

**IN THE MATTER OF ARBITRATIONS COMMENCED PURSUANT TO  
THE ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH AND  
THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW  
ARBITRATION RULES 2010**

**PCA CASE NO. 2016-36**

**between:**

**INDUSTRIALL GLOBAL UNION AND UNI GLOBAL UNION**  
*(the "Claimants")*

- and -

[REDACTED]

**AND**

**PCA CASE NO. 2016-37**

**between:**

**INDUSTRIALL GLOBAL UNION AND UNI GLOBAL UNION**

- and -

[REDACTED]

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**PROCEDURAL ORDER NO. 6**  
**(FURTHER ISSUES CONCERNING DOCUMENT PRODUCTION)**

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22 November 2017

**The Tribunal**

Mr Donald Francis Donovan (President)  
Mr Graham Dunning QC  
Professor Hans Petter Graver

**Registry**

Permanent Court of Arbitration  
Tribunal Secretary: Ms Judith Levine

Pursuant to Paragraph 5.6 of Procedural Order No. 1 of 19 April 2017, Paragraph 5.4 of the Terms of Appointment, and Paragraphs 29 and 33 of Procedural Order No. 5 of 7 November 2017, the Tribunal issues the following Procedural Order No. 6.

## **I. INTRODUCTION**

1. This Procedural Order sets out directions for the Parties' compliance with Procedural Order No. 5 and adjustments to the pleading schedule.

## **II. PROCEDURAL BACKGROUND**

2. Paragraph 3.1 of Procedural Order No. 1 sets out a pleading schedule and hearing dates. Section 5 of Procedural Order No. 1 contains a schedule for document production. The dates for pleadings and document production were adjusted by agreement of the Parties on 21 June 2017, as approved by the Tribunal on 12 July 2017.
3. The Tribunal issued Procedural Order No. 5 (Document Production) on 7 November 2017. The Tribunal directed the Parties to produce, by 21 November 2017, the documents identified in the Order and its Annexes. The Tribunal also:
  - a. Noted that the Parties' provisional agreement on certain of Claimants' Requests (including Claimants' Requests No. 5, 7, and 21) pending the Respondents' request to Claimants to modify search terms, and thus entered no order on those requests at the time;
  - b. Directed the Parties to agree upon narrower search terms that would govern Claimants' Requests No. 6 and 7; and
  - c. With respect to the Claimants' Requests No. 18 and 21, permitted the Claimants to "designate an additional 10 factories as to which the Request is granted."
4. By letter dated 16 November 2017, the Respondents requested the Tribunal to resolve certain outstanding issues concerning document production and to extend the timeline for the Respondents' document production.
5. On 17 and 19 November 2017, the Claimants explained their positions on the outstanding document production requests. By a separate letter dated 19 November 2017, the Claimants raised certain issues concerning the Respondents' Request No. 19 for documents relied on by the Claimants' expert witness [REDACTED].
6. By two letters dated 20 November 2017, the Respondents replied to various points raised by the Claimants.
7. On 21 November 2017, the Claimants informed the Tribunal that the Respondents had notified them that evening that they were unable to meet the document production deadline, but intend to provide the Claimants with a subset of their production by noon on 22 November 2017. To "avoid the inequity caused by only one side producing documents," the Claimants advised that they would withhold their production until noon Washington time.

### **III. ISSUES IN DISPUTE**

#### **A. Claimants' Request No. 5**

8. The Claimants' Request No. 5 requested the Respondents to produce "[r]eports, memoranda, and notes of audits and inspections of each Supplier Factory conducted by each Respondent or their respective Agents during the Relevant Period." The Tribunal directed the Respondents to produce the requested information with respect to all factories falling within the Claimants' definition of "Supplier Factory."
9. The Respondents now request the Tribunal to issue an order stating that the Claimants' Request No. 5 pertains only to "Accord-related audits and inspections" conducted by the Respondents. The Respondents object to any proposed limitations on their right to produce documentary evidence in future submissions.
10. The Claimants offer to withdraw the request for non-Accord documents in the category, but only on the condition that the Respondents undertake not to rely later on such documents as evidence of their compliance with Accord obligations. The Claimants maintain that if the Respondents wish to reserve the right to rely on both Accord and non-Accord related audits and inspections, they should produce documents in to both categories.

