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]

PROCEDURAL ORDER NO. 3

(SCOPE OF THE "LIABILITY-PLUS PHASE")

---

19 September 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 3.1 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. 3.

I. INTRODUCTION

1. Following resolution of the Preliminary Issues in Procedural Order No. 2 of 4 September 2017, this Procedural Order defines the scope of the next phase of the arbitration, in which the Tribunal will determine liability, along with specified issues of remedies, in order to facilitate the efficient resolution of the dispute in the event that the Tribunal holds either Respondent liable as to any of the factories that are the subject of the claims (the "**Liability-Plus Phase**").

2. The Tribunal here orders that in this phase, the Parties address (a) all issues of liability, and (b) in the event either Respondent is held liable as to any factories, and subject to the more specific directions set forth below, available heads of damage, as well as the principles and methodology to be applied in determining the quantum to be awarded under any such heads of damage.

II. PROCEDURAL BACKGROUND

3. The procedural background to these proceedings is detailed in Procedural Order No. 2 of 4 September 2017. For purposes of this Order, the Tribunal recalls only the following key steps.

4. On 17 March 2017, the Tribunal held a first procedural conference in London during which the Parties agreed to confer on the precise scope of the Liability-Plus Phase.

5. On 19 April 2017, the Tribunal issued Procedural Order No. 1, of which Paragraph 3.1 stated:

> As directed by the Tribunal at the Preliminary Procedural Conference and by email on 23 March 2017, a procedure for the merits will commence on a parallel track to resolution of the Preliminary Issues. The merits phase will include not only liability issues, but also specified issues of remedies whose determination during the merits phase would facilitate final resolution (including, for example, available heads of damages and principles to be applied to remedies).

6. Procedural Order No. 1 set out both a schedule for briefing the preliminary issues and an agreed schedule for the merits phase, including for submissions, document production, and a hearing.

7. By letter dated 23 May 2017, the PCA informed the Parties that the Tribunal had decided to dismiss the Respondents' Admissibility Objection, and that reasons would follow in the form of a detailed decision. The Tribunal recalled that the Parties had agreed to confer on the precise scope of the pleadings and hearings in the Liability-Plus Phase and invited the Parties to report on the status of their discussions by 15 June 2017. The Tribunal requested that, in the event the Parties had not reached agreement, they each "submit a specific proposal and a brief statement of the reasoning supporting that proposal."

8. On 15 June 2017, having been unable to reach agreement on the scope of the Liability-Plus Phase, the Parties submitted separate proposals to the Tribunal ("**Claimants' Proposal**" and "**Respondents' Proposal**," respectively).

9. On 16 June 2017, in accordance with the schedule as amended by agreement, the Claimants submitted their Statement of Claim, accompanied by exhibits, legal authorities, two witness statements, and two expert reports. On 8 August 2017, following correspondence among the Parties and Tribunal, the Claimants filed an amended version of the Statement of Claim, with renumbered exhibits and legal authorities (the "**Statement of Claim**").

III. PARTIES' PROPOSALS

A. Summary of the Claimants' Proposal

10. The Claimants view the Liability-Plus approach as an opportunity to identify specific remedies issues for the Tribunal to resolve short of adjudicating [redacted] mini-disputes involving [redacted] and [redacted] factories. To this end, the Claimants consider that only determining liability and identifying the available heads of damages (i.e., categories of compensation due for breach of the Accord) would not suffice to facilitate final resolution of the dispute.

11. The Claimants therefore propose a two-phase approach. The first phase, the Liability-Plus Phase, would include:

(i) A determination of liability for breach of the Accord.

(ii) Assuming a finding of liability, a determination of available heads of damages.

(iii) Assuming available heads of damages are found to include remediation costs for corrective actions for factories that remain uncorrected, a determination of a "global amount to be paid into escrow" using the below formula. The Tribunal would need to calculate the average cost of remediation per factory, through random sampling (e.g., 20% of each of the Respondents' supplier factories based on size of the factory and the number of employees).

AVERAGE COST OF REMEDIATION PER FACTORY	X	TOTAL NUMBER OF FACTORIES IN EACH TIER FOR WHICH EACH RESPONDENT IS FOUND LIABLE

The Claimants note, however, that they "do not have the information sufficient to perform this random sampling, calculate the average cost of remediation, and extrapolate the cost to the number of factories for which the Tribunal may find Respondents liable."[1] They do advise that they have retained an expert, [redacted] of [redacted], who estimates costs to remediate [redacted] factories at approximately [redacted] and [redacted] factories at approximately [redacted].[2]

(iv) Assuming available heads of damages are found to include hazardous duty pay, a determination of a "global amount to be paid into escrow" using the below formula. This in turn would require the Tribunal to determine the relevant period for which damages of hazardous duty pay would be appropriate. The Claimants propose that the amount should be calculated as of the date when all corrective actions should have been completed in accordance with Corrective Action Plan ("**CAP**") deadlines until remediation is completed. The Tribunal would also need to determine a hazardous duty pay rate (as to which the Claimants propose 30% as an appropriate minimum rate).[3]

NUMBER OF EMPLOYEES AT A FACTORY	X	NUMBER OF DAYS THAT THE FACTORY REMAINS UNREMEDIATED	X	HAZARDOUS DUTY DAILY PAY RATE

1 Statement of Claim, para. 180.
2 Statement of Claim, para. 180, citing CER – [redacted], paras. 65, 67.
3 Statement of Claim, paras. 184-186, referring to Articles 13 and 15 of the Accord, and prior examples of hazardous duty pay in the UN system and U.S. government practices.

