MPC ARBITRATION

Arbitral judgment on the motion for the Arbitral Tribunal to decline jurisdiction rendered by Messrs S. [redacted] A.M. [redacted] and P. [redacted] in the arbitral proceedings between:

[redacted] **B.V.**
A private limited company established under Netherlands law and registered in [redacted], the Netherlands
represented by mr. M. [redacted]
Applicant in the original claim and defendant in the motion for the Arbitral Tribunal to decline jurisdiction
hereafter also called "[redacted]

and

[redacted] **Sp. Z.O.O.**
a private limited company established under Polish law and registered in [redacted], Poland
represented by mr. K.C. [redacted]
Defendant in the original claim and applicant in in the motion for the Arbitral Tribunal to decline jurisdiction
hereafter also called "[redacted]

1. **Procedure**

1.1 By letter of 20 March 2019 [redacted] has filed a request for arbitration under the MPC arbitration regulations (2013) against [redacted]

The dispute relates to an action for performance by [redacted] on [redacted] for delivery of 933.500 kilograms fat filled milk powder (instant, 28%, fat) subject to a penalty payment for non-performance.
In addition, [redacted] has asked that [redacted] would be ordered to pay the costs of the arbitration proceedings including costs of legal assistance.

1.2 The arbitration request was forwarded to [redacted] by registered letter of 22 March 2019. [redacted] has confirmed receipt of the arbitration request.

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

1.4 Parties have been advised that mr. B. Niemeijer was appointed secretary to the arbitration procedure and both parties duly have filed a list of preferred persons to be appointed as arbitrators to the proceedings in accordance with the listing procedure of the MPC arbitration regulations (2013) (hereafter also called the "**Arbitration Regulations**").

[redacted] and [redacted] have been advised that in accordance with the Arbitration Regulations, Mr. S. [redacted] (domiciled in [redacted] The Netherlands), Mr A.M. [redacted] (domiciled in [redacted] Belgium), and Mr P. [redacted] (domiciled in [redacted], France) have accepted their appointment as arbitrators in these

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

1.5 Parties were advised that the arbitration proceedings shall be conducted in the English language in accordance with article 12 sub 5 of the Arbitration Regulations.

1.6 Arbitrators have in accordance with article 11 of the Arbitration Regulations determined that the formal place of arbitration shall be The Hague, The Netherlands.

1.7 In accordance with the Arbitration Regulations parties were given the opportunity by letter of 12 April 2019 to ask for an immediate hearing in case both parties wished to do so without further exchange of statements. Parties did not request an immediate hearing. [redacted] did not used the opportunity to elucidate its claim after which [redacted] was allowed to file its statement of defence.

1.8 [redacted] has filed a statement on 8 May 2019 containing a motion for the Arbitral Tribunal to decline jurisdiction.

1.9 Subsequently [redacted] has filed a statement of defence in the motion for the Arbitral Tribunal to decline jurisdiction on 29 May 2019.

1.10 By letter of 7 June 2019 the Arbitral Tribunal has advised parties that it would first render its judgement on the motion to decline jurisdiction. Neither party has requested a hearing.

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

- arbitration request ([redacted] dated 20 March 2019;
- statement of defence ([redacted] containing a motion to decline jurisdiction dated 8 May 2019;
- statement of defence ([redacted] in the motion to decline jurisdiction 29 May 2019;

2. The facts

2.1 In so far as relevant for the motion to decline jurisdiction parties have brought forward and have not or not with sufficient substantiation disputed the following facts.

2.2 [redacted] and [redacted] have entered into two agreements for the sale and purchase fat filled milk powder.

2.3 In this respect [redacted] has sent [redacted] two purchase confirmations dated 13 November 2018 no. 64349 (hereinafter referred to as the **Purchase Confirmation '49**) respectively dated 3 December 2018 no. 64395 (hereinafter referred to as the **Purchase Confirmation '95**). The Purchase Confirmation '49 contains the following:

"(...)

