,347,250 ml Febrivac Dist;

(iii) CFE by its letter dated 18 July 2022 avoided the individual purchase agreements between the parties with regard to the undelivered quantities of Febrivac 3 Plus and Febrivac Dist.

5.36. **94**
In view of what has been considered by the Court, Ceva's assertion that CFE failed to mitigate its loss no longer requires assessment.

Distemink 2022

Has Ceva failed to fulfill its contractual obligations?

5.37. **95**
Pursuant to Article 35 CISG a seller must (inter alia) deliver goods which are of the quantity, quality and description required by the contract.

5.38. **96**
CFE asserts that Ceva was to supply 2,600,000 doses of Distemink no later than in May 2022 and that Ceva imputably failed in this obligation by supplying only 1,202,552 doses, thus failing to supply 1,397,448 doses.

5.39. **97**
That CFE has ordered 2,600,000 doses of Distemink for 2022 is not in dispute.

However, in its statement of defence Ceva does contest CFE's assertion that only 1,202,552 doses were delivered. According to Ceva, CFE does not take into account deliveries that took place in 2023. Ceva asserts that these later deliveries were allocated by the parties to the 2022 shortfall. According to Ceva, the shortfall for Distemink in 2022 merely amounts to 267.500 doses (i.e. 202,750 doses for the European market and 64,750 for the US market).

5.40. **98**
CFE has not disputed Ceva's assertions about the remaining shortfall for Distemink in 2022. CFE merely acknowledges that *«later deliveries»* (of Distemink) *«may have lowered the extent/consequences»* of Ceva's shortcoming, but does not specify the quantity of these deliveries.

5.41. 99
Against this backdrop, the Court is of the opinion that it is sufficiently substantiated and established that Ceva failed to deliver 267,500 doses of Distemink in 2022. To that extent, the Court establishes that Ceva failed to fulfill its obligations.

Is Ceva's failure to perform a result of force majeure?

5.42. 100
Ceva asserts that its failure to deliver Distemink in 2022 is the result of force majeure. Ceva argues in short that:

i. there were manufacturing issues with regard to Distemink because Ceva's subsidiary was not able to procure certain crucial raw materials as result of COVID-19;

ii. there were supply issues for packaging and batch control issues in the EU;

Ceva's subsidiary was deprived of trained personnel because:

a. the previous owner of the Verona facility dismissed personnel under the pressure of its banks, and;

b. key personnel chose to resign during COVID-19;

Ceva's subsidiary encountered issues in extraneous testing and other technical issues that were inherent to the Verona facility due to poor documentation of the production process, acquired from the Verona facility's previous owner.

5.43. 101
CFE asserts that Ceva failed to provide sufficient substantiation or proof with regard to the existence of force majeure. According to CFE, the circumstances mentioned by Ceva merely imply a possible delay in the fulfillment of the agreement. CFE argues that these circumstances all fall within Ceva's risk and responsibility.

5.44. 102
Pursuant to Article 79(1) CISG, a party is not liable for a failure to perform any of its obligations if it proves that the failure was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

5.45. 103
The Court is of the opinion that Ceva's reliance on force majeure fails. With regard to Ceva's assertion that its subsidiary was not able to procure raw materials because of COVID-19, the Court finds that Ceva has insufficiently substantiated its assertions.

Of importance in this regard is that Ceva also argues that it was eventually able to procure replacement materials, which demonstrates in the opinion of the Court that the impediment and its consequences could be overcome. The manufacturing and technical issues, mentioned by Ceva, have been insufficiently substantiated since Ceva refers solely to an extensive witness

statement. It is not clear to the Court how this witness statement substantiates Ceva's assertions. It is not the Court's duty to search through this witness statement for arguments in support of Ceva's assertions. With regard to the supply issues for packaging and batch control issues in the EU, there is no reason to accept – without any further explanation which is lacking – that these circumstances should fall within the risk and responsibility of CFE. The same applies to Ceva's assertion that it was deprived of trained personnel.

Is Ceva obliged to compensate CFE for damage suffered by Ceva's failure to perform?

5.46. **104**
Pursuant to Article 45(1)(b) CISG, a buyer may claim damages as provided in articles 74 to 77 CISG if a seller fails to perform any of his obligations under (inter alia) the contract.

5.47. **105**
As previously considered, it is an established fact that Ceva failed to deliver 267.500 doses of Distemink to CFE for the execution of the 2022 purchase order, while CFE's reliance on force majeure fails. Therefore, CFE is entitled to claim damages.

What amount should CFE be compensated for the non-delivery of Distemink?

5.48. **106**
CFE is claiming damages from Ceva as a result of the non-delivery of Distemink in the execution of the 2022 purchase order. CFE claims loss of profit, lost commission, goodwill compensation and costs incurred to asses liability and damages.

In support of its claims, CFE (inter alia) relies on a damage report by Accuracy.

5.49. **107**
Ceva raises various defences against the (extent of the) damages claimed by CFE and relies on a report by [x].

5.50. **108**
Pursuant to Article 74 CISG, damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

5.51. **109**
The breach of the CMA regarding the purchase order of Distemink for 2022, is referred to in the Accuracy report as «Breach 2». In the Accuracy report the damages regarding Breach 2 are calculated at the total amount of € 145,000.00. In the [x] report the damages for Breach 2 are calculated at the total amount of -/- € 705, i.e. a «profit» of € 705,00. The Court comes to the following observations when comparing the two reports regarding Breach 2.

5.52. 110
In both reports, in order to determine the damages, a comparison is made between the so-called «Soll situation» – being the counterfactual scenario without the alleged breach – and the so-called «Ist situation» – being the scenario in which the alleged breach has actually occurred. Furthermore, both reports make a distinction between the lost commissions as a result of the non-deliveries for the USA/Canadian market and the lost profits as a result of the non-deliveries for the European market.

USA/Canadian market

5.53. 111
According to the Accuracy report, the lost commissions for the USA/Canadian market in relation to Breach 2 amount to € 47,000.00. In the [x] report the lost commissions are calculated at € 5,667.00. The difference between these calculations stems from three distinct elements.

5.54. 112
The first is the distribution of the ordered vaccines between the European market on the one hand and the USA/Canadian market on the other. CFE placed two orders for the delivery of Distemink for 2022, namely an order dated 4 May 2021 for 1,200,000 doses and an order dated 28 March 2022 for 1,400,000 doses. The total number of ordered doses Distemink for 2022 – namely 2,600,000 doses – is not in dispute. Nor is it in dispute that the order dated 4 May 2021 was intended for the USA/Canadian Market. However, according to the Accuracy report 99,000 doses of the order placed on 28 March 2022 should be attributed to the USA/Canadian market based on the historic ratio, while according to the [x] report the entire order should be attributed to the European market. The Court points out that each order has a shipping address and the shipping address is indicative of the market for which the order was intended. Because the shipping address in the order of 28 March 2022 was a European address the Court assumes – in line with the [x] report – that the entire order was for the European market.

5.55. 113
The second – and the main – difference stems from the number of vaccines delivered to the USA/Canadian market. Unlike the [x] report, the Accuracy report does not take into account the late delivery on 25 April 2023 of an additional 397,750 doses for the USA market. As CFE has not disputed that these doses were delivered and should be attributed to the order of Distemink for 2022, the shortfall of Distemink for the USA/Canadian market is determined at 64.750 doses in accordance with the [x] report.

5.56. 114
The third and final difference between the calculation of the lost commissions for the USA/Canadian market in the two reports is the exchange rate of US dollars to euros. The Accuracy report uses the exchange rate as at 1 April 2022 so that the corresponding commission is € 0.083 per dose, while according to the [x] report the appropriate exchange rate leads to a commission of € 0.088 per dose. As the difference is negligible the Court will – to the favor of CFE – use the commission per dose in euros as stated in the [x] report.

5.57. 115
The conclusion regarding the lost commissions regarding the Distemink order for 2022 for the USA/Canadian market is that the Court will follow the calculation presented in the [x] report and determine the amount at € 5,677.00.

European market

5.58. 116
According to the Accuracy report, the lost profits for the European market resulting from the non-delivery of Distemink for 2022 are € 122,000.00. In the [x] report the lost profits are calculated at € 16,687.00. The difference between these calculations arises from two elements. The first is the shortfall in the number of delivered doses. The second is the profit per dose.

5.59. 117
The difference in the shortfall in the number of delivered doses is firstly based on the distribution of the ordered vaccines with the order of 28 March 2022 between the European market and the USA/Canadian market. As already considered, the Court assumes that the entire order was for the European market and the Court in that respect follows the [x] report. Secondly, the difference stems from the fact that – unlike the Accuracy rapport – the [x] rapport takes into account the late delivery on 8 May 2023 of 732,000 doses for the European market. As CFE has not disputed that this delivery took place nor that the delivery should be attributed to the Distemink order for 2022, the Court will follow the [x] report in this respect as well. The conclusion therefore is that the shortfall for Distemink regarding the 2022 order for the European market is 202,750 doses.

5.60. 118
With regarding to the profit per dose, the Accuracy report argues that the relevant profit should be based on the historical profit margin for 2021 corrected for the inflation.

This would result in a profit of € 0.15 per dose. According to the [x] report, this approach is conceptually incorrect as it does not take into account the actual purchase price in accordance with the CMA and the actual sales price. Furthermore, the [x] report states that the underlying data for the historical profit margin had not been provided, so the historical profit margin Accuracy calculates with cannot be validated.

5.61. 119
The Court considers that, generally, damages should be calculated specifically, with due regard to all the relevant circumstances. Therefore, the damages should in principle be calculated based on the purchase price according to the CMA and the expected sales price and not on the historical profit margin for 2021 corrected by the inflation. As there is no dispute between the parties about the purchase price of Distemink in 2022 under the CMA, their dispute regarding the profit margin centres on the sales price of Distemink. CFE has not provided any actual data regarding the sales price of Distemink which was sold under the 2022 order. The Court understands this data was not available when the Accuracy report was drafted as none of the delivered Distemink had been sold yet at that point. CFE did not provide additional information on this point during the course of the proceedings, nor is there an

update of the Accuracy report in this respect. CFE has maintained its approach based on the historical profit margins. In light therefore, the Court comes to the following conclusion.