#### **B. Claimants' Requests No. 6 and 7**

11. The Claimants' Request No. 6 requested the Respondents to produce "Correspondence and minutes of meetings between each Respondent and the Accord Foundation concerning the remediation of Supplier Factories during the Relevant Period." The Respondents agreed to "produce the documents underlying the communications logs for selected factories exhibited to the Statement of Defence, which include many hundreds of documents responsive to this Request." The Tribunal directed the Respondents to produce what they agreed to produce, subject to further efforts by the Parties to agree on search terms that would yield a manageable set of documents.
12. The Claimants' Request No. 7 requested the Respondents to produce "Communications, agreements, internal logs, remediation tracking charts, meeting minutes, timelines and other documents evidencing each Respondent's engagement with its Supplier Factories to monitor remediation and require CAP implementation throughout the Relevant Period." The Respondents agreed to "produce the documents underlying the selected factory communications logs exhibited to the Statement of Defence [over 20,000 documents]." The Tribunal directed the Respondents to produce what they agreed to produce, subject to further efforts by the Parties to agree on search terms that would yield a manageable set of documents.
13. The Respondents state that the Claimants did not propose alternative search terms for Requests No. 6 and 7 until 10 November 2017 and the search terms they eventually proposed would yield an unreasonable number of documents to review. The Respondents maintain that it is the nature of the requests, rather than the search terms that has generated an unmanageable volume of documents.
14. To achieve a manageable set of documents, the Respondents request the Tribunal to order that the Respondents are only required to produce documents responsive to the Claimants' Requests No. 18 and 21 (which the Respondents submit are "virtually identical" to the Claimants' Requests No. 6 and 7). The Respondents contest the imposition of any limitations on their ability to rely in the future on documents that would otherwise have been responsive to the Claimants' Requests No. 6 and 7.

15. The Claimants state that the Respondents are obliged to implement narrowly tailored searches that produce responsive documents. The Claimants suggest that the Respondents have not employed common techniques used by counsel to respond to document production requests, such as “Boolean searching and parameters that are designed to minimize the number of non-responsive documents pulled in a given search.”
16. The Claimants state that they would withdraw their Requests No. 6 and 7 in exchange for the production of documents for 10 additional factories for each of [REDACTED] and [REDACTED] under the Claimants’ Requests No. 18 and 21, but reserve the right to seek relief from the Tribunal should the Respondents rely in the future upon documents that otherwise would have been subject to production.

### C. Claimants’ Requests No. 18 and 21

17. The Claimants’ Request No. 18 requested [REDACTED] to produce:

Copies of the underlying communications between [REDACTED], and/or the Accord Foundation, and/or the Supplier Factories that are summarized in each “Communications Log” submitted with Exhibits R(2016-36)-020 through R(2016-36)-042 (to the extent not already provided) and equivalent communications between [REDACTED], and/or the Accord Foundation, and/or [REDACTED] Supplier Factories, not otherwise included in an exhibited “Communications Log.”

18. [REDACTED] agreed to produce the documents underlying the communications logs submitted with Exhibits R(2016-36)-20 to -42 but objected to the remainder of the request.

19. The Claimants’ Request No. 21 requested [REDACTED] to produce:

Copies of the underlying communications between [REDACTED], and/or its Agents, and/or the Accord Foundation, and/or Supplier Factories that are summarized in each “Correspondence Log” submitted with Exhibits R(2016-37)-007 to R(2016-37)-031 (to the extent not already provided), and equivalent communications between [REDACTED], and/or its Agents, and/or the Accord Foundation, and/or [REDACTED] Supplier Factories, not otherwise included in an exhibited “Correspondence Log.”

20. [REDACTED] agreed to produce the documents underlying the communications logs submitted with Exhibits R(2016-37)-7 to -31 but objected to the remainder of the request.

