

**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”)**

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**PROCEDURAL ORDER NO. 16**

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**The Arbitral Tribunal**

Dr. Veijo Heiskanen (Presiding Arbitrator)

Mr. Oscar M. Garibaldi

Mr. J. Christopher Thomas QC

**Registry**

Permanent Court of Arbitration

7 August 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 30 May 2020, the Respondent wrote to the Tribunal, requesting that the Tribunal issue further orders on alleged shortcomings in the Claimant's document production pursuant to Procedural Order No. 8 (the "**Respondent's Application**"). The Respondent enclosed with its Application (i) Appendix 1, a tabulated summary of its requests divided into categories A to E; (ii) Appendix 2, an abridged copy of the Claimant's Privilege Log, including the entries that the Respondent challenges, annotated with the corresponding original document production requests; (iii) Appendix 3, the Claimant's complete Privilege Log; and (iv) Appendix 4, the correspondence between the Parties regarding the alleged shortcomings in the Claimant's document production.
4. On 1 June 2020, the Claimant wrote to the Tribunal, requesting that the Tribunal issue further orders on alleged shortcomings in the Respondent's document production (the "**Claimant's Application**"). The Claimant requested that the Tribunal prioritize the Claimant's Application in view of the upcoming time limit of 19 June 2020, the date on which the Claimant was required to file its Statement of Reply.
5. Having considered the Parties' requests, the Tribunal suspended the time limit for the Claimant to comment on the Respondent's Application until a later date that would be fixed in due course.
6. On 10 June 2020, the Tribunal issued Procedural Order No. 13, approving a revised procedural timetable as agreed between the Parties. Procedural Order No. 13 set out, *inter alia*, the time limits for further submissions by the Parties regarding their respective Applications.
7. On 24 June 2020, the Tribunal issued Procedural Order No. 14, setting out the Tribunal's decisions on the Claimant's Application of 1 June 2020 regarding the Respondent's document production obligations.
8. On 24 July 2020, the Claimant submitted its comments on the Respondent's Application in accordance with Procedural Order No. 13.
9. On 31 July 2020, the Respondent submitted its comments on the Claimant's letter dated 24 July 2020, enclosing updated Appendices 1, 2, and 4.1.

10. On 6 August 2020, the Claimant provided further comments in response to the Respondent's letter of 31 July 2020.

## **II. THE RESPONDENT'S APPLICATION**

11. In its Application, as amended in its letter dated 31 July 2020, the Respondent requests that the Tribunal make the following orders:
  - (i) that Claimant produce the documents listed under Categories A, B, C-1, C-2 and C-4 in Appendix 1 of the Application, an updated version of which is enclosed herewith;
  - (ii) that Claimant remove the redactions in the documents listed under Category D in Appendix 1 hereto; and
  - (iii) that the Category E documents be produced, or alternatively, in the light of PO14, that the ROK may request that the Tribunal draw inferences that the Category E documents that Claimant has failed to produce would be adverse to Claimant's interests.

## **III. POSITIONS OF THE PARTIES**

### **1. The Respondent's Position**

12. The Respondent submits that the Claimant has failed to comply with its document production obligations by refusing to provide sufficient information in the Claimant's Privilege Log to justify its withholding and redaction of responsive documents. The Respondent argues that the "minimal, boilerplate information" provided by the Claimant as to its claims of privilege and confidentiality are insufficient for the Respondent and the Tribunal to determine that the documents have been legitimately withheld under paragraph 28(c) of Procedural Order No. 8 and that there are compelling grounds for the redactions under Article 9(2) of the IBA Rules.
13. According to the Respondent, despite its repeated requests, the Claimant "has prioritized secrecy over compliance" with the Tribunal's orders and has failed to provide a legal basis and the reasons for asserting (i) attorney-client privilege; (ii) work-product doctrine; and (iii) commercial sensitivity or confidentiality, or any combination thereof, over 1,502 documents. The Respondent argues, relying on decisions of investment treaty tribunals and U.S. case law, that the Claimant, as the Party seeking to withhold evidence, cannot escape the burden of justifying its claims of privilege on grounds of undue burden.
14. The Respondent further argues that the Claimant has submitted certain responsive documents that were not previously produced as exhibits with its Statement of Reply, which shows that the Claimant's document production was inadequate.