5.62. **120**
The Court finds that the normative profit projected in the Accuracy report for 2022, is not realistic. The normative profit set out in the Accuracy report is based on the assumption that CFE would have been able to dictate the sales prices in the market due to its monopolistic position. CFE has insufficiently substantiated this assumption and the Court considers it unlikely. Given the fact that the mink market is vulnerable and CFE is a cooperative it is furthermore not likely that CFE will act in the market in the way that Accuracy expects.

5.63. **121**
According to Ceva a profit of € 0.08 per dose would be realistic. Ceva has, however, not substantiated or explained the underlying assumption that CFE would have only been able to increase the sales price for Distemink in 2022 in line with inflation and would not have been able to pass on a larger part of the increased purchase price to its customers.

5.64. **122**
The Court will therefore have to estimate the profit per dose that CFE would have realized if Ceva had fulfilled its contractual obligations to deliver the ordered Distemink timely and in full. The Court considers the most likely scenario to be somewhere in between the two positions presented by the parties, namely that while CFE would not have been able to dictate the sales prices, it would have been able to increase the sales price by more than inflation and thereby pass on some of the increased purchase price to its customers. The Court therefore estimates – ex aequo et bono – the profit for the Distemink 2022 order at € 0.10 per dose. This results in lost profit for the European market of € 20,257.00.

5.65. **123**
The parties agree that in the «Ist-situation», CFE has been able to realize an extra profit in 2022 due to the scarcity of the vaccines, which has to be taken into account when determining the damages. In the Accuracy report the extra profit is calculated at € 23,000.00. According to the [x] report the extra profit is € 23,239.00. As the calculation in het Accuracy report is based on an incorrect number of delivered vaccines, the Court will follow the calculation in the [x] report in this respect.

5.66. **124**
The conclusion is the following. The lost commissions for the USA/Canadian market are € 5,667.00 while the lost profits for the European market are € 20,257.00. Together, this amounts to € 25,934.00. For determining the damages, it is necessary to subtract the extra profit of € 23,239.00 in the «Ist-situation». The total damages awarded for the shortfall in the delivery of the 2022 Distemink order, are therefore determined at the amount of € 2,695.00.

Conclusion with regard to Distemink 2022

5.67. **125**
CFE's claims with regard to Distemink 2022 are partially granted.

The Court declares, in short, that Ceva was contractually obliged to supply 2,600,000 doses of Distemink and that Ceva imputably failed in this contractual obligation by not delivering 267,500 doses. The Court also orders Ceva to compensate CFE for its damages, which are estimated at € 2,695.00.

5.68. **126**
CFE has also claimed statutory interest over the awarded amount. As the awarded amount relates to damages, the statutory interest rate of Article 6:119 DCC applies.

Citing CISG Advisory Council Opinion No. 14, CFE has argued that the moment a loss occurs constitutes the starting point for calculating the interest. Regarding the 2022 Distemink order, Ceva's breach occurred on 7 July 2022, being the first date after which CFE's notice term of 8 days expired. Ceva has not contested this and the Court sees no reason to find otherwise. Therefore the Court will award the statutory interest from 7 July 2022.

Biocom-P 2022

5.69. **127**
In short, CFE argues that Ceva breached its obligations under the CMA by not having Biocom-P available for purchase from 1 January 2022 onwards. CFE asserts that it suffered damage as a result and holds Ceva liable.

5.70. **128**
Ceva defends itself and asserts (inter alia) that the CMA is nullable because of error and/or fraud. Ceva also argues that its subsidiary was unable to meet certain obligations under the CMA due to no fault of its own. Furthermore, Ceva raises various defences with regard to the damages claimed by CFE.

5.71. **129**
The Court will assess Ceva's claim for nullification of the CMA due to error and/or fraud first, since this defence is the most far-reaching.

Is the CMA subject to annulment due to error and/or fraud?

5.72. **130**
Ceva asserts that it acquired the Verona Facility under the assumption that it was state-of-the-art and properly operational. It had no indication prior to signing the CMA that the Verona Facility would not be fit for producing Biocom-P legally. Ceva furthermore asserts it was led to believe that the Verona Facility was just a few formal steps away from acquiring the appropriate authorizations for the production of Biocom-P. According to Ceva, the reality proved otherwise. Ceva argues that it ascertained, shortly after the acquisition of the Verona Facility, that the facility was afflicted with flaws and deficiencies. Removing these flaws and

deficiencies would have required a major reconstruction of the Verona Facility, costing millions of dollars. Without these reconstructions it proved impossible to obtain the necessary authorizations for the production of Biocom-P. Therefore, Biocom-P could not legally be produced in the Verona Facility.

5.73. **131**
Furthermore, Ceva asserts that CFE was aware of this, or that CFE could at least have been aware of this, when concluding the CMA. Ceva argues that it discovered, in a later stage, that CFE withheld crucial information during the contract negotiations. Ceva asserts that it would not have entered into the CMA, or at least not on the same conditions, if it had been aware of the facts and circumstances as set out above. According to Ceva, this leads to the conclusion that the CMA is subject to annulment due to error and/or fraud.

5.74. **132**
CFE disputes that the CMA is subject to annulment due to error and/or fraud. According to CFE, the undisclosed information as alleged by Ceva is not relevant nor crucial. CFE also asserts that if any relevant or crucial information was actually unknown to Ceva, it was not aware of this. Lastly, CFE argues that if any relevant or crucial information was actually unknown to Ceva and CFE was actually aware of this information, this should still be for the risk of Ceva.

5.75. **133**
Pursuant to Article 3:44 DCC, a juridical act may be annulled when it has been performed under the influence of (inter alia) fraud. Fraud occurs when a person induces another to perform a specific juridical act by intentionally providing him with inaccurate information, by intentionally concealing any fact he was obliged to communicate, or by any other artifice. Representations in general terms, even if they are untrue, do not, as such, constitute fraud.

5.76. **134**
Pursuant to Article 6:228 DCC, an agreement which has been concluded under the influence of an error and which would not have been entered into had there been a correct assessment of the facts, may be nullified:

i. if the error is due to information given by the counterparty, unless the counterparty could assume that the agreement would have been entered into irrespective of such information;

ii. if the counterparty, in view of what it knew or ought to know regarding the error, should have informed the party about its error;

iii. if the counterparty in entering into the agreement made the same incorrect assumption as the party in error, unless the counterparty, even if there had been a correct assessment of the facts, need not have understood that the party in error would therefore be prevented from entering into the agreement.

Nullification cannot be based on an error regarding an exclusively future circumstance or an error which, considering (i) the nature of the agreement, (ii) generally accepted principles, or (iii) the facts of the case, should remain for the account of the party in error.

5.77. 135
Ceva bases its reliance on nullability due to error and/or fraud on multiple issues with respect to the Verona Facility, namely:

i. issues with the heating, ventilation and air conditioning-systems («HVAC»);

ii. non-compliance of the wastewater treatment, the room decontamination, gas doors, the backup generator and the shower in the exit personal airlock;

iii. budget cuts in 2016 to save on construction costs;

iv. various issues ascertained by the relevant United States authority, being the Centers for Disease Control and Prevention («CDC»).

Issues (i), (ii) and (iii)

5.78. 136
In support of its assertion that the Verona Facility needed major reconstructions in order to produce Biocom-P, Ceva argues (inter alia) that it ascertained issues with the HVAC-system shortly after acquisition. Ceva refers to multiple exhibits in this regard, the two most important being an engineering study by GBA (an engineering and construction company that was involved in the design of the Verona Facility) dated 15 May 2020, and a testimony of [naam 1], director of GBA, dated 27 October 2023.

5.79. 137
According to Ceva, the HVAC installation in the biosafety level-3 area («BSL-3») of the Verona Facility, referred to by Ceva as «Suite A», generated unusually frequent pressure alarms on a daily basis. Ceva argues that the HVAC installation needed to be modified to ensure adequate airflow. The supply air fans in the relevant area did not provide adequate isolation and did therefore not meet the relevant regulatory requirements.

Ceva ascertained this issue shortly after acquiring the Verona Facility in 2020 and these issues led Ceva to undertake a more extensive investigation into other possible cases of non-compliance. This more extensive investigation demonstrated that there were also issues with the wastewater treatment, the room decontamination and gas doors, the backup generator and the shower in the exit personal airlock. Remedying these defects would have amounted to a reconstruction costing millions of dollars.

5.80. 138
The Court is of the opinion that Ceva has insufficiently substantiated its non-compliance assertions, also considering what CFE has argued. The following is decisive in that regard.

5.81. 139
First of all, the GBA-report from 2020 only mentions HVAC reconstructions amounting to an estimated $ 200,000. It has not become clear to the Court whether Ceva actually carried out these reconstructions. The amount is also far from the multimillion dollar reconstruction argued by Ceva. Secondly, the testimony from GBA's director cannot be regarded as a decisive

report, since this testimony merely describes how GBA's director reflects in 2023 on what has occurred during the construction of the Verona Facility from 2015 until 2020. The testimony mentions, among others, that GBA was involved in discovering the non-compliance of the wastewater treatment, the room decontamination, gas doors, the backup generator and the shower in the exit personal airlock. The Court notes, however, that Ceva has not submitted any exhibits dated from 2020 until 2022 in support of this argument. Thirdly, the Court is of the opinion that CFE has disputed Ceva's assertions on this point on sufficiently reasoned grounds. CFE argued in its pleading notes that in 2020 GBA did not investigate the HVAC compliance with legal requirements and that GBA merely recommended non-mandatory reconstructions. According to CFE, GBA's 2020 findings are based on its general knowledge and input from Ceva's staff, rather than of site observations and reports. Hence, the court finds that Ceva has not sufficiently substantiated that it entered into the CMA under a misrepresentation of facts on points (i) and (ii) above, nor that fraud occurred in this regard.

5.82. **140**
In addition, Ceva argues that it discovered in 2023 that the Verona Facility was not built in line with BSL-3 requirements because of budget cuts in 2016 to save on construction costs. According to Ceva, this information was withheld in the negotiations on the CMA.