21. With respect to Requests No. 18 and 21, the Tribunal ordered each Respondent to produce the documents it had agreed to produce and equivalent documents as to the additional factories designated by the Claimants in accordance with Paragraph 31 of Procedural Order No. 5. In Paragraph 31 of Procedural Order No. 5, the Tribunal directed:

taking account of the prospect of undue burden, but recognizing too the value of broadening the sample set in order to ensure balanced information on relevant issues and material issues, the Tribunal directs that as to the Claimants’ Requests 18 and 21, the Claimants may designate an additional 10 factories as to which the Request is granted.

22. On 14 November 2017, pursuant to Paragraph 31 of Procedural Order No. 5, the Claimants designated 10 additional factories for each Respondent (20 factories in total) as to which the Respondents need to produce documents responsive to the Claimants’ Requests No. 18 and 21.

23. The Respondents request the Tribunal to clarify whether the Claimants are entitled to designate five or ten factories per Respondent. The Respondents note that the breadth of this request (even as to five factories per Respondent) results in a large volume of responsive documents. Relying on this factor (and on the Claimants’ alleged delay in designating the relevant factories), the Respondents request an extension of the deadline for document production for ten factories to 28 November 2017

and for twenty factories to 4 December 2017. Alternatively, the Respondents propose making an initial document production on the current deadline of 21 November 2017, and producing the remaining documents on 28 November 2017 (if a total of ten factories is ordered) or 4 December 2017 (if a total of 20 factories is ordered). The Respondents are currently reviewing and producing documents for the five factories per Respondent selected by the Claimants.

24. The Claimants also invite clarification from the Tribunal regarding the number of factories that Paragraph 31 of Procedural Order No. 5 covers. Urging the Tribunal to adopt their reading of Paragraph 31, the Claimants draw attention to Respondents' alleged willingness to compromise on Claimants' Requests No. 6 and 7 (see paragraph 16 above).

#### **D. Claimants' Requests No. 11 and 13**

25. The Claimants' Request No. 11 requested the Respondents to produce:

Documents evidencing any request for financial or other assistance in order to maintain a safe workplace and/or to comply with upgrade and remediation requirements set out in the CAPs, submitted by any Supplier Factory, or offered, granted, or denied by any Respondent, directly or through Agents, to any Supplier Factory throughout the Relevant Period, including assistance in the form of joint investment agreements, loans, guarantees on loans, business incentives, advance payments, or direct payments for renovations.

26. The Tribunal directed the Respondents to produce the requested documents.

27. The Claimants' Request No. 13 requested the Respondents to produce:

Documents evidencing that each Respondent "evaluate[d] what commercially realistic options might be available to ensure that remediation is financially feasible" upon receipt of requests for financial assistance from their Tier 1 or Tier 2 Supplier Factories."

28. The Tribunal directed the Respondents to produce "any documents evidencing responses to the requests produced in response to Request No. 11."

29. For the production of documents responsive to the Claimants' Requests No. 11 and 13, the Respondents now request an extension of 8 business days, to 8 December 2017, if a total of ten factories is ordered with respect to the Claimants' Requests No. 18 and 21, or to 14 December 2017, if a total of twenty factories is ordered with respect to the Claimants' Requests No. 18 and 21.

30. The Claimants consider the Respondents' extension request to be "unacceptable." They request the Tribunal to order the Respondents to comply with the Claimants' Requests No. 11 and 13 based on a timeframe set out in the Claimants' letter of 19 November addressing the document production issues and recounted below.

#### **E. Adjustments to Pleading Schedule**

31. The Claimants criticize the Respondents' "unilateral assertion" that they will not comply with the document production deadline of 21 November 2017. The Claimants request the Tribunal to order both sides to produce all remaining responsive documents by 28 November 2017 and to revise the deadline for Claimants' Reply from 29 December 2017 to 12 January 2018.

32. Should the Tribunal grant the Respondents an extension beyond 28 November 2017 for document production, the Claimants request a corresponding extension in time for the submission of their Reply. The Claimants oppose the grant of any extension for the Respondents' Rejoinder because (i) the Respondents will be in possession of the Claimants' documents well before 14 February

2018; and (ii) there was an imbalance in the original deadlines (the Claimants received only 5 weeks and 3 days for their Reply and the Respondents received 6 weeks and 3 days for their Rejoinder). Should the Tribunal extend the deadline for the Respondents' Rejoinder, the Claimants submit that the deadline should be no later than 21 February 2018 and that the hearing should then be moved to the week of 19 March to 25 March 2018 (currently held in reserve).