**A. Category A**

15. The Respondent requests that the Tribunal order the Claimant to produce all documents as to which no lawyers are listed as among the senders, direct recipients, or recipients in copy, but that are claimed to be privileged. According to the Respondent, the Claimant has not established that all the documents in question are attachments to e-mail communications between client and counsel. To the extent that the Claimant makes a general statement in its Privilege Log that “families [of documents are] grouped together,” the Respondent notes that the Claimant has failed to identify which documents are attachments to which e-mail chains. The Respondent further contends that merely describing the documents as “communicating and/or relating to legal advice” without identifying the subject of the alleged advice is insufficient to determine the basis for the documents having been withheld.
16. The Respondent argues, referring to a decision of the Delaware Court of Chancery, that attaching a non-privileged document to an e-mail to a lawyer does not “cloak” that document with privilege. According to the Respondent, the authorities that the Claimant relies on to argue the contrary in fact suggest that an assessment of whether an e-mail attachment is protected by privilege requires a case-by-case analysis, where the Claimant must prove that it was transmitted to an attorney at the attorney’s request or for legal advice. As the Claimant has not offered any information that any of the documents in category A is independently privileged or was used by any of its lawyers for the purpose of preparing or providing legal advice, the Respondent argues that the documents are in fact not privileged and must be produced.
17. Additionally, the Respondent submits that documents that were neither sent nor received by lawyers but are only labelled as “prepared in anticipation of adversarial proceedings” do not justify the Claimant’s claim of work-product protection. The Respondent notes that even if the documents were attachments to e-mails in respect of which the Claimant claims privilege, there is no indication that lawyers were the recipients of those attachments and that the documents were prepared for the purpose of proceedings under the lawyers’ instructions.

**B. Category B**

18. The Respondent requests that the Tribunal order the Claimant to produce all documents as to which, in addition to lawyers, non-lawyer third parties are listed among the senders, direct recipients, or recipients in copy. The Respondent relies on U.S. case law to argue that the inclusion of third parties as senders and recipients in e-mail communications serves to waive any privilege with respect to those e-mail communications and to any attached document regardless of whether the documents contain privileged information.

19. The Respondent rejects the Claimant's assertion that third-party communications are protected by privilege when they comprise part of the request for or provision of legal advice. Noting that e-mail chains are made up of distinct documents, the Respondent contends that earlier documents that had nothing to do with attorneys or legal advice when they were made "do not become privileged by later being forward[ed] to an attorney." Therefore, unless the Claimant can show that the earlier e-mails with third parties in an e-mail chain were communications made at the attorney's request or for legal advice, the Claimant should be ordered to produce those e-mails and "can simply redact the later privileged e-mails."
20. The Respondent alleges that the Claimant has not established that the third parties are agents of the Claimant or its counsel or that the purpose of the communications with the third parties was to render or obtain legal advice to warrant the extension of the privilege. According to the Respondent, given that Ipreo was not engaged at the counsel's request or for the purpose of obtaining legal advice, no privilege applies to information provided by Ipreo even if they had later become "integral to the advice that Claimant was receiving from its outside counsel." Moreover, the Respondent contests that Ipreo was a "functional employee" of the Claimant, as the Claimant has not shown that Ipreo meets "the requisite (high) standard of integration" into the Claimant's corporate structure. Similarly, the Respondent points out that, absent a showing that Newgate and Newscom were incorporated into the Claimant's staff, the hiring of external public relations agencies to perform functions which the Claimant lacks internally does not automatically make those agencies "functional employees" of the Claimant.
21. As to documents that have the same descriptions as documents in respect of which the Claimant has admitted that "the agency relationship is arguably not clearly established," and that are therefore not privileged, the Respondent argues that the Claimant must produce them as there is no basis for continuing to withhold them.
22. The Respondent submits that, insofar as the Claimant claims "Work Product Protection" for documents in category B, the limited information provided does not indicate that the documents were "prepared in anticipation of adversarial proceedings" by or for lawyers at their instructions. In any event, the Respondent maintains that work-product privilege is waived when the privileged document is disclosed to a third party.