5.83. **141**
The Court holds that Ceva has not sufficiently substantiated this assertion. It has failed to underpin which budget cuts exactly led to the alleged non-conformity of the Verona Facility. Neither has it become clear to the Court how this contributed to not meeting the BSL-3 requirements. CFE, on the other hand, has submitted a testimony from Ms [naam 2], former site leader at the Verona Facility. The court derives from this statement that the budget cuts from 2016 did not pertain to the Verona Facility's ability to produce Biocom-P.

5.84. **142**
The Court also takes into consideration that Ceva failed to elaborate the exact costs of the alleged reconstructions of the Verona Facility. The testimony of GBA's director merely mentions *«(…) a 7-digit number (millions of dollars) (…)»*. Ceva did not further specify this amount, despite being legally bound to sufficiently substantiate its claim on this point, given that Ceva is the party invoking the legal consequences of error and/or fraud (Article 150 DCCP).

Issue (iv)

5.85. **143**
To further support its assertions that the Verona Facility could not be made BSL-3 compliant without major reconstructions, Ceva submitted an inspection report from 2019 from the relevant United States authority, being the Center for Disease Control and Prevention («CDC»). Contrary to what Ceva argues, the Court holds it does not follow from this report that the appropriate authorizations for the production of Biocom-P could only be acquired after an extensive reconstruction. The report does mention that exhaust HEPA filters in a specific area of the Verona Facility failed certification. Ceva addresses this issue in its statement of defence, but without further explanation, which is lacking, the Court does not

see how the remaining points in the CDC-report require a multimillion dollar reconstruction. CFE has also disputed Ceva's assertions on this point, stating that the CDC report mostly prescribes corrective actions of an administrative nature. According to CFE, acquiring BSL-3 approval from the relevant authorities did not require any measure of significant importance, which also seems logical to the Court, since CFE's affiliate was already producing Biocom-P in its former facility, before the Verona Facility was constructed. It is unlikely that CFE would construct a new facility, being the Verona Facility, which could not produce Biocom-P without extensive reconstruction.

5.86. **144**
The Court also notes in this regard that the CDC already approved storage of the toxin necessary for Biocom-P in 2017. Ceva acknowledges that at the time of acquiring the Verona Facility both parties were aware that it was not yet authorized to produce Biocom-P. The Court establishes that Ceva has not presented any facts or circumstances that justify the conclusion that it at any time requested BSL-3 approval from the CDC. Neither has it become clear to the Court which steps were undertaken by CFE after purchasing the Verona Facility in order to acquire the aforementioned approval. In its termination letter dated 12 September 2022, Ceva mentions a CDC audit. The letter reads, insofar as relevant: *«(…) During a recent CDC audit of the Facility, CDC auditors recommended Ceva consider destruction of all C. Botulinum toxin inventories at the Facility due to safety concerns. (…)»*. Without further elaboration, which is lacking, the Court fails to see how this relates to the required BSL-3 approval in order to produce Biocom-P.

The Court also notes that Ceva did not file any exhibits with regard to the *«recent CDC audit»* as mentioned in the termination letter.

Conclusion with regard to error and/or fraud

5.87. **145**
This leads to the conclusion that the CMA is not subject to annulment as a result of error or fraud. Ceva has insufficiently substantiated its assertions on this point, while CFE has disputed Ceva's assertions on sufficiently reasoned grounds.

5.88. **146**
As a result, Ceva's arguments with regard to the waiver of its right to rely on nullability pursuant to Article 12.8 CMA no longer require assessment.

Did Ceva fail to fulfill its contractual obligations?

5.89. **147**
CFE argues that, under the CMA, Ceva was contractually obliged to have Biocom-P available for production from 1 January 2022 onwards. In support of this, CFE refers to the intentions and purpose of the CMA as set out in (inter alia) Article 13 CMA. According to CFE, Article 8 CMA prescribes that it was obliged to purchase certain minimum volumes of mink vaccine from 2022 onwards.

5.90. 148
Ceva has not contested these assertions. Therefore, the Court considers it an established fact that under the CMA Ceva was contractually obliged to have Biocom-P available for production from 1 January 2022 onwards.

5.91. 149
Ceva has argued, however, that the principle of reasonableness and fairness limits the applicability of the CMA. According to Ceva, it would be unreasonable to hold it to the obligation of obtaining the relevant approvals for the Verona Facility, given that fulfilling this obligation would not only require disproportionately high investments, but also necessitate shutting down the Verona Facility for the required major construction changes.

5.92. 150
Pursuant to Article 6:248(2) DCC, a rule binding upon the parties as a result of an agreement shall not apply to the extent that, in the given circumstances, this would be unacceptable according to standards of reasonableness and fairness. According to established case law from the Dutch Supreme Court, this standard must be applied with restraint. The answer to the question of whether the principles of reasonableness and fairness preclude reliance on a contractual clause depends on various circumstances, such as the nature and further content of the agreement in which the clause appears, the social position and mutual relationship of the parties, the manner in which the clause was established and the extent to which the counterparty was aware of the purpose of the clause.[5] The burden of proof regarding such circumstances generally rests on the party opposing reliance on the clause.[6]

5.93. 151
As previously considered by the Court with regard to Ceva's reliance on the CMA being subject to annulment due to error and/or fraud, Ceva failed to substantiate sufficiently that the Verona Facility required disproportionately high investments in order to legally produce Biocom-P. Therefore, Ceva's claim to not apply the relevant provisions of the CMA because these are said to be unacceptable according to the standards of reasonableness and fairness, fails.

Is Ceva's failure to perform a result of an impediment beyond its control?

5.94. 152
Ceva argues that it failed to have Biocom-P available for production as a result of an impediment beyond its control.

5.95. 153
Pursuant to Article 79(1) CISG, a party is not liable for a failure to perform any of its obligations if it proves that the failure was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

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[5] Supreme Court of the Netherlands 19 May 1967, ECLI:NL:HR:1967:AC4745.
[6] Supreme Court 16 January 1987 of the Netherlands, ECLI:NL:PHR:1987:AG5509.

5.96. 154
In support of its reliance on an impediment beyond its control with regard to Biocom-P, Ceva asserts that the Verona Facility could only produce Biocom-P after disproportionately high investments, which would include shutting it down for major reconstructions. As already considered above with regard to Ceva's reliance on nullability of the CMA, the Court does not follow Ceva's arguments on this point.

5.97. 155
Ceva also argues that it cannot produce Biocom-P because it transferred the C. Botulinum master seed to CFE's affiliate on 26 June 2023 at the explicit request of CFE. CFE, on the other hand, has argued that it only requested the master seed after Ceva explicitly stated in its letter dated 5 June 2023 that it would destroy the master seed following an order from the CDC to do so. This assertion has not been contested by Ceva.

In light thereof, the Court fails to see how the transfer of the master seed amounts to an impediment beyond the control of Ceva under Article 79(1) CISG.

5.98. 156
This leads the Court to conclude that Ceva's reliance on an impediment beyond its control with regard to Biocom-P fails.

Was Ceva entitled to terminate (opzeggen) the CMA regarding Biocom-P as of 12 September 2022?

5.99. 157
CFE asserts that Ceva was not entitled to terminate the CMA with regard to Biocom-P as of 12 September 2022 and requests the Court to declare this as such.

5.100. 158
Ceva, on the other hand, defends itself and asserts that its termination of the CMA with regard to Biocom-P as of 12 September 2022 was lawful.

5.101. 159
In assessing if Ceva was entitled to terminate the CMA with regard to Biocom-P as of 12 September 2022, the following is relevant.

5.102. 160
By its letter dated 12 September 2022, Ceva terminated the CMA with regard to (among others) Biocom-P. Ceva's letter reads, insofar as relevant:

> *«(…) Ceva hereby confirms its termination of the Agreement with respect to the Biocom P (…) due to Ceva's inability to legally produce such products due to noncompliance of the Verona, Wisconsin production facility (…). As you know, the (…) products are produced with C. Botulinum toxin, which is a tier 1 select agent strictly regulated by the U.S. Center for Disease Control (the «CDC»). As you also know, the Facility had not received CDC approval for manufacture of products with C. Botulinum toxin at the time the Facility was acquired by Ceva. Nor had the Facility obtained*

U.S. Department of Agriculture («USDA») approval for production or sale of the Biocom P, Biocom or Botumink products.

Following Ceva's acquisition of the Facility, it was determined that modifications to the Facility sufficient to obtain CDC and USDA approvals for manufacture of Biocom P, Biocom and Botumink products with C. Botulinum toxin are not commercially feasible. The challenge of obtaining required regulatory approvals was exacerbated by actions of United Vaccines taken prior to Ceva's acquisition of the Facility, including without limitation: the termination of significant United Vaccine personnel; unusable equipment being installed in the C. Botulinum suite of the Facility; a change in production methods for the Biocom P, Biocom and Botumink products; and poorly maintained manufacturing records.

Following Ceva's acquisition of the Facility, it was further learned that the integrity of C. Botulinum toxin containers transferred from United Vaccines' former manufacturing site to the Facility prior to Ceva's acquisition may have been damaged or otherwise compromised, thus creating a significant safety hazard. During a recent CDC audit of the Facility, CDC auditors recommended Ceva consider destruction of all C. Botulinum toxin inventories at the Facility due to safety concerns.

It is for the above host of reasons that Ceva has, as you know, been unable to accept Customers' previous orders of Biocom P. (…)

(…)

This notice is given without prejudice to any other rights or remedies Ceva may have under the Agreement, and all such rights and remedies are hereby reserved in full.

