

**IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH
THE FREE TRADE AGREEMENT BETWEEN THE REPUBLIC OF KOREA AND THE
UNITED STATES OF AMERICA, DATED 30 JUNE 2007**

- and -

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW, 2013**

PCA CASE NO. 2018-51

- between -

**ELLIOTT ASSOCIATES, L.P. (U.S.A.)
(the “Claimant”)**

- and -

**REPUBLIC OF KOREA
(the “Respondent,” and together with the Claimant, the “Parties”)**

PROCEDURAL ORDER NO. 17

The Arbitral Tribunal

Dr. Veijo Heiskanen (Presiding Arbitrator)

Mr. Oscar M. Garibaldi

Mr. J. Christopher Thomas QC

Registry

Permanent Court of Arbitration

4 September 2020

I. PROCEEDINGS

1. On 13 January 2020, the Tribunal issued Procedural Order No. 8, setting out the Tribunal's decisions regarding the Parties' outstanding document production requests.
2. On 27 February 2020, the Tribunal issued Procedural Order No. 12, providing clarifications regarding the scope of the Parties' document production obligations.
3. On 24 June 2020, the Tribunal issued Procedural Order No. 14 concerning the Claimant's application of 1 June 2020 for further orders relating to the Respondent's document production.
4. On 7 August 2020, the Tribunal issued Procedural Order No. 16 concerning the Respondent's application of 30 May 2020 for further orders relating to the Claimant's document production.
5. On 12 August 2020, pursuant to the Tribunal's directions in Procedural Order No. 16, the Claimant confirmed, *inter alia*, that:
 - (a) it has applied the attorney-client privilege standard as described by the Tribunal in paragraph 51 of Procedural Order No. 16 in respect of category A document, with the exception of:
 - Rows 472-475, 493 and 496, where the sole privilege asserted was attorney work product protection, which the Claimant confirms was properly asserted; and
 - Row 234, which is an internal Elliott email discussing in confidence the legal advice provided in Row 235; and
 - (b) it has applied the standard as described by the Tribunal in paragraph 54 of Procedural Order No. 16 in respect of category B documents.
6. On 14 August 2020, the Respondent requested that the Tribunal reconsider its decisions in relation to category A and category B documents as set forth in Procedural Order No. 16, enclosing legal authorities RLA-115 and RLA-116.
7. On 19 August 2020, the Claimant submitted comments on the Respondent's letter of 14 August 2020, asking that the Respondent's request for reconsideration be rejected.

II. POSITIONS OF THE PARTIES

1. The Respondent's Position

8. The Respondent submits that it is concerned that in Procedural Order No. 16, the Tribunal has denied the Respondent's objections "based solely on the Claimant's 'confirm[ing] that it has applied the relevant legal standard[s]'. According to the Respondent, it was "essential to the

Tribunal's properly considering the ROK's objections to the Claimant's assertions of privilege" that the Tribunal determined whether the Claimant has complied with the applicable privilege standards in respect of each of the 107 category A documents.

9. The Respondent argues that it would be contrary to Procedural Order No. 8, which requires that the "[t]he privilege log must contain sufficient information [...] to allow the Respondent and, if necessary, the Tribunal to determine whether withholding the document is justified," if a party could unilaterally assert that it has applied the applicable privilege standards. Such an outcome, according to the Respondent, would risk eroding confidence in the integrity of the document production exercise.
10. The Respondent further contends that the Tribunal's allowing evidence to be withheld from production on grounds of privilege based on the Claimant's assertion that third parties were its agents or "functional employees" falls short of the applicable legal standards.
11. The Respondent recalls its position that the Claimant's privilege log "fails on its face," so that the validity of the Claimant's assertions of privilege may be determined without review of the withheld documents. Alternatively, "absent such a holding," the Respondent takes the view that the propriety of the Claimant's privilege claims can only be determined by reviewing the documents. Consequently, the Respondent requests that:

the Tribunal suspend its decisions with respect to category A and category B documents for the purpose of:

- (a) itself reading the 107 category A documents *de bene esse* or allowing a special master (the identity of whom the ROK would seek to agree with the Claimant) to review the documents to determine whether each email in the various chains and every attachment are properly withheld for privilege; and
 - (b) requiring the Claimant to submit evidence proving the agent or "functional employee" status of each third party as to which it claims such status.
12. The Respondent considers that such review would resolve the matter "finally and efficiently," without impacting the existing procedural timetable if begun promptly.

2. The Claimant's Position

13. The Claimant submits that the Respondent's request should be rejected as the Respondent seeks to reopen document production rulings by the Tribunal that were correct and properly reached.
14. According to the Claimant, its privilege log, which was further supplemented during the Parties' subsequent correspondence and two rounds of written submissions, contained all the information required by Procedural Order No. 8 for the Claimant to withhold the relevant documents. The

Claimant contends that it has therefore discharged its duty with respect to the assertion of privilege over documents withheld under categories A and B.