### **C. Category C**

23. The Respondent requests that the Tribunal order the Claimant to produce all documents that it has withheld on the basis of "Commercial Sensitivity/Confidentiality" without identifying the applicable confidentiality agreements to justify its claims of confidentiality. According to the

Respondent, the Claimant has not met the burden of showing “compelling grounds” of commercial or technical confidentiality under Article 9(2)(3) of the IBA Rules for the Tribunal to determine that the Claimant’s withholding of the documents is justified. The Respondent argues that the Claimant has provided “bare assertions” that the documents “contain[] commercially confidential information from a third party that is subject to a confidentiality agreement,” notwithstanding the Respondent’s requests for explanations on, *inter alia*, the description of the documents, the nature of the alleged confidentiality, and the scope of the confidentiality agreement.

24. The Respondent argues that the Claimant has withheld documents on the basis that they “refer[] to” purportedly confidential information (category C-1). To the extent that the Claimant claims that all documents in category C-1 are “correspondence or attachments to correspondence relating to Claimant’s engagement of Ipreo” (category C-2), the Respondent contends that the confidentiality agreement with Ipreo does not apply to the Claimant’s compliance with the Tribunal’s document orders in this arbitration. While the Respondent acknowledges the Claimant’s agreement to request permission from Deutsche Bank to disclose the requested valuation model (category C-3), the Respondent maintains that the Claimant must produce the document regardless of Deutsche Bank’s approval given that the confidential agreement with Deutsche Bank is also inapplicable in this arbitration. The Respondent notes that its “interests pertain only to the review of any documents [in category C] for the purpose of this arbitration and [that] the ROK agrees to comply with any measures deemed necessary should the Tribunal set conditions to Claimant’s producing these documents.”

**D. Category D**

25. The Respondent requests that, while the Claimant has failed to provide sufficient information and to show compelling grounds for redacting 424 documents, the Tribunal order the production of only four documents in unredacted form. Noting that the four requested documents were redacted on the ground of containing “[i]nformation protected by a confidentiality agreement with a third party,” the Respondent stresses that the Claimant has not provided any information about the supposed agreement or any other relevant information to justify the redactions.

**E. Category E**

26. The Respondent requests that the Tribunal order the Claimant to produce additional documents that are responsive to Request Nos. 7, 9 to 11 and 14 of the Respondent’s Redfern Schedule. Alternatively, in light of the Tribunal’s determination in Procedural Order No. 14 that it is constrained from making a “fresh order in the event a party fails to comply with the Tribunal’s

document production orders,” the Respondent requests that the Tribunal issue “a similar order allowing it to invite the Tribunal to draw adverse inferences as and when appropriate” in relation to the Claimant’s withholding of category E documents.

27. According to the Respondent, the Claimant’s two document productions and the spreadsheet produced by the Claimant pursuant to Procedural Order No. 12 reveal that the Claimant has failed to disclose documents responsive to Request No. 7 “regarding EALP and/or the Elliott Group’s swap trade confirmations evidencing the acquisition, disposition or holding of SC&T swaps.” The Respondent further notes that the Claimant has not yet “provided confirmation that no swap contracts have been entered into between EALP and/or other Elliott Group entities in relation to or in connection with SC&T and/or SC&T shares from November 2014 to July 2018.”
28. As to documents responsive to Request Nos. 9 to 11, the Respondent contends that the Claimant has “selectively and intentionally held back” certain documents “out of concern that producing them would be prejudicial to its claims.” In particular, the Respondent argues that, considering that 31 daily position reports were produced, additional daily reports must have existed and would have been generated on each trading day during the nine-month period from September 2014 to July 2015 covered by the Requests, which the Claimant has failed either to produce or to confirm the contrary.
29. Finally, the Respondent asserts that the Claimant withheld documents responsive to Request No. 14, including the share trade confirmations, daily positions reports and monthly statements “relating to EALP’s purported acquisition of 11,125,927 shares in SC&T by 3 June 2015.” According to the Respondent, the Claimant’s production of these documents in respect of SC&T transactions on 5 February 2015 and certain dates in September 2015 demonstrates that similar documents must also exist for the requested date.