33. The Respondents object to the Claimants' request for an extension of the deadline for filing their Reply. The Respondents maintain that (i) the tight pleading schedule in this arbitration is of the Claimants' making; and (ii) the Claimants compounded the delays in document production by providing their list of additional factories pertaining to the Claimants' Requests No. 18 and 21 only on 14 November 2017. The Respondents argue that the Claimants have had since the Respondents' last submission (29 September 2017) to work on their Reply. The Respondents submit that any reduction in the time available to them to review the Claimants' Reply (which is currently 6 weeks and 3 business days) will prejudice the Respondents' ability to defend themselves.

#### **F. Respondents' Request No. 19**

34. The Respondents' Request No. 19(ii) requested the Claimants to produce:

Complete version of the [REDACTED] referred to in the Expert Report of [REDACTED], including: [...] (ii) all factory responses to the [REDACTED] (including the names, addresses, number of workers and any other information about the participating factories) [...]

35. As recorded in the Redfern Schedule, the Respondents clarified that this request included:

(ii) (a) a list of the names, addresses, number of workers and any other information concerning factory profile collected by [REDACTED] for all factories responding to the [REDACTED] (separated from responses to substantive survey questions); (b) the raw data recording all individual factory responses to all questions (both in summary/table format used to calculate overall figures and the individual responses as originally received or recorded), with factory names redacted [...]

36. The Tribunal directed the Claimants to produce the documents requested, as refined above.

37. The Claimants argue that this request seeks the production of information that is (i) protected from disclosure by Articles 9(2)(b) and (e) of the IBA Rules on the Taking of Evidence in International Arbitration (**IBA Rules**); and (ii) in part, not in [REDACTED]'s possession, custody, or control. The Claimants request the Tribunal to confirm that these materials are exempt from production on grounds of confidentiality.

38. The Claimants explain that [REDACTED]'s employer required his survey to be anonymous and that [REDACTED] informed survey respondents that he did not seek identification of the survey respondents, factories, or brands. As a result, [REDACTED] did not collect the names and addresses of the factories that responded to his survey. The Claimants note that providing factory-specific information would be sufficient to identify the factory respondents and thereby would violate the confidentiality undertakings made by [REDACTED] to his employer and the survey respondents.

39. Citing Article 9(2)(e) of the IBA Rules, the Claimants underline the possible commercial and other repercussions that the survey respondents and [REDACTED] might face if [REDACTED] were to reveal identifying information. Citing Article 9(2)(b) of the IBA Rules, the Claimants argue that while [REDACTED] is not covered by attorney-client privilege, he is bound by the ethical and confidentiality undertakings that he made to his employer and the survey respondents. The Claimants state that the objective of [REDACTED]'s survey was to make industry-wide observations and not observations about individual survey respondents. The Claimants note that the Respondents have been provided with the results of [REDACTED]'s survey and will be provided

with the full list of questions in [REDACTED]'s survey and the response rates, which is the aggregate data used by [REDACTED] to reach his conclusions.