15. As to the Respondent's complaint about an alleged absence of evidence supporting the Claimant's position on privilege, the Claimant argues that it is inherent in the nature of a privilege log that supporting evidence will be limited.
16. The Claimant considers the Respondent's request that the Tribunal or an independent third party review the privileged documents "unworkable." By way of example, the Claimant notes that the analysis of whether a third party is an agent or functional employee would require an assessment in the full context of that party's engagement, not solely by reference to responsive documents. The Claimant contends that such review of "an already proper invocation of privilege" would add potentially substantial time and expense to the proceedings.
17. The Claimant finally argues that the Respondent's request is "futile" as the Tribunal, in Procedural Orders No. 14 and 16, has already determined that it lacks the power to issue fresh orders concerning document production under the Treaty and Procedural Order No. 1.

III. THE TRIBUNAL'S ANALYSIS

18. As summarized above, the Respondent seeks reconsideration of certain of the Tribunal's decisions in Procedural Order No. 16 on the basis that the Tribunal has failed to "hold[] the Claimant to its burden of proof in several aspects, and denying the ROK's objections based solely on the Claimant's 'confirm[ing] that it has applied the relevant standard[s]'. In particular, the Respondent "disagrees" with the Tribunal's finding in paragraph 51 of Procedural Order No. 16, in which the Tribunal held that it was not "necessary or indeed appropriate to determine for each of the 107 category A documents whether the Claimant has complied with its document production obligations under the applicable legal standard."
19. The Respondent's principal complaint thus relates to the Tribunal's finding in paragraph 51 of Procedural Order No. 16. While the Respondent omits to mention it, the Tribunal notes that this finding was made "[i]n view of the Tribunal's finding in paragraph 47 above." In paragraph 47, the Tribunal had held as follows:

The Tribunal also recalls its determination in Procedural Order No. 14, which dealt with the Claimant's Application, that "neither the Free Trade Agreement between the Republic of Korea and the United States of America [...] nor Procedural Order No. 1 envisage that the Tribunal may issue a fresh order in the event a party fails to comply with the Tribunal's document production orders." Accordingly, pursuant to paragraph 5.3.7 of Procedural Order No. 1 and Article 9(5) of the IBA Rules (to which the Tribunal may refer pursuant to paragraph 5.3.6 of Procedural Order No. 1 for the purpose of deciding on the Parties' document production requests), the proper way for a party to address alleged failures by

another party to produce documents as ordered by the Tribunal is to request that the Tribunal draw the inference that the documents that the party in question has failed to produce would be adverse to the interests of that party. (Footnote omitted.)

20. Accordingly, just as in Procedural Order No. 14, which dealt with the Claimant's complaints about the Respondent's alleged failure to comply with its document production obligations, the Tribunal considered that "the proper way for a party to address alleged failures by another party to produce documents as ordered by the Tribunal is to request that the Tribunal draw the inference that the documents that the party in question has failed to produce would be adverse to the interests of that party." In other words, instead of requesting that the Tribunal issue a fresh order for the production of the same documents that it has already ordered to be produced, or an abstract finding that the other party has failed to comply with its document production obligations, without consequences, a party should request that an appropriate inference be drawn on the basis that the other party has failed to produce a specific document or documents that it should have produced. This determination cannot be made in the abstract; it must be made in the context of a request for a specific inference, supported by argument and evidence showing that the other party has failed to comply with an obligation to produce a specific document or documents, or has unjustifiably withheld them from production. The appropriate time for a party to make such a request is after the completion of the document production process, that is, in its second round written submission or, at the latest, at the hearing.
21. The additional guidance that the Tribunal provided in Procedural Orders Nos. 14 and 16 did not affect this principal ruling. The Tribunal's guidance was meant to assist the Parties by clarifying the scope of their document production obligations under Procedural Order No. 8, "in view of the wide-ranging allegations made by both Parties regarding the alleged failures by the opposing Party to comply with its document production obligations." The clarifications provided by the Tribunal, and the confirmations that the Tribunal requested that each Party make, afforded both Parties the opportunity either (i) to confirm that they had complied with their document production obligations under Procedural Order No. 8 or (ii), in light of the clarification provided by the Tribunal, to reconsider their decisions to withhold certain documents from production and produce additional documents. The Tribunal notes that neither Party produced any additional documents in light of the clarifications provided in Procedural Orders Nos. 14 and 16 and instead confirmed that they had complied with their respective production obligations.
22. Accordingly, the Respondent's suggestion that the Tribunal has allowed the Claimant to make the determination of whether its withholding of certain documents from production is justified is based on a misreading of Procedural Order No. 16. Indeed, paragraph 72(h) of Procedural Order No. 16 makes clear that "[t]he Tribunal's determinations in this Procedural Order [*i.e.*, all