## **2. The Claimant’s Position**

30. The Claimant requests that the Tribunal reject the Respondent’s Application as the Claimant has complied with its document production obligations. The Claimant argues that it has properly withheld documents on the basis of legal privilege or confidentiality and has provided sufficient information to justify its withholding of documents in accordance with paragraph 28(c) of Procedural Order No. 8. The Claimant denies that it has behaved “secretively” or that its document production was deficient as demonstrated in the Parties’ preceding exchanges of correspondence on document production which, in the Claimant’s view, “helpfully narrowed the issues in dispute at least as to matters of principle.”

31. The Claimant also rejects the Respondent's allegation that the Claimant has submitted as exhibits with its Statement of Reply several responsive documents that were not previously produced. According to the Claimant, this is "simply wrong," as it had produced these documents in connection with document production, on 6 March 2020.

**A. Category A**

32. The Claimant submits that the documents listed in category A are all attachments to attorney-client communications and therefore are protected by attorney-client privilege as established under U.S. case law. According to the Claimant, the Respondent has "artificial[ly] and incorrect[ly]" isolated the attachments from their parent e-mails to question their privilege despite the Claimant's explanation of the source of privilege, namely that the document "families [are] grouped together" and "organized in chronological order."
33. Accordingly, the Claimant maintains that the documents in category A were rightly withheld and identified in the Privilege Log.

**B. Category B**

34. The Claimant rejects the Respondent's allegation that it has waived attorney-client privilege in respect of documents involving third parties. According to the Claimant, the majority of those documents are e-mail chains which only include correspondence between the Claimant and a third party as part "of the [Claimant's] request for or provision of legal advice." By way of example, the Claimant refers to four e-mail chains in which it forwarded information it obtained by third parties to its attorneys "as part of [its] request for legal advice," however, without copying the third party to the e-mail to its attorneys. Consequently, the Claimant argues that the communication with third parties are protected by attorney-client privilege in a similar way as attachments are and "there is no question of privilege being waived."
35. The Claimant further submits that almost all of the third parties involved in the communications between the Claimant and its attorneys acted as agents of the Claimant or its counsel. Therefore, as admitted by the Respondent, they are protected by attorney-client privilege. According to the Claimant, public-relations firms and other consultants performing a corporate function necessary for ongoing or anticipated litigation or possessing special experience in a field in which the company lacks experience are treated as agents under U.S. case law. Specifically, the Claimant explains that it "incorporated" Ipreo, a market analytics firm specialized in anticipating voting behavior, into the Claimant's team to assist in formulating strategies to encourage SC&T shareholders to vote against the proposed Merger. As regards Newgate and Newscom, the

Claimant avers that they “performed essential corporate functions [...] as the Claimant did not have an extant internal public relations team in Korea,” but was in need of such in the context of the anticipated litigation resulting from the Merger.

36. For the eleven documents for which “the agency relationship is arguably not clearly established,” the Claimant undertakes to disclose them to the Respondent.

### **C. Category C**

37. The Claimant submits that the confidentiality provisions in the Claimant’s agreement with Ipreo prohibit any disclosure of documents that the Claimant exchanged with Ipreo (category C-2). In citing the agreement, the Claimant notes that it prohibits the disclosure of “all information, materials, documents, data or the like in whatever form [...] which a party has provided to the other under or in connection with this Agreement.” According to the Claimant, the Tribunal recognized the Claimant’s obligation in this regard by ordering the production of the requested documents only insofar as the Claimant did not consider them “commercially confidential.” The Claimant argues that it has therefore rightly withheld and identified the requested documents in its Privilege Log.
38. The Claimant rejects the Respondent’s allegation that it withheld documents relating to the Claimant’s engagement of Ipreo (category C-1) “on account of unidentified confidentiality agreements.” The Claimant argues that, since all but one document is either Ipreo-related correspondence or an attachment to such correspondence, it “squarely” withheld these documents pursuant to the confidentiality obligations in its agreement with Ipreo. The Claimant further contends that the majority of these documents were withheld additionally on the basis of attorney-client privilege as explained in relation to the category B documents.
39. Given that the Respondent has confirmed that it would review the documents only for the purpose of this arbitration, the Claimant undertakes to produce the requested cover e-mail from Deutsche Bank (category C-4), as well as to write to Deutsche Bank to obtain its permission to disclose the requested valuation model attached to the e-mail.