[redacted], *13 November 2018*

PURCHASE CONFIRMATION N0.64349

We herewith confirm the following transaction :

Product :	*Fat filled milk powder instant, 28% fat*
Quality :	*According to EU-regulation 852/04 and 853/04* *According to [redacted] specifications dated 01.12.2016* *26% or 24% Protein*
Quantity :	*450.000 kg*
Packaging :	*Multiply paper bags with polyethylene innerbag heat-sealed, netweight 25 kg*
Pallets ;	*Single use pallets*
Price :	*EUR 1.580,00 / 1000 kg*
INCO Terms (2010) :	*FCA - Suwalki, Poland.*
Delivery :	*December 2018* *January 2019*
Payment :	*Within 14 days after date of delivery*
Details :	*MPC-conditions (see : www.[redacted]com)*
Option:	*Price of 1580/ton for 26% protein or 1550/ton for 24% protein*

2.4 The Purchase Confirmation '95 contains the following:

[redacted], *03 December 2018*

PURCHASE CONFIRMATION N0.64395

We herewith confirm the following transaction

Product :	*Fat filled milk powder Instant, 28% fat*
Quality :	*According to EU-regulation 852/04 and 853/04* *According to [redacted] specifications dated 01.12.2016* *26% or 24% Protein*
Quantity:	*600.000 kg*
Packaging :	*Multiply paper bags with polyethylene innerbag heat-sealed, netweight 25 kg*
Pallets :	*Single use pallets*
Price:	*EUR 1.600,00 / 1000 kg*
INCO Terms (2010) :	*FCA - Suwalkl, Poland.*
Delivery:	*January 2019 - 200mt* *February 2019 - 400mt*
Payment:	*Within 14 days after date of delivery*
Details :	*MPC-conditions (see : www.[redacted]com)* *Option: Price of 1580/ton for 26% protein or 1550/ton tor 24% protein"*

2.5 [redacted] has sent [redacted] to Sales Confirmations dated 14 November 2018 S20182232 (hereinafter referred to as the **Sales Confirmation '32**) respectively 6 December 2018 S20182303 (hereinafter referred to as the **Sales Confirmation '03**).

2.6 Sales Confirmation '32 contains the following:

"(...)

Product :	*Instant Fat Filled Milk Powder, 26% protein , 28% fat, dark yellow* *Accordance [redacted] spec.* *for iFFMP 24/28 EUR 1550*
HS code	*19019099*
Pallets	*One way pallets*
Packaging	*Multiply paper bags with polyethylene innerbag heat-sealed, netweight 25 kg*
Origin	*PL*
Quantity(net)	*450.000 kg*
Price	*EUR 1.580,00 per 1000 kg*
Terms of Delivery	*FCA, Suwalki*
Quality	*as per agreed spec*
Tradeterms	*Incoterms • 2010*
Delivery date	*December 2018 225,000 kg* *January 2019: 225,000 kg*
Payment Terms	*Within 14 days after date of collection*
Remarks	

We work towards our genera! terms and conditions and to MPC conditions for dairy products. See attached or see website www.[redacted].com. Please return a copy signed and stamped.
GFSI: All suppliers of the products and services have standards approved by GFSI (www.mygfsi.com) or they are supervised m any other way by [redacted] Sp. z o.o. to fulfil all needed requirements BRC: Current specification for liquid products are available on our website: www.[redacted]com and for all other products, please see attachment."

2.7 Sales Confirmation '03 contains the following:

"(...)

Product:	*Instant Fat Filled Milk Powder, 26% protein , 28% fat, dark yellow* *Accordance [redacted] spec.* *for iFFMP 24/28 EUR 1570*
HS code	*19019099*
Pallets	*One way pallets*
Packaging	*Multiply paper bags with polyethylene innerbag heat-sealed, netweight 25 kg*
Origin	*PL*
Quantity(net)	*600.000 kg*
Price	*EUR 1.600,00 per 1000 kg*
Terms of Delivery	*FCA, Suwalki*
Quality	*as per agreed spec*
Tradeterms	*Incoterms • 2010*
Delivery date	*January 2019 200,000 kg* *February 2019: 400,000 kg*
Payment Terms	*Within 14 days after date of collection*

Remarks *All previous claims are settled*

We work towards our general terms and conditions and to MPC conditions for dairy products. See attached or see website www.[redacted]com. Please return a copy signed and stamped.
GFSI: All suppliers of the products and services have standards approved by GFSI (www.mygfsi.com) or they are supervised m any other way by [redacted] Sp. z o.o. to fulfil all needed requirements BRC: Current specification for liquid products are available on our website: www.[redacted]com and for all other products, please see attachment."

2.8 [redacted] has delivered 116,500 kilograms of milk powder to [redacted] which has been paid for by [redacted]

3. **The motion to decline jurisdiction**

3.1 [redacted] has filed a motion to decline jurisdiction. The motion to decline jurisdiction is based in summary on the argument presented by [redacted] that parties have not agreed to MPC-arbitration.