We deeply regret this decision, but in the current circumstances we have no other viable choice. (…)»

5.103. **161**

In this procedure, Ceva asserts that it based its termination of the CMA as cited above on Article 12(7) CMA. This article reads as follows:

«(…) Any Party may, at its option and by written notice to the other Parties, terminate this Agreement either in its entirety or in part in relation to any particular Mink Vaccine if the manufacture, distribution or sale of any Mink Vaccine is or becomes unlawful or is determined, through action or inaction, to be unlawful in any part of Europe, US or Canada by a final and binding judgement or decision of any court or regulatory authority having competent jurisdiction to make such determination. (…)»

5.104. **162**

The Court does not follow Ceva in its assertion that it was entitled to terminate the CMA on the basis of Article 12(7) CMA. According to the Court, a reasonable interpretation of this provision entails that it was intended for the situation in which a mink vaccine, in this case Biocom-P, was to be banned or prohibited by the authorities. After all, it is undisputed between the parties that mink farming is controversial in many countries, while this has also been asserted by Ceva in these proceedings. That a prohibition of Biocom-P has occurred, has neither been asserted nor established.

5.105. 163
From Ceva's termination letter, as cited above, it follows that Ceva intended to terminate the CMA with regard to Biocom-P because it could not acquire approvals by the authorities to produce Biocom-P as a result of the Verona Facility being allegedly non-compliant. As previously considered, however, the Court is of the opinion that Ceva has failed to substantiate this assertion on sufficiently reasoned grounds.

5.106. 164
This leads to the conclusion that Ceva was not entitled to terminate the CMA with regard to Biocom-P on the basis of Article 12(7) CMA. That Ceva was entitled to terminate the CMA with regard to Biocom-P based on any other provision from the CMA has neither been asserted nor established.

Is Ceva obliged to compensate CFE for damages due to Ceva's failure to perform?

5.107. 165
Pursuant to Article 45(1)(b) CISG, a buyer may claim damages as provided in articles 74 to 77 CISG if a seller fails to perform any of his obligations under (inter alia) the contract.

5.108. 166
As previously considered, it is an established fact that Ceva failed to have Biocom-P available for production from 1 January 2022 onwards, and the reliance on an impediment beyond its control (force majeure) has been rejected.

5.109. 167
Consequently, CFE is entitled to claim damages.

To what amount should CFE be compensated for Ceva's failure to supply Biocom-P?

5.110. 168
According to Article 74 CISG damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

5.111. 169
According to the CMA, Ceva was obligated to supply Biocom-P to CFE until the lawful termination of the CMA. The Court considers Ceva's termination of the CMA by letter of 14 September 2022 as a termination from the earliest possible date, being 1. January 2028. Ceva was obligated to start supplying Biocom-P from 1 January 2023, since CFE did not order any Biocom-P to be delivered prior to this date. These two dates are also in line with the damages calculated by Accuracy which span the period from 1 January 2023 until 1 January 2028.

5.112. 170
Ceva failed to supply Biocom-P to CFE. Consequently CFE's loss will be based on the sum of all volumes of Biocom-P CFE would most likely have ordered during the period between 1 January 2023 and 1 January 2028.

Accuracy report

5.113. 171
Accuracy has calculated CFE's position in the «Soll-situation» minus its position in the «Ist-situation» as at 31 December 2022. According to Accuracy, for the non-delivery of Biocom-P the loss amounts to € 5,104,000 for the European market and to € 751,000 for the USA/Canadian market. This is a total amount of € 5,855,000.

5.114. 172
In calculating the loss, for the «Soll-situation» Accuracy takes the following parameters into account, which, in the relevant period, results in an amount CFE would have earned of € 4,850,000 on the European market and an amount of € 751,000 on the USA/Canadian market:

- the market for Biocom-P will stabilize in 2022 and show a relatively minor recovery of volumes with a gradual increase to 10,470,000 doses for the European market in 2027 and 3,020,000 doses for the USA/Canadian market. The total volume in the relevant period amounts to 45,675,000 doses for the European market and 13,120,000 doses for the USA/Canadian market;

- 91,3% of the estimated vaccine market volume will be supplied by CFE;

- CFE will realize a normative profit margin for Biocom-P in 2021 of € 0.18 per dose, with an increase each subsequent year in line with any increase in purchase costs and/or inflation: € 0.19 in 2022, € 0.20 in 2023 and 2024, € 0.21 in 2025 and 2026 and € 0.22 in 2027;

- for the USA/Canadian market CFE was entitled to a commission of USD 0.092. For the purpose of calculating the expected lost commission income in EUR in the future (i.e. the 2023–2027 period) Accuracy converted the USD commission to EUR using the current forward rates for the USD/EUR exchange rate over the forecast period;

- CFE will realize a level of operating expenses in line with the normative cost base for 2021 (€ 608,000), extrapolated to the future based on the expected inflation for 2022 to 2027. According to Accuracy the operating expenses are expected to be largely unaffected by the number of doses sold;

- a Weighted Average Cost of Capital («WACC») of 12%.

5.115. 173
For the «Ist-situation», Accuracy takes the following parameters into account, which results in an amount of € 254,000.00.

- CFE will incur costs from 12 September 2025 until 1 January 2028 for the European market without corresponding income, as no replacement vaccines for Biocom-P are available to CFE and Ceva will stop delivering Distemink as of 12 September 2025;

- CFE's normative operating cost base is fixed and insensitive to the level of volumes sold. Until 12 September 2025 CFE will therefore have to maintain its full operational capacity for vaccine distribution. Accuracy estimates that CFE, in the period between 12 September 2025 and 1 January 2028, will be able to reduce its operating cost base towards a normative level of approximately € 274,000 based on the normative housing, office and 50% of the normative personnel expenses incurred in 2021;

- all operating expenses are allocated to the vaccine activities in Europe;

- for the period beyond 12 September 2015, the operating cost base is allocated for 50% to Biocom-P (Breach 3) and for 50% to Distemink (Breach 4);

- a WACC of 12%.

For the USA/ Canadian market, the «Ist-situation» amounts to zero and does not influence the «Soll-situation».

[x] report

5.116. 174
According to the [x] report CFE's loss as a result of Ceva not supplying Biocom-P in the relevant period amounts to € 967,529 for the European market and € 356,992 for the USA/Canadian market. This is a total amount of € 1,324,521.

For the «Soll-situation», [x] calculates the loss at € 1,286,499 for the European market and for the «Ist-situation» [x] calculates savings of € 318,970 for the European market. For the USA/Canadian market, the «Ist-situation» amounts to zero and does not influence the «Soll-situation». In calculating the loss for the European market [x] estimates the profit margin per dose for 2023 at € 0.11 (a selling price of € 0.60 minus a cost price of € 0.49), for 2024 at € 0.12, for 2025 at € 0.12, for 2026 at € 0.13 and for 2027 at € 0.13. This is an average of € 0.12.

Ist-situation

5.117. 175
When determining the «Ist-situation», both Accuracy and [x] assume that Ceva will stop delivering Distemink as of 12 September 2025. The Court however finds that Ceva was not entitled to terminate the CMA as of 12 September 2025 (as to be discussed below). During the hearing Ceva has confirmed it will continue to supply Distemink as long as it is contractually obligated to do so. The Court therefore has no reason to assume that Ceva will

stop the supply of Distemink from 12 September 2025. Therefore the calculations of both parties in the «Ist-situation» are baseless and will not be taken into account. The Court finds no reason to take into account any savings or expenses in the «Ist-situation».

Accuracy-report versus [x]-report: main differences

5.118. **176**
The difference between the amount of the loss in the «Soll-situation» calculated by CFE on the one hand and calculated by Ceva on the other hand stems mainly from a difference in the following parameters:

- according to Ceva the mink market is shrinking and will not show an increase in the relevant period. [x] foresees a total volume during the relevant period of 33,663,408 for the European market and of 5,796,078 for the USA/Canadian market;

- according to [x], Accuracy's calculation of the profit margins is artificial and conceptually wrong. Instead of using a normative profit margin like CFE did, Ceva uses actual prices, increasing the European sales prices with the European inflation rate and the cost prices in as far as these are not agreed upon between the parties, with the US inflation rate.

5.119. **177**
The claim regarding Biocom-P partially relates to losses which have not yet occurred, i.e. future losses. Regarding such future losses, the Court has a certain degree of freedom in estimating the damage. When determining future losses in advance, the Court will have to take into account the relevant chances, both good and bad. In that respect the Court will have to determine what the reasonable expectations are regarding future developments in both the «Soll-situation» and the «Ist-situation».

Mink volumes

5.120. **178**
The Court finds that there are no sufficient indications that the mink market will increase over the period for which CFE is entitled to damages. The global mink market is shrinking since 2015, with a sharp decline during the COVID-19 pandemic. In 2024 Ceva has submitted additional evidence showing a further decline in 2023, from approximately 17,6 million in 2022 to approximately 14,7 million in 2023 (a reduction of 16%). This is an even higher decrease than projected by [x] in its first report. More countries are imposing bans, for example in October 2024 Romania decided to ban fur farming as of 1. January 2027. There are no signs that the sentiment regarding fur breeding is changing, potentially leading to an increased market demand. Indeed, the market development is now even below the numbers [x] had forecasted.

5.121. **179**
The Court will therefore follow [x] on the development of the volumes and will assess the damages taking into account [x] 's sales forecast. For the European market [x] forecasts a total volume of 33,663,408 doses in the relevant period.

5.122. **180**
For the USA and Canadian market [x] forecasts a volume of 5,796,078 doses, which leads to a loss amounting to € 356.992. In comparison: Accuracy forecasts a volume of 13,120,000 doses. [x]'s forecast is approximately 55% less than Accuracy's forecast. If the Court were to reduce the claimed amount in damages for the USA/Canadian market of € 715,000 by 55% it would lead to an amount lower than the amount [x] has calculated. The Court will therefore follow [x] and determine the damages for the USA/Canadian market at an amount of € 356.992.

Profit margin

5.123. **181**
The Court also finds that Accuracy's projected normative profit is not realistic.

The Court refers to its considerations regarding the Distemink order for 2022. Again, the normative profit set out in the Accuracy report is based on the assumption that CFE is able to dictate the sales prices in the market as there are no normal competitive forces. CFE has insufficiently substantiated this assumption and the Court considers it unlikely. Given the fact that the mink market is vulnerable and CFE is a cooperative it is furthermore not likely that CFE will act in the market as Accuracy expects it will. In the [x] report it is argued that it would be reasonable to assume that the maximum that CFE would have been able to increase its sales price annually, would have been the European inflation rate. The Court understands that according to Ceva, CFE would not have been able to transfer the increase in purchase price under the CMA to its customers beyond the European inflation rate.