### **D. Category D**

40. The Claimant maintains that it appropriately redacted four of the five documents requested by the Respondent due to confidentiality obligations between the Claimant and a Big Four accounting firm and the confidentiality obligation included in the agreement with Ipreo. As to the remaining document, the Claimant argues that it redacted internal information relating “exclusively to its

investments outside Korea because they have no relevance to this arbitration” and contends that the Respondent has done the same in documents produced to the Claimant.

**E. Category E**

41. The Claimant confirms that “no other swap contracts have been entered into by EALP or other Elliott Group entities in relation to SC&T shares” between November 2014 to July 2018 in relation to Request No. 7, apart from the transactions disclosed in the Claimant’s two document productions and certain transactions entered into in September 2015. While no trade confirmations or other documents in relation to September 2015 swap transactions were found during the Claimant’s own search, the Claimant undertakes to provide the Respondent with “the names of the entities involved, the dates of the transactions and the amount paid to acquire the swaps and received upon disposition.”
42. The Claimant further submits that it has already provided trade confirmations in respect of 10 of the 34 SC&T swap transactions from April and May 2015 and requests that the Respondent provide confirmations of receipt. While reiterating that it relies on directly held shares to establish the Tribunal’s jurisdiction, the Claimant undertakes to produce to the Respondent any remaining trade confirmations for swap transactions on these dates that it can find following “a diligent search.”
43. The Claimant rejects the Respondent’s suggestion that it has withheld documents responsive to Requests Nos. 9 to 11 relating to share transactions between September 2014 and 17 July 2015, including “the missing daily reports.” According to the Claimant, the Respondent relies on “pure conjecture” to speculate that there are “nine months’ worth of daily reports” which are allegedly missing when the Claimant “has in fact produced over a hundred” summaries of the Claimant’s position in SC&T shares on a particular date (“Stock Monitoring Summaries”). Given that such responsive daily position reports have been produced, the Claimant maintains that a further order in respect of Request Nos. 9 to 11 would be unnecessary.
44. The Claimant denies that it has deliberately withheld documents responsive to Request No. 14, including the share trade confirmations. According to the Claimant, documents responsive to Request No. 14 are “a sub-set” of the documents responsive to Requests No. 9-11 and have been in the Respondent’s possession as the Claimant disclosed them to the Korean Financial Supervisory Services. As the trade confirmations have been exhibited to the Claimant’s Statement of Reply, the Claimant considers an additional order by the Tribunal unnecessary.

45. Finally, the Claimant contends that the requests under Category E “alter[] the terms of the Respondent’s original corresponding Document Production Requests.” Consequently, they are not covered by the Tribunal’s existing document production orders and “no adverse inference can be drawn from a party not producing documents which it was not ordered to disclose.”

#### IV. THE TRIBUNAL’S ANALYSIS

46. The Tribunal’s earlier decisions on the Respondent’s document-production requests are recorded in Procedural Order No. 8 and Annex II thereto, which contains the Respondent’s Redfern Schedule. The Tribunal decided in relation to the Respondent’s document production requests, *inter alia*, as follows:

28. [...]

The Claimant is directed to prepare a privilege log which identifies each responsive document that is being withheld from production on grounds of legal impediment or privilege. The privilege log must contain sufficient information (but without disclosing the politically or institutionally sensitive or otherwise privileged information) to allow the Respondent and, if necessary, the Tribunal to determine whether withholding the document is justified[.]

47. 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.<sup>1</sup>
48. Nevertheless, as also noted in paragraph 52 of Procedural Order No. 14, 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 under Procedural Order No. 8, the Tribunal considers appropriate to clarify the scope of the Claimant’s document production obligations, just as it considered appropriate to clarify the scope of the Respondent’s document production obligations in Procedural Order No. 14.

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<sup>1</sup> Procedural Order No. 14, para. 51.

