

PCA CASE NO. 2016-37

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

between:

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

- and -


(the "Respondent", and with the Claimants, the "Parties")

PROCEDURAL ORDER NO. 8
(FURTHER ISSUES CONCERNING DOCUMENT PRODUCTION)

10 January 2018

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 Paragraphs 5.6 and 5.7 of Procedural Order No. 1 of 19 April 2017, and Paragraph 5.4 of the Terms of Appointment, the Tribunal issues the following Procedural Order No. 8, which applies only to PCA Case No. 2016-37 *IndustriALL Global Union and UNI Global Union v. [REDACTED]*.

I. INTRODUCTION

1. This Procedural Order sets out directions for the Parties' compliance with Procedural Order No. 6.

II. PROCEDURAL BACKGROUND

2. In accordance with Procedural Order No. 1 and the revised procedural timetable agreed by the Parties to the Bangladesh Accord Arbitrations, the Parties exchanged requests to produce documents in the form of Redfern Schedules. The Respondent's Request No. 19(ii) in its Redfern Schedule 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) . . .

3. On 7 November 2017, the Tribunal issued Procedural Order No. 5 (Document Production), following which, the Parties exchanged correspondence with the Tribunal on outstanding issues concerning document production, including on Respondent's Request No. 19(ii).
4. On 22 November 2017, the Tribunal issued Procedural Order No. 6 (Further Issues Concerning Document Production), paragraph 43(E) of which provides:

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.

5. The Tribunal issued Procedural Order No. 7 (Adjustments to the Procedural Schedule) on 1 December 2017, applicable only in PCA Case No. 2016-37.
6. By letter dated 22 December 2017, following an exchange of correspondence between the Parties, the Respondent requested the Tribunal to issue an order requiring the Claimants to produce: (i) a detailed log of the documents/data that [REDACTED] is prevented from producing in accordance with paragraph 43(E) of Procedural Order No. 6; and (ii) the complete responses [REDACTED] received as part of his underlying research relating to the [REDACTED], redacted only to the extent absolutely necessary to preserve confidentiality (and, in each case, explaining the basis on which a particular redaction has been made, as ordered by the Tribunal).
7. By letter dated 3 January 2018, the Claimants requested the Tribunal to deny the requests contained in the Respondent's letter of 22 December 2017, arguing that the Claimants are already in full compliance with their document production obligations.

III. PARTIES' POSITIONS AS TO COMPLIANCE WITH REQUEST NO. 19(ii)

A. The Respondent's Position

8. The Respondent argues that as at 22 December 2017, one month had transpired since the Tribunal issued Procedural Order No. 6 and yet the "Claimants have failed to provide the Respondent with any log to identify the precise categories of documents that have been withheld from production."
9. According to the Respondent, the Claimants have a duty to consult with ██████████ for the following:
 - a) identify the specific categories of documents/data in his possession that are responsive to Request 19(ii); b) identify whether ██████████ is prevented from producing that data; and c) then to either produce the data or describe those categories of withheld data to the Tribunal and the Respondent, with the specific basis for the withholding. In the absence of any explanation as to precisely what data has been withheld, the Claimants are preventing the Respondent from being able to confirm or contest the alleged confidential nature of the data.
10. The Respondent further asserts that considering the generic nature of the questions in the ██████████, "the Respondent sees no reason why the majority, if not the entirety, of the survey dataset cannot be produced on a factory by factory basis, using anonymous participant codes to identify the factories rather than their names." The Respondent argues that without this raw data, "it is simply impossible for the Respondent to assess whether the conclusions ██████████ seeks to derive from it (on which the Claimants seek to rely in support of their claims against the Respondent) are founded on sound principles."

B. The Claimants' Position

11. The Claimants submit that they have already complied with their document production requirements in full. The Claimants argue that after consulting with ██████████, they had provided to the Respondent, on 4 December 2017, a table identifying the three categories of documents requested by [the Respondent] that ██████████ cannot produce, as well as an explanation of the basis for not producing it."
12. The Claimants argue that the Respondent's complaints in its letter dated 22 December 2017 are unfounded because: (i) the Tribunal had directed them to identify "categories of responsive documents" and not specific, individual documents; and (ii) their "descriptions of categories of documents are direct quotes of the categories that ██████████ itself requested" and as such, "there is no basis for ██████████ to contend that it is confused by Claimants' descriptions."
13. The Claimants further contend that they have already provided all responses to the ██████████ on a per-question basis. Noting ██████████ raw data is stored in a database, the Claimants argue that it is not possible to redact a database in the same manner as a document. Notwithstanding the Claimants' ethical and confidentiality concerns associated with the Respondent's request, the Claimants argue that facilitating the Respondent's request for redacted copies of ██████████ and his survey team's notes and records would be an "extremely burdensome" exercise for which the Respondent has not yet provided a legitimate reason.

IV. TRIBUNAL'S DIRECTIONS

14. The Tribunal requests that the Claimants consider whether they can more “precisely . . . identify” the categories of documents and data withheld than by simply providing “direct quotes” of the categories the Respondent has requested. The Tribunal considers, for example, that there may be subcategories that the Claimants, as a result of discussions with [REDACTED] or their own review of the material, may be able to describe while protecting the confidentiality concerns that they assert.
15. The Tribunal considers that, if the Claimants conclude that they cannot, the most efficient way to test that conclusion will be cross-examination of [REDACTED] at the hearing, subject of course to such well-grounded objections as the Claimants may raise and the Tribunal may sustain.
16. The Tribunal reiterates that to the extent that it determines that a more detailed description should have been provided, that determination, like the absence of the documents themselves, may provide the basis for argument as to the weight to be given [REDACTED] evidence.
17. Finally, subject to the same observations, the Tribunal declines to order that the Claimants provide a complete but redacted set of responses related to the [REDACTED].
18. Accordingly, subject to the Tribunal's request to the Claimants stated above, it defers further consideration of the Respondent's application to the hearing.

Place of Arbitration, The Hague

Dated, 10 January 2018



Mr Donald Francis Donovan
Presiding Arbitrator