40. The Respondents state that the Claimants wrongly conflate sub-sections (a) and (b) of the Respondents' Request No. 19(ii).
41. The Respondents submit that their Request No. 19(ii)(a) requires the Claimants to produce a list of participating factory profile information separated from the responses to substantive survey questions that will not be linked to the factory profile information and will remain anonymous. The Respondents note that to test [REDACTED]'s findings effectively, they must have access to the factory identities and profile information. The Respondents reject the Claimants' submission that [REDACTED] does not possess information about individual factories, questioning how [REDACTED] would have selected the responsive factories without knowledge of the survey respondents. The Respondents suggest that the confidentiality obligation could only extend to information that might reveal a factory's or survey respondent's identity, but would not prevent disclosure of generic factory profile information (such as size, number of workers, and type and volume of products) requested in the Respondents' Request No. 19(ii)(a) that would not be sufficient to identify survey respondents. The Respondents accept that the Claimants can redact factory and personnel names, addresses, e-mail addresses, IP addresses, and telephone addresses from the responsive factory profile information, but they maintain that the Claimants should comply with the remainder of the Tribunal's order.
42. The Respondents request the Tribunal to order the Claimants to comply with Procedural Order No. 5 with respect to the Respondents' Request No. 19(ii)(b). The Respondents submit that their Request No. 19(ii)(b) is for underlying, anonymized raw data, with factory names redacted. The Respondents consider this information necessary to test [REDACTED] methodology, survey design, and conclusions. The Respondents argue that if [REDACTED] and the Claimants cannot produce the raw data relied upon by [REDACTED] for his findings, the proper remedy would be for the Claimants to withdraw this aspect of [REDACTED]'s report, not to prejudice the Respondents.

#### **IV. TRIBUNAL'S DIRECTIONS**

43. Taking into account all the Parties' submissions on the document requests, but without relying on any offer to compromise or negotiations over any proposed compromise, the Tribunal directs:
  - A. With respect to the Claimants' Request No. 5, the Tribunal limits the category to Accord-related audits and inspections, subject to such arguments as the Claimants may make as to evidentiary value should the Respondents seek to rely on documents that would have been subject to production in the absence of the limitation.
  - B. With respect to the Claimants' Requests No. 6 and 7, the Tribunal makes no further order to produce documents beyond its order as to these two Requests set out in Procedural Order No. 5, subject to such arguments as the Claimants may make as to evidentiary value should the Respondents seek to rely on documents that would have been encompassed by those Requests.
  - C. With respect to the Claimants' Requests No. 18 and 21, the Tribunal clarifies that in order to achieve balance, it intended that the Claimants may designate 10 factories for each of both [REDACTED] and [REDACTED].
  - D. With respect to the Claimants' Requests No. 11 and 13, the Respondents seek relief only as to timing, which is addressed below.

- E. With respect to the Respondents' Request No. 19(ii), the Tribunal directs that the Claimants may exclude from their production documents that [REDACTED] is prevented from producing by virtue of ethical constraints, confidentiality obligations, or lack of possession, custody, or control, subject to an obligation by the Claimants precisely to identify the categories of responsive documents that [REDACTED] cannot produce and the basis (ethical constraint, confidentiality obligation, lack of possession, custody, or control, or any combination thereof) for that incapacity, and subject further to the understanding that the Parties will be free to argue, and the Tribunal will need to assess, the impact that the absence of those documents from the record might have on the weight of [REDACTED] evidence.
- F. With respect to scheduling, the Tribunal considers that the Respondents will need additional time to complete their production. It directs that, immediately after the Thanksgiving holiday in the United States, the Parties promptly confer with the objective of agreeing firm but practicable dates by which each segment of the production can be completed and then agreeing further any adjustments to the schedule of written submissions necessitated by those completion dates. Without prejudicing any application that subsequently may be made, the Tribunal suggests that, to the extent discrete categories of documents are relevant only to particular issues and hence to specific sections of the reply submissions, the Parties consider whether the second round submissions might be served and filed in two or more segments. Again without prejudicing any application that subsequently may be made, the Tribunal finds merit in the Claimants' suggestion that the period reserved for rejoinder submissions might be shorter than for the reply submissions without unfairly treating the Respondents, because they will have had the Claimants' document production well before having received the reply submissions. In all events, the Parties should conduct their discussions on the understanding that the hearing dates are firm, including the commencement of the hearing the week starting 12 March 2018.
- G. The Tribunal requests a report from the Parties, jointly if possible but separately if need be, by 5 PM EST on **Tuesday, 28 November 2017**. Unless the Parties report complete agreement, they should also advise their availability for a conference call, preferably on Wednesday 29 November, but if not on Thursday 30 November 2017, with the Presiding Arbitrator alone, who will consult with the Co-Arbitrators before making any decision.

Place of Arbitration, The Hague

Dated, 22 November 2017



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**Mr Donald Francis Donovan**  
**Presiding Arbitrator**