**1. Category A**

49. As summarized above, under category A the Respondent requests that the Tribunal order the Claimant to produce documents listed in Appendix 1 of its Application, relating to documents listed in its Privilege Log “in respect of which no lawyers are listed as among the senders, direct recipients or recipients in copy, but that are claimed to privileged.” According to the Respondent, distinct documents attached to e-mail chains or authored by third parties cannot automatically be subject to attorney-client privilege or work-product protection. Rather, the correct rule, the Respondent says, citing *AM Gen. Holdings LLC v. Renco Grp, Inc.*, is that “[i]f e-mails are privileged, but the attachments to the emails do not independently earn that protection, then the attachments may not be withheld on the ground of privilege emanating from the e-mail which they accompany.”<sup>2</sup>
50. The Claimant argues, in response, that “in almost all cases the 107 category A documents are attachments to emails between client and counsel.” According to the Claimant, this is “self-evident” from the Claimant’s Privilege Log, which explains in its introduction that “[t]he documents are organized in chronological order within each section, with families grouped together.” The Claimant submits that the Respondent has presented the attachments to emails between counsel and client in isolation from their parent email, which is “artificial and incorrect.”
51. The Tribunal notes that the difference between the Parties regarding the documents falling under category A relates to the application of the relevant legal standard regarding attorney-client privilege rather than the content of the applicable legal standard. The Parties appear to agree that under the applicable legal standard attachments to emails between client and counsel can be considered privileged when they are communicated in confidence by client to counsel or vice versa in connection with seeking or obtaining legal advice.<sup>3</sup> This implies, *inter alia*, that (i) an otherwise non-privileged document attached to a communication between client and counsel is not clothed with privilege by the mere fact of the attachment, but may be covered by attorney-

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<sup>2</sup> *AM Gen. Holdings LLC v. Renco Grp, Inc.*, C.A. no. 7639-VCN, slip op. at 10 (Del. Ch. Ct. Apr. 18, 2013).

<sup>3</sup> The Respondent submits that, in the absence of a uniform rule as to the content of applicable privileges in international arbitration, “the laws of certain U.S. jurisdictions provide further guidance in regard to privileges asserted by Claimant in the withholding of documents,” in particular because the Claimant is a U.S.-based entity and the law of the place of the attorney’s domicile, in this case the U.S. (Washington D.C.), “may apply.” The Respondent also refers, in support, to Article 9(2)(b) of the IBA Rules, which provides that an arbitral tribunal shall, at the request of a Party or on its own motion, exclude from production any document for reasons of “legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.” The Claimant does not appear to challenge the Respondent’s position, and indeed has cited to U.S. case law, including *In re Abilify (Aripiprazole Prod. Liab. Litig.)*, 2017 WL 6757558, at \*7 (N.D. Fla. Dec. 29, 2017); *Durling v. Papa John’s Int’l, Inc.* 2018 WL 557915, at \*8 (S.D.N.Y. Jan. 24, 2018).

client privilege depending on the circumstances, in particular the relationship between the attached document and the legal advice that is being sought or provided; and (ii) an attachment cannot be designated as privileged without examining it individually in its relation to the attorney-client communication to which it is attached. In view of its finding in paragraph 47 above, the Tribunal does not consider it 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. Yet, the Tribunal does consider it appropriate to direct the Claimant to confirm that it has applied the relevant legal standard, as set out above, for each of the documents listed under category A in determining whether or not to withhold the documents in question from production.