Ceva has, however, not substantiated this assumption.

5.124. **182**
The Court will calculate the damages by estimating the expected profit margin for Biocom-P for the European market. In line with its judgement regarding the Distemink 2022 order, the Court considers the most likely scenario to be somewhere in between the two positions as presented by the parties, namely that CFE would not have been able to dictate the sales prices but it would have been able to increase the sales price by more than the inflation and thereby passing on some of the increased purchase price onto its customers. The Court will use an estimated profit margin of € 0.165 per dose, being approximately in the middle between the margins of both parties (Accuracy: an average of € 0.21 and [x] an average of € 0.12).

5.125. **183**
With a sales volume of 33,663,408 doses and an average profit margin of € 0.165, the lost gross profit amounts to € 5,554,462. An amount of € 2,200,000 normative operating expenses needs to be deducted, since all operating expenses are attributed to the European market. The Court calculates with the average of the amount for normative operating expenses used by Accuracy of € 2,186,000 and the amount used by [x] of € 2,222,764. The resulting amount is € 3,354,462. Applying the WACC of 12.0% leads to a further reduction of 25%, bringing the total damages to be awarded for the European market at € 2,515,846.74.

Ceva 's further objections

5.126. **184**
Ceva has also made the following remarks and/or has raised the following objections against the Accuracy report:

i. in calculating the commission for the USA/ Canadian market, Ceva uses slightly lower exchange rates. The Court will not take this into account, since it will only lead to negligible amendments to the parties' calculations;

ii. Ceva states that Accuracy's assumption that all vaccines will be sold is unrealistic and unproven. There is no evidence that all minks will be administered a Biocom-P vaccine. According to Ceva approximately 90% of minks will be administered a Biocom-P vaccine. This is approximately in line with CFE's parameter that it will supply 91.3% of the Biocom-P market. So, although the reasoning is different, this objection will only lead to a negligible amendment in the parties' calculations and will therefore not be taken into account;

iii. in its statement of defence Ceva remarks that other adjustments were made, such as corrections for CFE's operating expenses for the distribution of vaccines.

Ceva however does not give any further explanation on these adjustments and therefore the Court will not take these into account when assessing the damages; during the hearing Ceva referred to Accuracy's calculations assuming implicitly that CFE will sell each delivered vaccine to its customers in the same year the delivery took place, whereas an Excel sheet submitted by CFE shows that over the years CFE was unable to sell certain amounts of mink vaccines and had to write them off upon the expiry date of the vaccines. Accuracy assumes that CFE will supply 91.3% of the Biocom-P market. Its calculations are based on this assumption and therefore leave no room for a correction based on the possibility that CFE will not sell all of the vaccines ordered.

Has CFE failed to mitigate its loss?

5.127. **185**
According to Article 77 CISG, a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If a party fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

5.128. **186**
Ceva asserts that CFE has failed to take such reasonable measures to mitigate its loss and therefore the obligation for damages should be reduced accordingly. According to Ceva, CFE should have tried to find alternative suppliers for Biocom-P.

5.129. **187**
The Court finds that CFE could not and – for the remaining future – cannot reasonably mitigate its loss. Ceva informed CFE in the summer of 2022 it would not be supplying any Biocom-P.

Ceva should have delivered Biocom-P until 1 January 2028. This means that CFE, to mitigate its loss for at least part of the «damage-period», had less than 5.5 years to find an alternative supplier. A period of 5.5 years is however too short for an alternative supplier to develop and build a factory and to start manufacturing a vaccine like Biocom-P, let alone that a supplier could achieve this in less than 5.5 years.

5.130. **188**
Ceva states in its statement of defence that from 2022 CFE had many opportunities, the majority of which were facilitated by Ceva, to take steps to mitigate its loss.

It remains unclear what these «many opportunities» were, since Ceva only specifies one opportunity: the transfer of the IDT-business to CZ Veterinaria (CZV). Ceva argues that CZV was and is willing to produce Febrivac 3 Plus. In its statement of defence Ceva stated that by the end of 2022 it reached a tentative agreement with IDT and CZV. The plan was (i) for Ceva to transfer the Marketing Authorisations and the master seed for the Febrivac products to CZV at Ceva's costs, (ii) for CZV to take charge of the transfer of the production of the IDT Vaccines and (iii) for CZV and CFE to negotiate a distribution agreement. According to Ceva, in December 2022 CFE however made this plan contingent upon a prior agreement between Ceva and CFE on compensation for CFE's alleged losses due to product shortages, without giving any details on the desired compensation.

Ceva thereafter received the Accuracy report in April 2023. Following that, in July 2023, CFE expressed concrete willingness to discuss the matter of a transfer to CZV in response to an e-mail of Ceva about CZV's expectation to manufacture and release to the market a botulism vaccine by mid-2024, which would serve as an alternative to Biocom-P. Ceva argues that this was too late.

5.131. **189**
CFE however argues that it was all the time willing to cooperate with Ceva and CZV – referring to a letter of 10 May 2023 – but it was only able to negotiate an agreement with CZV, upon the first two steps agreed upon by the end of November 2022 being finalised or likely to be finalised. It refers to e-mails of CZV of 27 October 2023 and 8 February, 2024, in which CZV informed CFE, upon CFE's request, that it was working on the transfer of the process but could not give any update. Furthermore according to CFE, referring to an e-mail of Ceva of 16 May 2023, it was Ceva who made the progress of the transfer of the IDT-business contingent upon reaching an amicable settlement.

5.132. **190**
The Court finds that Ceva has not sufficiently motivated its position as regards CFE's duty to mitigate its loss. The only apparent possibility was the transfer of the IDT-business to CZV. The agreement entered into by the end of 2022 provided for Ceva and CZV to come to an agreement on the transfer of the business. CZV informed CFE in October 2023 and in February 2024 that this transfer was still in progress. It was up to Ceva to provide the Court with more details on this possible transfer. During the hearing it however only stated that CZV was still open to CFE as the distributor of the Botulism vaccine that CZV has developed and the Febrivac 3 Plus vaccine *«that is being transferred to CZV from IDT»*. This confirms that even

in November 2024 the transfer of the Febrivac 3 Plus vaccine to CZV had still not been finalised. Therefore it is unclear why CFE should start negotiating a distribution agreement with CZV regarding that vaccine. The Court furthermore dismisses Ceva's unsubstantiated reference to a Botulism vaccine CZV allegedly has developed, because Ceva has insufficiently substantiated this statement to be taken into account. Given all this, the Court will not discuss CFE's statement that the Febrivac 3 Plus vaccine is not an equivalent alternative to Biocom-P.

5.133. **191**
The conclusion is that the Court will not deduct any amounts because of a failure of CFE to mitigate its loss.

Goodwill

5.134. **192**
CFE also claims goodwill compensation from Ceva. Expressed in business terms, CFE's claim for goodwill compensation is based on the proposition that CFE built, expanded or strengthened a customer base, in the relevant period, and that Ceva will acquire the customer base and obtain substantial benefits from the acquisition, so that compensation is required under Article 7:442 DCC.

5.135. **193**
The Court rejects this claim because the specific facts here make it obvious CFE's proposition is deeply flawed. The Court notes that it was United Vaccines (a CFE affiliate) that enjoyed a strong position prior to Ceva's market entrance (in the US/Canada market, which is the relevant market here), and subsequently, CFE intended to set up a sales subsidiary, but the subsidiary never fulfilled its intended role, so that Ceva started selling the products into the US/Canada market (and owing commission to CFE) (as a «workaround»). In its statement of defence (at 234), Ceva wrote: *«(…) no other resellers were ever engaged than the US and Canadian Resellers to whom United Vaccines, CFE's subsidiary, already supplied the UV Mink Vaccines (…).»* This is undisputed. The important point here is that there is nothing in the record to suggest that any substantial market power accrued to Ceva in the US and Canada from its period of sales. Instead, CFE was (like its predecessor and affiliate United Vaccines) the party that enjoyed a strong market position and close customer relationships in the US and Canada, even though sales contracts, for a time, were routed through Ceva. Along these lines, CFE's statement that it is Ceva that has a monopoly position (presumably based on its manufacturing the products) is not borne out by the business realities in the record.

5.136. **194**
For these reasons, there is nothing in the record to suggest that Ceva has acquired or will acquire any kind of customer base or enjoy any kind of benefit from its direct contracting practices with customers. If anything, it is the other way around: Ceva's manufacturing has helped CFE build, expand and strengthen CFE's customer base and customer relationships enjoyed by it and its affiliate.

5.137. **195**
Along these lines, there is no need for the Court to examine the details of the DCC provisions on agency, since these provisions require at least some type of customer base and benefit to

Ceva before any kind of compensation would be warranted. It is sufficient here for the Court to note that agency must be examined based on the DCC provisions, which are mandatory law (governing the contract despite the parties' express exclusion of any kind of agency relationship), that the definition of agency appears to have been met (requiring a review of Article 7:442 DCC's rules on goodwill), but that the requirements for compensation, as set out in Article 7:442 DCC, have not been met for the reasons set out above. In addition to those reasons, the agreement is still in force (except perhaps a partial termination in respect of Biocom P; see the Court's analyses in this judgment) and that is an additional reason why no compensation should be ordered (at least not at this time).

5.138. **196**
There is one final point that should be addressed here. That is CFE's point that if there is no substantial benefit to Ceva, that is because of Ceva's failure to comply with its obligations. The Court rejects this point because the Court has dealt with Ceva's non-compliance in this judgment and will award appropriate damages. In the Court's view, these damages restore CFE to the position it would have had, absent the non-compliance, so that the matter of non-compliance is fully dealt with in this way. As a matter of law, there is no scope in Article 7:442 DCC to award goodwill compensation that might have been due if Ceva had fully complied with its obligations. And there is nothing in the record to suggest that Ceva would have enjoyed anything close to substantial benefits if it had fully complied with its obligations under the contract.

5.139. **197**
This analysis makes any further discussion of Ceva's other arguments on this topic unnecessary.