determinations, including those concerning the confirmations the Claimant was directed to make in paragraphs 72(a) and (b)] are without prejudice to the Respondent's right to seek to establish in due course that the Claimant has failed to produce a specific document or documents that were in its possession, custody, or control, and to request that the Tribunal draw appropriate inference from any such failure." Accordingly, notwithstanding the confirmations given by each Party after the issuance of Procedural Orders Nos. 14 and 16, respectively, the original orders to produce the documents made in Procedural Order No. 8 remain in effect, and therefore it remains open to either Party further to contest the other Party's compliance with that Order and to request that the Tribunal draw an appropriate inference from any such alleged failure to comply.

23. Consequently, the Claimant's confirmations in its letter of 12 August 2020, to the effect that it "has applied the attorney-client privilege standard as described by the Tribunal in paragraph 51 of Procedural Order No. 16," and that it "has applied the standard as described by the Tribunal in paragraph 54 of Procedural Order No. 16 in respect of the category B documents," do not preclude the Respondent from requesting that the Tribunal draw an adverse inference pursuant to paragraph 5.3.7 of Procedural Order No. 1 and Article 9(5) of the IBA Rules (to which the Tribunal may refer pursuant to paragraph 5.3.6 of Procedural Order No. 1 for the purpose of deciding on the Parties' document production requests) on the basis that the Claimant has in fact failed to comply with its document production obligations, including those in relation to which the Claimant confirmed its compliance. In ruling on any such request for adverse inferences, the Tribunal may take the Claimant's confirmations into account, as appropriate, when determining whether adverse inference is justified, but such confirmations do not conclusively dispose of the matter. The Claimant's confirmations that it has applied the relevant legal standards when withholding certain documents from production do not immunize the Claimant from an adverse inference if the Respondent is able to demonstrate that the Claimant has in fact failed to comply with its obligations, and to justify the concrete inference proposed to be drawn in relation to each withheld document or category of documents.
24. This reasoning applies, *mutatis mutandis*, to the Tribunal's findings in Procedural Order No. 14, which dealt with the Claimant's allegations that the Respondent had failed to comply with its own document production obligations under Procedural Order No. 14. Paragraph 75(g) of Procedural Order No. 14 similarly made clear that "[t]he Tribunal's determinations in this Procedural Order are without prejudice to the Claimant's right to seek to establish in due course that the Respondent has failed to produce a specific document or documents that were in its possession, custody or control, and to request that the Tribunal draw appropriate inference from any such failure." Accordingly, the confirmation provided by the Respondent in its email of 7 July 2020 that it had produced, pursuant to paragraph 75(d) of Procedural Order No. 14, "the last version of any

responsive documents in its possession, custody or control,” does not preclude the Claimant from seeking to demonstrate that the Respondent has failed to comply with its document production obligations under Procedural Order No. 8, including in relation to documents for which it has provided a confirmation of compliance.

25. Finally, as to the Respondent’s request that the Tribunal appoint a special master to determine whether the Claimant unjustifiably withheld certain documents from production, the Tribunal notes that neither Party raised the possibility of appointing a special master in the context of their initial document production requests, which were determined, to the extent disputed, in Procedural Order No. 8, or in the submissions that led to the issuance of Procedural Orders Nos. 14 and 16. Accordingly, there was no occasion for the Tribunal to consider whether appointment of a special master would be justified, nor is there any occasion to do so now, as the current procedural setting does not allow the Tribunal to ensure that such a procedure apply equally to the requests of both Parties in respect of document production. For these reasons, and in the absence of any error in Procedural Order No. 16 that would justify its reconsideration, the Tribunal finds that there is no basis to appoint a special master on this occasion.
26. Nonetheless, in view of the continuing disagreements between the Parties as to their compliance with their respective document production obligations, the scope of those disagreements, and the desirability of resolving such disagreements prior to the hearing, the Tribunal is prepared to entertain any joint proposal of the Parties on the appointment of a special master to examine, at the request of either Party, the other Party’s compliance with its obligations under Procedural Orders Nos. 8, 14, and 16, respectively, and to report his or her findings to the Tribunal. The Tribunal encourages the Parties to consult and revert to the Tribunal by the date set in the Tribunal’s order below.

IV. THE TRIBUNAL’S DECISION

27. In light of the above, the Tribunal decides as follows:
 - (a) The Respondent’s request that the Tribunal reconsider certain of its decisions in Procedural Order No. 16 is denied; and
 - (b) The Parties are invited to consult with a view to making a joint proposal to the Tribunal on the appointment of a special master and revert to the Tribunal by 18 September 2020.

Place of Arbitration: London, United Kingdom



Dr. Veijo Heiskanen
(Presiding Arbitrator)

On behalf of the Tribunal