3.2 [redacted] argues that the Purchase Confirmations from [redacted] were not accepted by [redacted] and that parties have concluded agreements by phone and that the Purchase Confirmations are sent after an agreement was entered in to by parties.

3.3 [redacted] furthermore argues that there is no agreement for MPC Arbitration because [redacted] general terms and conditions are applicable. [redacted] argues that its Sales Confirmations refer to its general terms and conditions and these general terms and conditions apply if and when these conditions deviate from the conditions set out in the MPC Conditions.

More substantially [redacted] has argued that under the Convention on [redacted] Sale of Goods (CISG) parties have neither agreed to any jurisdiction as set out in the general terms and conditions nor as set out in the MPC Conditions and therefore as there is a battle of the form the "knock out rule" brings about that neither the jurisdiction in the general terms of conditions of [redacted] nor the MPC Conditions should apply, but Polish courts are competent.

4. **Defence against the motion**

4.1 [redacted] has contested the motion to decline jurisdiction. [redacted] has based its defence in summary on the following.

4.2 [redacted] argues that it is customary in the industry and specifically in the relationship between [redacted] and [redacted] to consult on a buy and sell agreement by phone and after that to confirm this by a written confirmation in which reference is made to the MPC Conditions. Earlier agreements with [redacted] were concluded in the same manner as the Purchase Confirmations.

4.3 [redacted] contests that the Purchase Confirmations are to be assessed as an offer which is accepted by [redacted] Sales Confirmations.

4.4 [redacted] argues that the Sales Confirmation also cannot be assessed as a counter-offer as the Sales Confirmation does not deviate from [redacted] Purchase Confirmations as far as price, term of delivery, quality, conditions of delivery, payment, price etc.is concerned. [redacted] contest that the general terms and conditions which have been submitted by [redacted] in the proceedings are actually [redacted] general terms and conditions.

4.5 Moreover [redacted] argues that [redacted] Confirmations themselves refer not only to their general terms and conditions but also to the MPC Conditions and that any uncertainty as to which conditions apply must not be rewarded. Since [redacted] referred to the MPC Conditions on its own Sales Confirmation the MPC Conditions should apply.

5 **Competence of the Arbitral Tribunal**

5.1 The Arbitral Tribunal will hereinafter assess whether the parties have entered into a valid arbitration agreement under the MPC Conditions. Whether MPC arbitration has been validly agreed must be assessed in accordance with the law applicable to the purchase agreements concluded between parties.

5.2 Based on the laws of the Netherlands, specifically article 1051 DCCP the Arbitral Tribunal shall have the power to decide on its own jurisdiction. The Arbitral Tribunal shall have jurisdiction if an agreement to arbitrate is proven in accordance with article 1021 DCCP. In this regard, contrary to what [redacted] has argued in its defence, it is sufficient that a written document refers to general conditions which provide for a choice for arbitration and which was (implicitly) accepted by the opposing party.

5.3 The Arbitral Tribunal considers that it is not disputed that parties have entered in to two purchase agreements for 450,000 kilograms respectively 600,000 kilograms of fat filled milk powder. Parties have executed these contracts partly.

5.4 The Arbitral Tribunal considers that the CISG in principle shall apply to the purchase agreements concluded between parties, given the [redacted] nature of this purchase and the fact that this convention applies materially, formally and temporally. Whether MPC Conditions have become part of the agreements is determined within the framework of the CISG according to the rules that apply to the conclusion and interpretation of agreements.
The Arbitral Tribunal is of the opinion that the MPC Conditions shall form part of the agreements if at the time of the conclusion of the agreements the parties have explicitly or tacitly agreed to the incorporation of these terms and conditions in the agreement and that both parties had a reasonable opportunity to become acquainted with these terms and conditions.

5.5 Furthermore, it considered that the applicability of general terms and conditions to purchase agreements is not explicitly regulated in the CISG. The "CISG Advisory Council opinion no 13, inclusion of standard terms under the CISG" (hereinafter: Opinion 13) states that "(...)*The inclusion of standard terms under the CISG is determined according to the rules for the formation and interpretation of contracts under the CISG. Standard terms are included in the contract where the parties*

have expressly or impliedly agreed to their inclusion at the time of the formation of the contract and the other party had a reasonable opportunity to take notice of the terms. (...)"

5.6 [redacted] disputes the inclusion of the MPC Conditions and therefore the agreement to MPC arbitration because the Purchase Confirmations of [redacted] was sent after parties have reached an oral agreement on the purchase of fat filled milk powder.