12. The Claimants envisage a second, "Claims Phase" after the Liability-Plus Phase concludes. The Claims Phase would allow those factories for which the Respondents have been found liable to make specific claims to draw funds from the escrow account to remediate uncorrected issues. A similar process is envisaged for claims to be made by individual employees for hazardous duty pay. The Claimants envisage that an agreed neutral third party would administer the escrow fund, and that the Tribunal would retain jurisdiction to resolve disputes related to the administration of the escrow account.

13. The Claimants note that their proposals do not alter their requests for declaratory relief, costs, interest, offset for tax consequences, and any other relief considered necessary or appropriate.

14. The Claimants conclude that they "do not believe that any final resolution of this dispute is possible without detailed guidance from the Tribunal not only on questions of liability and available heads of damages, but also with regard to compensation due for Respondents' alleged violations of the Accord." They submit that their proposal is designed for efficient resolution of the dispute in such a way that will provide "concrete, global damages numbers that can form the basis for a second phase of the dispute."

B. Summary of the Respondents' Proposal

15. The Respondents view the Liability-Plus Phase as an opportunity to define "precise questions the Tribunal will need to decide in order to determine both whether there has been any breach of the Accord, and if so, the type(s) of remedies that will be available in the (heavily contested) event of a finding of liability in respect of Article 12 and/or Article 22 of the Accord." To this end, the Respondents propose, at pages 2-4 of their Proposal, a set of neutrally phrased questions that the Parties would brief, and the Tribunal would consider, during the Liability-Plus Phase. The questions are framed under the headings of "I. Liability" (for each Respondent for breaches of Article 12 and 22 of the Accord, with respect to Tier 1, 2 and 3 factories and for active and inactive factories); and "II. Remedies (in the event that liability is found)," including whether the Claimants are legally entitled to each of the remedies sought in their Notices of Arbitrations, and the extent to which the principles applicable to determining the remedies may be different for Tier 1, 2, and 3 factories and for active and inactive factories.

16. The Respondents consider that the Claimants' proposals include the "resolution of detailed issues of quantum during the merits phase," which in the Respondents' view "defeats the entire purpose and advantages of having a liability-plus phase." The Respondents characterize the Claimants' proposals as "inefficient and impractical," because (1) the Parties would need to brief issues of quantum for heads of damages that may not be accepted by the Tribunal; and (2) the Respondents continue to perform under the Accord and thus the operative facts and figures applicable to any quantum determination could change considerably during the course of proceedings.

17. The Respondents envisage that at the end of the Liability-Plus Phase, the Parties would have the Tribunal's finding on liability, and in the event the Respondents are held liable, a holding on the appropriate heads of damage and any principles to be applied to the determination of specific remedies. These findings would provide a "guidepost" that would equip the Parties to proceed to amicable resolution or make efficient submissions on the precise quantum/scope of remedies. The Respondents point out that if the Tribunal were to find no basis for monetary damages for breach of the Accord, there would be no need to engage in a complicated and detailed investigation into quantum, involving fact and expert evidence.

18. The Respondents also contend that the hearing date and timetable in Procedural Order No. 1 were established on the basis that there would be a Liability-Plus Phase and not a "full argument on quantum." They note that as a result, "the timelines do not allow for the full and proper articulation of the case on quantum."

C. Tribunal's Analysis

19. The Parties obviously agree that the Liability-Plus Phase of the arbitral proceedings should involve submissions by the Parties, and determination by the Tribunal, as to whether either Respondent has breached Articles 12 and 22 of the Accord. The list of liability issues presented at pages 2-3 of the Respondents' Proposal provides a sensible starting point. In any event, given that the list sets forth the relevant legal issues as the Respondents see them, they will presumably organize their response submissions in that manner, and the Claimants will need to so reply. Needless to say, the Claimants remain free to add whatever additional points, properly falling within the scope of a reply submission, when they do reply. The Tribunal encourages the Parties to organize their respective submissions so that they directly engage the adverse parties' points.

20. The Parties also agree that the Liability-Plus Phase should involve a determination by the Tribunal on whether the heads of damages claimed by the Claimants are available in the event of a finding of breach.[4] They also agree that in general it would be helpful for the Tribunal to decide what "principles should apply to determining" each remedy and whether distinctions should be drawn between factories in different tiers, and between active and inactive factories. The Tribunal expects the Parties to directly engage on those points.

21. The Parties diverge, however, on the extent to which the Liability-Plus Phase should encompass the *methodology* of calculating damages (such as through use of certain formulas and sampling) and the extent to which the Tribunal should now engage in actual calculation of amounts to be paid in *application* of the methodology. The Claimants do not propose that the Parties should undertake any part of what they describe as the "Claims Phase" in this phase, so the Tribunal need address at this time only the components of what they describe in the Proposal as the "Liability-Plus Phase".