## **2. Category B**

52. Under category B the Respondent seeks an order directing the Claimant to produce documents as to which non-lawyer third parties are listed as among the senders, direct recipients, or recipients in copy in addition to lawyers, on the ground that in such cases the privilege was waived. The Respondent rejects the Claimant's explanations and justifications for withholding the documents, including for lack of legal basis and/or supporting evidence.
53. The Claimant argues, in response, that category B covers two scenarios – first, e-mail chains that begin with correspondence between the client and a third party and concludes with correspondence between the client and its attorney, “by reference to sharing or forwarding information from the third party;” and second, a scenario in which a third party is involved in communications between an attorney and the client. According to the Claimant, the communications covered by the first scenario are protected by attorney-client privilege on the basis of the same principles as those applicable under category A. As to the second scenario, the communications are also privileged if the third-party acts as an agent of the attorney or the client “in order to support the obtaining of legal advice.” According to the Claimant, this is the case for all documents requested by the Respondent that involve third parties. In addition, the Claimant states that it has conducted a further review of the relevant documents and has identified eleven documents “in respect of which the agency relationship is arguably not clearly established.” The Claimant indicates that it will separately disclose these documents to the Respondent.
54. Having considered the Parties' positions, the Tribunal determines that, insofar as the Respondent seeks disclosure of documents falling under the first scenario referred to in paragraph 53 above, *i.e.* email chains that begin with correspondence between the client and a third party and conclude with correspondence between the client and its attorney, the communications are protected under

the same legal standard as documents falling under category A. Consequently, these documents should be considered privileged to the extent that they were communicated in confidence by client to counsel in connection with seeking or obtaining legal advice. As to documents falling under the second scenario, *i.e.* communications between client and counsel in which third parties are involved, the Tribunal considers that under the applicable legal standard such communications are privileged insofar as such third parties can be considered agents or functional employees of the Claimant, or of counsel, and insofar as the communications were for the purpose of seeking legal advice.<sup>4</sup>

55. For the reasons set out in paragraph 51 above, the Claimant will be directed to confirm that it has applied the legal standards referred to in paragraph 54 above in determining whether or not to withhold any of the category B documents from production.

### **3. Category C**

56. Under category C, the Respondent seeks production of documents withheld by the Claimant “on the purported basis of ‘Commercial Sensitivity/Confidentiality’ without sufficient information, let alone ‘compelling’ grounds.” These include documents withheld on account of unidentified confidentiality agreements (category C-1); documents withheld on account of an inapplicable confidentiality agreement with Ipreo (category C-2); documents withheld on account of a confidentiality agreement with Spectrum Asia (category C-3); and documents withheld on account of an inapplicable confidentiality agreement with Deutsche Bank, including a cover email and the attached valuation model (category C-4).
57. The Respondent subsequently withdrew its request under category C-3 (documents withheld on account of a confidentiality agreement with Spectrum Asia) as the Claimant produced the requested documents. The Claimant also subsequently produced one of the documents (cover email from Deutsche Bank transmitting a valuation model prepared by Deutsche Bank) covered by category C-4 and indicated that it would seek Deutsche Bank’s consent to disclose a copy of the valuation model. The Respondent requests that the Tribunal order the Claimant to produce its communications with Deutsche Bank, together with the valuation model.

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<sup>4</sup> The Parties appear to agree that this is the applicable legal standard, although they appear to disagree on how the standard should be applied; see the Respondent’s Application, para. 48(a), the Respondent’s letter of 31 July 2020, pp. 5-9 and the Claimant’s letter of 24 July 2020, p. 5, and the case law and other legal authorities cited therein.

58. The Claimant argues that all of the remaining documents under category C are covered by confidentiality obligations pursuant to agreements with third parties and are therefore excluded from production under Article 9.2(e) of the IBA Rules. According to the Claimant, some of the documents under category C-1 (identified in rows between 732 and 972 of its Privilege Log) are also covered by attorney-client privilege.
59. The Tribunal notes that the Parties do not disagree that Article 9.2(e) of the IBA Rules (“grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling”) governs the issue as to whether or not documents falling under category C should be produced; their disagreement relates, rather, to the issue how the rule should be applied. Indeed, according to the Respondent, the Claimant has not demonstrated that there are “compelling” grounds to withhold the documents, and that mere commercial or technical confidentiality is not sufficient. The Respondent further submits that the Claimant has failed to provide “sufficient information” within the meaning of paragraph 28(c) of Procedural Order No. 8 to justify its withholding of the documents.
60. The Tribunal notes that, after the Respondent’s withdrawal of its request for documents falling under category C-3 and the Claimant’s production of the cover email under category C-4 and its undertaking to seek Deutsche Bank’s consent to disclose a copy of the valuation model, the principal remaining difference between the Parties regarding category C documents concerns documents withheld by the Claimant pursuant to the confidentiality clause in its agreement with Ipreo. Having considered the matter, the Tribunal finds that, in view of the strict language of the confidentiality clause in the agreement with Ipreo, the confidentiality obligation undertaken by the Claimant under the clause constitutes a “compelling” ground to withhold the requested documents. Furthermore, given that the Claimant has produced the confidentiality clause in the Ipreo agreement, the Tribunal considers that the Claimant has provided “sufficient information” within the meaning of paragraph 28(c) of Procedural Order No. 8 to justify its withholding of the documents.
61. The remaining difference between the Parties concerns the Respondent’s request for production of the valuation model developed by Deutsche Bank (category C-4). The Tribunal notes that the Claimant has undertaken to seek Deutsche Bank’s consent to disclose a copy of the model. The Claimant will be directed to inform the Respondent of the status of its request and Deutsche Bank’s response to the Claimant’s request.