Conclusion with regard to Biocom-P 2022

5.140. **198**
The Court partially awards CFE's claims with regard to Biocom-P and declares that Ceva breached its contractual obligations under the CMA by not having Biocom-P available for purchase from 1 January 2022 onwards. The Court also declares that Ceva unlawfully terminated the CMA with regard to Biocom-P per 12 September 2022.

5.141. **199**
CFE is also seeking that the Court declare that Ceva exercised no or to little effort into making Biocom-P available for purchase and supply. The Court fails to see CFE's legally relevant interest in awarding this claim, given the fact that the Court is already declaring that Ceva breached the CMA on this point. This part of CFE's claim is therefore dismissed.

5.142. **200**
The Court also orders Ceva to compensate CFE for its loss suffered as a result of Ceva not having Biocom-P available for production, whereby the loss is estimated by the Court at the following amounts:

European market	€ 2,515,846.74
USA/Canadian market	€ 356,992.00
Total	€ 2,872,838.74

5.143. **201**
CFE is also claiming statutory interest over the awarded amount. As the awarded amount relates to damages, the statutory interest rate of Article 6:119 DCC applies. CFE is claiming the statutory interest as of 8 June 2022, being the date on which CFE received CFE's e-mail stating that it could neither produce nor deliver Biocom-P. Ceva has not opposed this. However, Accuracy has discounted future lost profits to 31 December 2022 to account for the time value and risk profile inherent to these future lost profits. Therefore the statutory interest will be awarded from this date.

Distemink 2023

5.144. **202**
CFE asserts that Ceva was to supply 6,000,000 doses of Distemink no later than in May 2023 and that Ceva imputably failed in this obligation by supplying only 4,435,000 doses.

5.145. **203**
Ceva disputes that it failed to deliver the agreed quantity of Distemink. According to Ceva, the parties only reached consensus about the delivery of 4,000,000 doses on 19 September 2022. Ceva asserts that CFE placed an order for 2,000,000 extra doses of Distemink on 16 March 2023 but contests that it accepted this order. According to Ceva, it did not accept CFE's order for the extra doses because it was confronted at that time with severe production and regulatory issues with regard to Distemink destined for the EU.

Has Ceva failed to fulfill its contractual obligations?

5.146. **204**
Pursuant to Article 35 CISG a seller must (inter alia) deliver goods which are of the quantity, quality and description required by the contract.

5.147. **205**
The Court is of the opinion that Ceva has successfully challenged CFE's assertion that the parties reached consensus on the delivery of 6,000,000 of Distemink doses, providing sufficient supporting arguments. The following is relevant in this regard.

5.148. **206**
By e-mail dated 15 September 2022 CFE inquired with Ceva about CFE's order of Distemink for 2023. CFE's e-mail, insofar as relevant, reads as follows:

> *«Hello [naam 3],*
>
> *We are in constant contact with our distributors and understood that US/Canada needs 2 million doses of Distemink for 2023. So, we want to order 2 million extra doses of Distemink. We still want to keep 3 million doses on hold. (…)»*

5.149. **207**
Ceva responded to this by e-mail dated the same day, insofar as relevant:

> *«(…) I confirm that Ceva Verona can produce 6 million doses of Distemink for 2023.*
>
> *As discussed with you over the phone today, beyond the order for 3 million doses as stated in your email below, please confirm a firm order for 4 million doses (3 million from your order below + 1 million more) and I can then plan a production of 2 million at risk to manage the extra orders you may have for delivery in 2023. Without this confirmation, Verona will only produce 3 million doses for delivery in 2023.»*

5.150. **208**
To which CFE responded by e-mail dated 19 September 2022, insofar as relevant:

> *«(…) I confirm that we will order 4 million doses Distemink for delivery 2023. (…)»*

5.151. **209**
Ceva subsequently thanked CFE for its confirmation by e-mail dated the same day.

5.152. **210**
In the Court's opinion, the foregoing demonstrates that the parties reached consensus about the delivery of 4,000,000 doses of Distemink for 2022. Ceva did indicate by its e-mail that it was, at that time, capable of producing an additional 2,000,000 upon request if necessary (*«at risk»*) however, given CFE's e-mail dated 19 September 2022, this was not yet the case.

5.153. **211**
By its e-mail dated 6 March 2023, CFE ordered 2,000,000 extra doses.

CFE's e-mail reads, insofar as relevant, as follows:

> *«(…) Above this we would like to order the extra 2 million doses of Distemink which you already produced, to be delivered as soon as possible. (…)*
>
> *We will send you separately the official order document.*
>
> *(…)*
>
> *Please confirm. (…)»*

5.154. 212
Subsequently, by e-mail dated 16 March 2023, CFE sent Ceva an order document, which indicated an ultimate delivery date of 31 May 2023.

5.155. 213
Ceva did not respond to either of CFE's e-mails of 16 March 2023 and asserts in this procedure that it never accepted CFE's additional order for 2,000,000 doses.

5.156. 214
Pursuant to Article 18(1) CISG acceptance of an offer requires a statement made by or other conduct of the offeree indicating assent to an offer. Silence or inactivity does not in itself amount to acceptance.

5.157. 215
It has neither been asserted nor established that Ceva subsequently confirmed the order for the additional 2,000,000 doses. In view of the foregoing, the Court establishes that the parties did not reach consensus on this point.

5.158. 216
Furthermore, Ceva asserts that, when it accepted CFE's original order for 4,000,000 doses, it was not yet aware of any future issues that might hinder the production of Distemink and it started production. Ceva asserts that, after a while, it established that the produced batches were not compliant with the requisite product specifications. According to Ceva, its subsidiary was required under US law to start an investigation, which it did in January 2023. This investigation took nine months, according to Ceva, and identified that the production process, specifically the lyophilization cycle and the moisture testing, was too fragile. Ceva states that the new raw material, which its subsidiary had to change as a consequence of the US government requisition with regard to COVID-19, destabilised production. Ceva asserts it hired an external expert who successfully redesigned the lyophilization cycle in May 2023. These amendments to the production process required approval by the regulatory authorities for the US and European markets. These approvals took time and, according to Ceva, a subsidiary of CFE failed to request approval from the regulatory authorities for the European market in a timely manner. In support of these assertions, Ceva has submitted a witness statement by Ms [naam 4] and [naam 5].

5.159. 217
CFE has not, or at least not on sufficiently reasoned grounds, contested these assertions. Therefore, the Court is of the opinion that these assertions by Ceva provided a valid reason for Ceva to not accept CFE's additional order for 2,000,000 doses of Distemink.

5.160. 218
The Court furthermore establishes that CFE's motion for increase of claims does not mention Ceva's assertions in this regard at all, despite the fact that these assertions were part of the debate in the summary proceedings about the 2023 purchase order for Distemink.

By its judgment of 19 January 2024, the NCCA found that, as a result of the production and regulatory issues as asserted by Ceva *«delivery to CFE of Distemink produced by Ceva for use*

in the EU is most likely not feasible in the near future. An immediate measure in this respect can therefore not be given.»[7] Considering that Ceva's assertions were clearly part of the debate and that CFE can therefore be assumed to be aware of them, the Court is of the opinion that it was CFE's duty to address these assertions in its motion for increase of claims. By failing to do so, CFE has not represented the facts in full. Pursuant to Article 21 DCCP, the Court may draw such adverse inferences as it deems appropriate from this.

The Court therefore holds that CFE's failure to represent the facts in full warrants the dismissal of CFE's claims on this point and justifies the conclusion that CFE will not be given the opportunity to respond to Ceva's assertions included in its statement of defence regarding CFE's increase of claims.

5.161. **219**
The conclusion is that the Court will dismiss CFE's claims with regard to Distemink 2023.

Distemink 2024

5.162. **220**
CFE asserts that Ceva was to supply 6,000,000 doses of Distemink no later than in May 2024 and that Ceva imputably failed in this obligation by not supplying any Distemink for the 2024 vaccination season. According to CFE, Ceva tried to impose unreasonable price increases that were not in accordance with the CMA.

5.163. **221**
Ceva disputes that the parties reached consensus about the supply of Distemink for the 2024 vaccination season. According to Ceva, it was not in a position to accept CFE's order due to the production and regulatory issues mentioned above.

Did the parties reach consensus about the supply of Distemink for 2024?

5.164. **222**
Pursuant to Article 23 CISG, a contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of the CISG.

Under Article 14(1) and 15(1) CISG, a proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provisions for determining the quantity and the price. An offer becomes effective when it reaches the offeree. Based on Article 17 CISG, an offer is terminated (*vervalt*) when a rejection reaches the offeror. **223**

5.165. **224**
According to the Court, the parties did not reach consensus about the supply of Distemink for the 2024 vaccination season. The following is relevant in that regard.

[7] NCCA 19 January 2024, ECLI:NL:GHAMS:2024:131, paragraph 4.7 to 4.9.

5.166. **225**
By e-mail dated 12 July 2023, CFE sent a purchase order to Ceva. CFE's e-mail reads, insofar as relevant, as follows:

> *«(…) Enclosed I sent you the Distemink order for 2024. Already on June 28th 2023 we informed you that we need at least 6.000.000 doses of Distemink.*
>
> *Please confirm this order. (…)»*

5.167. **226**
CFE's e-mail contained a purchase order, mentioning *«Distemink Vet 250D»* with a quantity of *«24.000»* and a *«net unit exw price (USD)»* of $ 99,00.

5.168. **227**
Ceva responded to this by e-mail dated 13 July 2023, insofar as relevant, as follows:

> *«(…) Thank you for the order of Distemink. However, I can not accept this order as the price stated (99.00 USD) is not an agreed price between Ceva and CFE.*
>
> *Under these circumstances, I am afraid Ceva will not deliver Distemink in 2024. (…)»*

5.169. **228**
Prior to this, the parties corresponded by e-mail about the price for Distemink for 2024. In this correspondence, Ceva took the position that the parties first needed to agree on the price before CFE could place an order. Ceva also proposed a price increase. CFE, on the other hand, asserted that the parties were entitled to rely on the price list applicable until 1 January 2024.