22. *First*, the Tribunal understands the issues identified at points II.A.1.c. & d. of the Respondents' list of remedies issues[5] to encompass the "*first*" issue identified by the Claimants as to both cost of remediation and hazardous duty pay.[6] Hence, the Parties have agreed that those points will be resolved during this phase of the proceeding.

---

4 *See* Notice of Arbitration against [redacted], 8 July 2016, para. 55 and Notice of Arbitration against [redacted], 11 October 2016, para. 61.

5 *See* Respondents' Proposal, pp. 2-3 (". . . are the Claimants legally entitled to . . . c) an order for the Respondents "to place into escrow 100 percent of the estimated remediation costs of all corrective actions for each factory that remain uncorrected as of the date of the award (the 'Escrow Funds')," with "disbursements from the Escrow Funds . . . made to pay for remediations as appropriate"; d) an order for the Respondents "to pay hazardous duty pay to all workers employed (or formerly employed) in noncompliant factories, calculated as a percentage of regular income received during the Relevant Period (i.e., as of the date when all corrective actions should have been completed in accordance with the deadlines established when the CAP was technically approved, until such time as remediation is completed)."").

6 *See* Claimants' Proposal, p. 2 ("*First*, the Tribunal determines whether Claimants are entitled to the estimated remediation costs of all corrective actions for each factory that remain uncorrected as of the date of the award."); p. 3 ("*First*, the Tribunal determines whether Claimants are entitled to damages for hazardous duty pay for workers employed or formerly employed in the Respondents' supplier factories that remain unremediated, calculated as a percentage of regular income received during the relevant period."). *See also* Statement of Claim, paras. 177(i), 183(i).

23. *Second*, as to the "*second*" issue identified by the Claimants as to both cost of remediation and hazardous duty pay,[7] the Tribunal determines that the approach that best balances competing considerations of efficiency would be to have the Parties address the methodology by which the Tribunal would determine compensation for any breaches, but to take no steps during this phase to apply that methodology. Specifically, the Tribunal directs the Respondents to address the Claimants' proposal, in the case of both cost of remediation and hazardous duty pay, that the Tribunal "determine a global amount to be paid into escrow using [the] formula" set forth in the Claimants' Proposal.[8] That discussion should include, of course, the formula itself. Needless to say, the Respondents remain free to argue against the Claimants' approach in its entirety, to propose refinements, or to propose an alternative, including as to any components of the Proposal. Further, the Tribunal directs the Parties to address, with respect to cost of remediation, the methodology by which any estimate would be determined, and with respect to hazardous duty pay, not only whether the Claimants are legally entitled to an award ordering the Respondents "to pay hazardous duty pay to all workers employed (or formerly employed) in non-compliant factories, calculated as a percentage of regular income received during the Relevant Period . . ." but also what principles apply to calculating that percentage rate and what it should be, if it is expected to be a constant value in the formula.

24. The Tribunal fully appreciates the Respondents' point that entering into any aspect of remedies at this point risks doing work that will not be necessary in the event that the Tribunal holds that they are not liable. But that circumstance obtains whenever a case is not divided, as they virtually never are, into each discrete sequential issue – whether jurisdiction, admissibility, threshold issues, merits, or any other. With the concurrence of the Parties, the Tribunal dealt with that circumstance here as to the Admissibility Objection by providing for parallel treatment of that issue with the merits; with the concurrence of the Parties, the Tribunal is dealing with that circumstance as to remedies by enlarging treatment of liability to include narrowly defined issues of remedy. Again, the Tribunal concludes that these approaches have best balanced the competing considerations of efficiency.

25. The scope of the Liability-Plus Phase will hence be limited to methodology and applicable principles. There will be no need for the collection or presentation of data, and we will not determine an amount of damages to be placed in escrow. The proposal for a claims process will be deferred. The Respondents' concern about changing "operative facts and figures" will be mooted for the duration of this phase.

IV. DECISION

26. The Tribunal, having considered the Parties' respective positions, for the reasons set out above, unanimously directs the Parties' remaining written and oral submissions in this Liability-Plus Phase of the arbitration to address remedies issues in accord with, and to the extent of, the directions set forth in this Order.

27. The Parties may apply to the Tribunal if they require any clarification of these directions or encounter any serious practical difficulties in implementing them.

---

7 *See* Claimants' Proposal, pp. 2-3 ("*Second*, if the Tribunal determines that Claimants are entitled to remediation costs, then Claimants propose that the Tribunal determine a global amount to be paid into escrow using a formula described below . . ."); p. 3 ("*Second*, if the Tribunal determines that Claimants are entitled to hazardous duty pay damages, then Claimants propose that the Tribunal determine a global amount to be paid into escrow using a formula described below . . .").

8 *See also* Statement of Claim, paras. 177(ii), 183(ii).

Place of Arbitration, The Hague

Dated, 19 September 2017

Donald Francis Donovan
Presiding Arbitrator