5.7 The Arbitral Tribunal rejects this defence of [redacted] The Arbitral Tribunal considers that inclusion of the MPC Conditions into the offers can be done implicitly or can be inferred from the negotiations between parties or the practice which has developed between them. In this respect the Arbitral Tribunal considers relevant that parties have concluded purchase agreements in the past under the MPC Conditions in similar fashion. The Purchase Confirmations with inclusion of the MPC Conditions sent by of [redacted] after an oral agreement reflect to the opinion of the Arbitral Tribunal the practice between parties and is known practice in the industry.

5.8 In addition the Arbitral Tribunal finds that the Sales Confirmations sent by [redacted] contain the same essential elements to the purchase agreements and these essential elements do not deviate from the Purchase Confirmations of [redacted] The Sales Confirmations of [redacted] state in this respect: *"We work towards our general terms and conditions and to MPC conditions for dairy products"*. The Arbitral Tribunal is of the opinion this does not alter the terms of the Purchase Confirmations. The said sentence clearly refers to the applicability of the *"MPC Conditions for dairy products"*.

5.9 The aforementioned brings about that the Arbitral Tribunal is of the opinion that the Sales Confirmations is not considered a counter offer but a confirmation of the agreements parties have concluded. In this respect the Arbitral Tribunal considers that reference to the general terms and conditions of [redacted] in the Sales Confirmations does exclude the inclusion of the MPC Conditions for dairy products. [redacted] has argued that its own terms and conditions are to prevail above the MPC Conditions. However, [redacted] did not shown nor substantiate adequately why or how its own terms and conditions would prevail above the MPC Conditions. Since [redacted] also works with the MPC Conditions it is ~~to~~ the clear understanding of the Arbitral Tribunal that the MPC Conditions are included.

5.10 Moreover and superfluously, in a possible battle of the forms [redacted] has claimed that the knock out rule would apply. The Arbitral Tribunal is of the opinion that even if the 'knock out rule' would apply under the CISG, this could not help [redacted] in its motion to decline jurisdiction. In essence the knock out rule accepts the agreement of the parties on the essentials negotiated, leaves the non-conflicting standard terms of both sides as part of the contract intact and substitutes the conflicting terms by the respective provisions of the Convention or the otherwise applicable law. This would bring about that the standard terms and conditions of [redacted] -which are considered the conflicting terms - are to substituted by provision of the CISG or otherwise applicable law.

5.10 In view of the above the Arbitral Tribunal finds that the MPC Conditions are included in the Purchase Confirmations by way of reference and parties have agreed to its inclusion. The Arbitral Tribunal considers that parties have an agreement to arbitrate as presented under article 15 of the MPC Conditions. The Arbitral Tribunal therefore has jurisdiction.

6. **Procedure**

6.1 Since the Arbitral Tribunal shall deny the motion to decline jurisdiction, the Arbitral Tribunal has set a date for a hearing on 5th September 2019 at 13:30 hours at the office of the Gemzu at Van Stolkweg 31, 2585 JN the Hague, The Netherlands. If parties wish to file any further documents, they must do so ultimately two weeks in advance of the hearing. If parties wish to hear witnesses at the hearing they have to notify arbitrators at least two weeks in advance of the hearing with a summary of the issues they want to hear the witnesses on. Parties have to duly call the witnesses they want to hear themselves to appear at the hearing.

7. **Decision**

7.1 The Arbitral Tribunal, giving judgement in the motion to decline jurisdiction, acting as reasonable persons with due care and in all fairness:

1. Denies the motion to decline jurisdiction;

2. Orders parties to appear in the hearing on 5th September 2019 at 13:30 hours at the office of the Gemzu;

3. Stays any further decision;

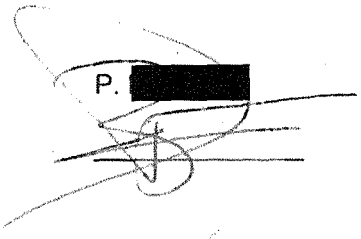
This arbitral judgement is drafted in four copies and duly signed:
- Each party will receive one original copy;
- One original copy will be saved at the offices of the Body of Arbitration, being the offices of the Dutch Dairy Trade Association (Gemzu);
- One original copy will be filed with the court registry of the Court of The Hague.

The Hague, 20 ~~July~~ August 2019.

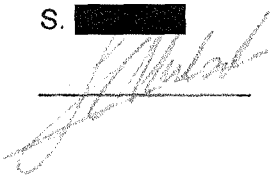
A.M. [redacted]



P. [redacted]



S. [redacted]



B. Niemeijer, secretary