5.170. **229**
The foregoing, in the Court's opinion, allows for no other interpretation than that Ceva rejected CFE's offer by its e-mail of 13 July 2023, as a result of which CFE's offer was terminated (*vervallen*). Although CFE's e-mail can be considered a sufficiently definite proposal in accordance with Article 14(1) and 15(1) CISG, it is evident from Ceva's reply that it refused this proposal because it did not agree with the proposed prices by CFE. The preceding correspondence between the parties further underlines this. CFE has argued that the parties under the CMA had agreed pricing systematics and that therefore Ceva was not in a position to refuse CFE's order. The price of the vaccines had to and could be determined following the CMA's pricing systematics.

5.171. **230**
The CMA indeed contains provisions on pricing. However, the Court does not have to explore this, because based on the foregoing considerations with regard to the production and regulatory issues for Distemink in 2023, the Court also agrees with Ceva that its assertions on this point, which have not been contested by CFE on sufficiently reasoned grounds, provide a valid reason to reject CFE's order for 2024. These issues mainly occurred with Distemink destined for the European market, but the Court is of the opinion that CFE has insufficiently substantiated for which market its order for 2024 was intended. It is not the responsibility of the Court to figure that out.

5.172. 231
The Court therefore dismisses CFE's claims with regard to Distemink for 2024.

Distemink 2025

5.173. 232
CFE asserts that Ceva is contractually obliged to supply 6,000,000 doses of Distemink no later than in May 2025 in compliance with the CMA and that an anticipatory breach exists regarding this obligation. According to CFE, Ceva already indicated that it will not supply the ordered quantities at a price calculated based on the agreed pricing systematics and is therefore obliged to compensate CFE for its damages.

5.174. 233
Ceva acknowledges that it accepted CFE's order for 6,000,000 doses of Distemink. Ceva notes, however, that the parties still need to reach an agreement on the price since the CMA only stipulates prices until 1 January 2024.

Did the parties reach consensus about the supply of Distemink for 2025?

5.175. 234
The Court considers that CFE's 2025 order of 6,000,000 doses of Distemink is an established fact, since Ceva acknowledges this. Also, Article 55 CISG leaves the option open to agree on the sale and delivery of certain goods, while no agreement has yet been reached on the price. Therefore, the mere fact that the parties still need to (or may not) reach agreement on the price does not preclude the formation of consensus.

Should it be anticipated that Ceva will fail to fulfill its contractual obligations?

5.176. 235
CFE asserts that Ceva is wrongly insisting that the parties still need to agree on a price for CFE's 2025 order of Distemink. According to CFE, by taking this position, Ceva is effectively refusing to commit to supplying Distemink and is violating its obligations towards CFE. CFE asserts that this constitutes an anticipatory breach, taking into account the agreed provisions of the CMA and the fact that Ceva, according to CFE, disregarded its duties in the past.

5.177. 236
Ceva asserts that it is currently producing Distemink and disputes that there is an anticipatory breach.

5.178. 237
The Court is of the opinion that CFE has insufficiently substantiated that there is an anticipatory breach by Ceva. After all, CFE does not dispute that Ceva is currently producing Distemink and Ceva, when asked during the hearing, explicitly reiterated this. With respect to the price of the vaccines, CFE has expressed its willingness to discuss (reasonably) adjusted prices. Parties have tried to discuss this in the autumn of 2024, but meetings on this subject apparently have not yet taken place. While Ceva asserts that the parties have not yet reached consensus on the price, the Court notes that CFE has not filed a claim in these proceedings

seeking the determination or establishment of the price, while it could have done so. Instead, CFE is claiming damages. In the Court's opinion, this claim is therefore premature.

5.179. **238**
The Court therefore dismisses CFE's claims with regard to Distemink for 2025.

Was Ceva entitled to terminate (opzeggen) the CMA regarding Distemink as of 12 September 2025?

5.180. **239**
CFE asserts that Ceva has unlawfully terminated the CMA with regard to Distemink as of 12 September 2025. CFE states that the CMA has an initial term of 15 years and that it can only be terminated earlier in limited and specific cases as described in the CMA, on account of to the agreed importance of long-term and reliable supply of mink vaccines. CFE asserts that Ceva's termination letter does not rely on the termination options as agreed in the CMA, nor any other (alleged) legal ground for termination. According to CFE, Article 12(4) of the CMA does contain a termination option «for convenience», but only after the calendar year 2024 and with a notice period of three years. CFE states that this can lead to a termination as of 1 January 2028 at the earliest.

Therefore, Ceva's termination of the CMA with regard to Distemink as of 12 September 2022 was unlawful.

5.181. **240**
Ceva explicitly disputes that its termination of the CMA with regard to Distemink was unlawful. In support of this, Ceva asserts that it was the parties' intention that Ceva's affiliate had the right to terminate at any time for convenience by virtue of Article 12(4) of the CMA, subject to a prior three-year notice and provided that the effective termination will not occur before 1 January 2025. According to Ceva, this means that the effective termination had to take place after the 2024 calendar year, but the three-year notice period could start before 1 January 2025.

5.182. **241**
According to the Court, Ceva's reasoning fails. A reasonable interpretation of the parties' intent implies that Ceva was not entitled to terminate the CMA on 12 September 2025. The following is relevant in that regard.

5.183. **242**
According to established case law from the Supreme Court, a purely linguistic interpretation of a contractual provision is not decisive. It also matters what the parties could reasonably be expected to attribute to (the provisions of) the contract under the given circumstances, and what they could reasonably expect from each other.[8] Relevant factors may include the context in which the parties are acting, the nature of the parties and prior correspondence and negotiations.[9] However, other conduct, statements, and circumstances that have arisen after

[8] Supreme Court 13 March 1981, ECLI:NL:HR:1981:AG4158.
[9] Supreme Court 5 April 2013, ECLI:NL:HR:2013:BY8101; Supreme Court 7 February 2014, ECLI:NL:HR:2014:260.

the conclusion of the contract may also be relevant for the interpretation a contractual provision.[10]

5.184. **243**
The analysis must start with the language of the contract. Article 12(4) CMA contains the termination clause for convenience. The article reads as follows :

> *«After the calendar year 2024 Biomune shall have the right to terminate the Agreement for convenience only taking into account a notice period of three years.»*

5.185. **244**
The Court notes that Articles 12(3)–12(6) CMA have a clear and consistent structure. Each of these Articles includes the phrase «shall have the right to terminate the Agreement» in a specific context:

i. Article 12(3) grants Biomune the *«right to terminate» «during the full term»* of the CMA in the event of negative publicity or media attention, with a three-year notice period;

ii. Article 12(4) grants Biomune the *«right to terminate»* for convenience *«after the calendar year 2024»*, with a three-year notice period;

iii. Article 12(5): grants both parties a *«right to terminate»* (with no reference to time), in the event of a fundamental breach (not cured or incurable), with a three-year notice period;

iv. Article 12(6) grants both parties a *«right to terminate the Agreement with immediate effect by giving written notice»* in the event of bankruptcy or similar circumstances (there is no three-year notice period).

5.186. **245**
It is noteworthy that Article 12(6) uses the terms (a) *«immediate effect»* and (b) *«terminate… by giving written notice»*, while Articles 12(3)–12(5) mandate a three-year notice period. Along these lines, the Court's opinion is that the word «terminate» in this context clearly means «give notice of termination», which may be either «with immediate effect» (12(6)) or subject to a three-year «notice period» (12(3)–12(5)).

5.187. **246**
This clear and consistent structure is, in the Court's view, a persuasive indication that the phrase *«after the calendar year 2024 Biomune shall have the right to terminate…»* in Article 12(4) means notice of termination may be given after that calendar year. In other words, the phrase *«after the calendar year 2024»* refers to the time when notice of termination may be given; the phrase does not refer to the time when the *«notice period»* (of three years following notice of termination) expires.

[10] Supreme Court 12 Oktober 2012, ECLI:NL:HR:2012:BX5572.

5.188. **247**
This analysis is confirmed by the documents submitted regarding the negotiations on the CMA. The Court focuses on these documents below.

5.189. **248**
The Court notes CFE's e-mail to Ceva dated 4 February 2020. From this e-mail, the Court infers that Ceva indicated in the contract negotiations that it requested an option to terminate the agreement in the event that Ceva's affiliate intended to stop manufacturing the products. CFE's e-mail reads, insofar as relevant, as follows:

> *«(…)* ***Revised drafts***
>
> *First, please find attached the revised draft and a markup. I have drafted the revised agreement further to our call of January 27, 2020. In this call it was my understanding that our first draft was agreed upon on the broad lines. I have noted the following remaining points from the side of Biomune/Ceva:*
>
> *(…)*
>
> 4. *Ceva/Biomune request the right to terminate the agreement in the event that Biomune intends to stop manufacturing the products for example in the event that material investment should be made to continue manufacturing of the products. In case of termination of the agreement CFE and Biovet will acquire all master seeds, production files etc. from Biomune to enable them to take over the production itself or via a third party (this is also a new point in the negotiations which should be discussed); (…)»*

5.190. **249**
CFE's lawyer also sent an e-mail to Ceva dated 6 February 2020. In this e-mail, CFE raised objections to the termination option as proposed by Ceva. CFE stressed that it was its intention to enter into a long-term collaboration. CFE proposed an initial contract term of three years, during which Ceva's affiliate was not entitled to terminate the agreement. CFE also proposed that after this initial term, the parties could terminate the agreement taking into account the agreed notice period of three years. This would render the possibility for CFE and its affiliates to build up stock in preparation of searching an alternative supplier. CFE's e-mail reads insofar as relevant, as follows:

> *«(…) Term of the agreement*
>
> *Parties have agreed in an earlier stage upon a term of 15 years. You now have suggested that you would like to be able to terminate the agreement for convenience at any period in time taking into account a notice period of three years. As discussed, this amendment would have a major impact on the agreed outline of the collaboration and there would not be a solid or long term basis for Wim and Flemming to invest in the collaboration and the further development of the market and their network.*
>
> *[naam 6] and [naam 7] have suggested to agree upon an initial fixed period of three years during which the agreement cannot be terminated. During this initial term Biomune is not entitled to terminate the agreement. The only exception would be a*

right to terminate in the event that Ceva or Biomune is forced to terminate the production vaccines due to an attack of third parties. In such case the terminating party should take into account the notice period of three years and during the notice period US Newco, Biovet and CFE may built up stock to further prepare for a transitional period in which they can seek an alternative supplier. Biomune will enable US Newco, Biovet and CFE to take over the production itself or via a third party by transferring all master seeds, production files etc. After the initial term parties may terminate the agreement taking into account the agreed notice period of three years. During the notice period US Newco, Biovet and CFE may built up stock to further prepare for a transitional period in which they can seek an alternative supplier. Biomune will enable US Newco, Biovet and CFE to take over the production itself or via a third party by transferring all master seeds, production files etc. (…)»

5.191. **250**
Ceva also submitted an early draft of the CMA by Ceva dated 8 February 2020. Article 7(2) of this draft included an option for Ceva to terminate for convenience. This article reads, insofar as relevant, as follows:

«(…)

(b) Ceva may terminate this Agreement:

(i) by providing Customers 3-years prior written notice, if any Party, or their respective Affiliates or customers becomes the subject of negative publicity or media attention in connection with or related to the Products; or

(ii) for any reason following the commencement of the Minimum-Purchase-Quantity Period by providing Customers 3-years prior written notice. (…)»

5.192. **251**
By e-mail dated 11 February 2020, CFE informed Ceva that it agreed with including an option to terminate the CMA for convenience, taking into account a three years notice period as from 2025 and the following years of the term. CFE's e-mail reads, insofar as relevant, as follows:

«(…) In short, making detailed comments and changes was given the above and the very tight timing from Ceva side not viable (and would have cost all lot of time and money). Therefore we changed our earlier draft and included the new agreements made, including:

(…)

5. termination for convenience only, taking into account a three years notice period as from 2025 and following years of the term; (…)»

5.193. **252**
Furthermore, Ceva submitted an early draft of the CMA by CFE dated 11 February 2024. This draft contains under Article 13(4) the termination clause as agreed upon in the definitive version of the CMA.

5.194. 253
The Court is of the opinion that the documents as set forth above, in particular CFE's e-mail dated 6 February 2020, show that it was (at least) CFE's intention that Ceva could only terminate the agreement after 1 January 2025 and that Ceva had to observe a subsequent notice period of three years. The case file contains no documents from which it can be inferred that Ceva subsequently responded to the positions as expressed by CFE in its e-mail dated 6 February 2020, nor that Ceva insisted on a more extensive termination clause before entering into the CMA.

5.195. 254
This leads to the Court's conclusion that a reasonable person in the same circumstances as the parties would not have interpreted the parties' intent in any manner other than that Ceva was only allowed to terminate the CMA after 1 January 2025 and that it had to observe a subsequent notice period of three years. This would terminate the CMA per 1 January 2028 at the earliest.

5.196. 255
The Court therefore allows CFE's claim on this point and declares that Ceva was not entitled to terminate the CMA regarding Distemink per 12 September 2025.

Costs incurred to assess liability/damages

5.197. 256
CFE claims € 304,985.15 for costs incurred to assess liability/damages. These costs consist of € 77,405.22 for the Accuracy report, € 15,881.25 for the addendum to the Accuracy report and € 211,698.68 for legal advice from its lawyers. The Court considers that costs of litigation is a question of procedural law which is not covered by the CSIG.[11] The costs at hand are, in the opinion of the Court, not damages as referred to in Article 74 CSIG, but rather procedural costs which are determined under domestic, i.e. the law of the Netherlands.

5.198. 257
Under Dutch law, Article 6:96(2)(b) DCC addresses the question if and to what extent costs for determining damages and liability may be awarded. Reasonable costs for determining liability may be awarded if it was reasonable that these costs were made.

5.199. 258
Regarding the costs for the Accuracy report and the addendum, the Court is of the opinion that CFE, in given circumstances, reasonably incurred these costs and the costs are reasonable in light of the complexity of the claim. Ceva has successfully disputed the legal basis of the claim in this regard, namely that these costs cannot be awarded under Article 74 CSIG, but it has not stated that the costs are unreasonable or unreasonably made. The costs for the Accuracy report and the addendum to the Accuracy report will therefore be awarded.

[11] U.S. Court of Appeals (7th Circuit), 19 November 2002, Case no./docket no. 01-3402, 02-1867, 02-1915 *(Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Comp)*.

5.200. 259
As far as the claimed costs for legal advice are concerned, Ceva has put forth that it is unclear to what extent these costs for services rendered by CFE's lawyers are distinct from those claimed under CFE's claim for the costs of the legal proceedings. CFE has argued that the submitted invoices appear to be lawyers' fees that may have no connection to the assessment of liability and/or damages. Furthermore, the invoices span a period of over a year, during which CFE brought three litigations against Ceva. It is according to Ceva not possible for Ceva to determine whether the claimed fees belong to other proceedings or advice related to CFE's actions against Ceva. The Court considers that legal expenses could relate to legal services rendered for determining liability and/or damages, but they may also relate to legal services which are compensated under the awarded legal costs or awarded cost for extrajudicial services as meant under Article 6:96(2)(c) DCC. It is up to CFE to sufficiently clarify why the legal costs pertain to the determination of damages and/or liability in this case. CFE has submitted invoices from the law firm it engaged, but it has not provided any further clarification. The Court is therefore of the opinion that CFE has not sufficiently substantiated its claim in this regard and the claim in this respect will therefore be denied.

5.201. 260
CFE has also claimed statutory interest over these costs. As the awarded amount relates to damages, the statutory interest rate of Article 6:119 DCC applies. CFE has not specified when it paid the costs Ceva has to compensate. The statutory interest will be therefore be awarded from the date of this judgment.

Enforceability notwithstanding appeal

5.202. 261
For the event that the Court were to award CFE's claims, Ceva puts forward a defence against the provisional enforceability sought by CFE. According to Ceva, CFE has insufficiently substantiated that it has an urgent interest in enforceability notwithstanding appeal.

5.203. 262
If the requested enforceability notwithstanding appeal is contested, the parties' interests in this matter must be weighed. The question that must be answered in that respect is whether the interest of the party requesting enforceability notwithstanding appeal outweighs the interest of the opposing party in maintaining the existing situation until the judgment has become final and binding or a decision has been made on any appeal.[12]

5.204. 263
The Court holds that CFE's interest in enforceability notwithstanding appeal outweighs Ceva's interest in maintaining the existing situation. It is relevant in this regard that it has been established in these proceedings that Ceva partially failed to fulfill its agreements with CFE and that, as a result, CFE suffered substantial loss. In the Court's opinion, it cannot reasonably be required of CFE to wait for compensation of its loss until this judgment has becomes final and binding or until a decision has been made on any appeal. Ceva has also failed to

[12] Supreme Court, 29 November 1996, ECLI:NL:HR:1996:ZC2215.

substantiate on sufficiently reasoned grounds why its interest in maintaining the existing situation should outweigh CFE's interest in compensation of its loss.

5.205. 264
The Court therefore disregards Ceva's defence and declares this judgement enforceable notwithstanding appeal.

Costs of the proceedings

5.206. 265
Ceva, as the more unsuccessful party, will be ordered to pay CFE's costs of process. The cost order is based on the NCC rates for assessing lawyers' fees (see Annex III to the NCC Rules). With regard to CFE's lawyer's fee the Court grants an amount equal to 3.0 points (i.e. 1.0 for the writ of summons and 2.0 for the hearing).

Though CFE has submitted a motion for increase of claims, the Court dismisses most of the claims brought forward in this motion. Therefore no lawyer's fee is granted for this motion.

5.207. 266
The costs on the part of CFE are set at:

- writ of summons (service)	€ 106,73	
- court fee	€ 15,856.00	
- lawyer's fee	€ 13,500.00	(3,0 × € 4,500.00)
total amount	€ 29,462.73	

6 Conclusion and order

THE COURT: 267

6.1.
declares that Ceva was contractually obliged to supply 14,000,000 ml Febrivac 3 Plus and 9,000,000 ml Febrivac Dist no later than in May 2022 and that Ceva imputably failed in this contractual obligation by supplying only 4,354,250 ml Febrivac 3 Plus and 1,347,250 ml Febrivac Dist, and that CFE by its letter dated 18 July 2022 avoided the individual purchase agreements between the parties with regard to the undelivered quantities of Febrivac 3 Plus and Febrivac Dist,

6.2.
declares that Ceva was contractually obliged to supply 2,600,000 ml Distemink and that Ceva imputably failed in this contractual obligation by not delivering 267,500 ml of Distemink and that Ceva is obliged to compensate CFE for losses to an amount of € 2,695.00 to be increased by the statutory interest from 7 July 2022 until the day of full payment,

6.3.
declares that Ceva was not entitled to terminate the CMA regarding Distemink per 12 September 2025,

6.4.
declares that Ceva breached its contractual obligations under the CMA towards CFE by not having Biocom-P available for purchase from 1 January 2022 onwards and by unlawfully terminating the CMA with regard to Biocom-P per 12 September 2022,

6.5.
orders Ceva to compensate CFE for the loss suffered as a result of Ceva not having Biocom-P available for production from 1 January 2022 onwards and unlawfully terminating the CMA with regard to Biocom-P as of 12 September 2022, whereby the damages are determined at the amount of € 2,872,838.74, to be increased by the statutory interest from 1 January 2023 until the day of full payment,

6.6.
orders Ceva to compensate CFE for the costs it incurred to assess its loss at the amount of € 93,286.47 to be increased by statutory interest from the date of this judgment until the day of full payment,

6.7.
orders Ceva to pay to CFE the costs of these proceedings, set at € 29,462.73, whereby the costs of these proceedings must be increased by statutory interest from seven days after service of this judgment until the day of full payment,

6.8.
declares this judgment enforceable notwithstanding appeal,

6.9.
dismisses any other claims.

Done by A.C. Bordes, L.S. Frakes and D.E. Alink, Judges, assisted by E.F.M. Houbiers, Clerk of the Court.