#### 4. Category D

62. Under category D, the Respondent seeks production of five redacted documents as to which the Claimant has allegedly failed to provide sufficient information to allow the Respondent or the Tribunal to determine that the Claimant's withholding of the documents is justified under paragraph 28(c) of Procedural Order No. 8, or to show compelling grounds for redacting responsive documents under Article 9.2(c) of the IBA Rules. According to the Respondent, the Claimant "has sought to justify these redactions solely by describing three broad categories of supposed grounds for the redactions, without properly identifying which grounds applied to which documents, let alone showing that these grounds are compelling."
63. The Respondent subsequently reduced its request to four documents, withdrawing its request for one of the documents (ELPROD 0002903) on the basis that the Claimant had clarified that its redactions are "of irrelevant information."
64. The Claimant contends that the redactions in all five documents are appropriate, and that it has provided an explanation for each redaction.
65. As in the case of the Parties' other disagreements relating to the Claimant's document production obligations, the difference between the Parties on this particular issue is more about the application of the relevant legal standards than the standards themselves. Indeed, the Parties agree that the applicable standards include Article 9.2(e) of the IBA Rules, which provides that an arbitral tribunal shall exclude from production any document on "grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling," as well as paragraph 28(c) of Procedural Order No. 8.
66. The Tribunal notes that three of the Respondent's remaining four requests relate to information provided by Ipreo. In light of its ruling in paragraph 60 above, the Tribunal considers that the Claimant has provided "sufficient information" within the meaning of paragraph 28(c) of Procedural Order No. 8 to justify its redactions of these documents.<sup>5</sup>
67. As to the remaining document, ELPROD 0000527, the Claimant states that it has redacted, "in accordance with its confidentiality obligations," the name of the "Big Four Accounting Firm" which conducted the valuation of Cheil. The Tribunal notes that the Claimant has not provided

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<sup>5</sup> According to paragraph 28(c) of Procedural Order No. 8, the Claimant's Privilege Log "must contain sufficient information (but without disclosing the politically or institutionally sensitive or otherwise privileged information) to allow the Respondent and, if necessary, the Tribunal to determine whether withholding the document is justified."

any information about (i) the confidentiality undertaking on which it seeks to rely, or (ii) whether such undertaking extends to the name of the party that conducted the valuation. The Tribunal therefore will direct the Claimant to disclose to the Respondent the text of the relevant confidentiality undertaking, without disclosing the name of the party that conducted the valuation absent further order of the Tribunal.

## **5. Category E**

68. The Claimant seeks under this category an order directing the Claimant to produce certain documents which are allegedly responsive to Requests Nos. 7, 9 to 11, and 14 of the Respondent's Redfern Schedule and the Claimant has allegedly failed to produce or identify as having been withheld. The requested documents include documents relating to (i) EALP's and/or the Elliott Group's swap trade confirmations evidencing the acquisitions, disposition, or holding of SC&T swaps for certain dates; (ii) EALP's and/or the Elliott Group's share trade confirmations with external brokers evidencing their acquisition, disposition, or holding of SC&T shares or other interests from September 2014 through 17 July 2015; (iii) internal allocation of shares and swaps among and between EALP and/or the Elliott Group from September 2014 through 17 July 2015; (iv) EALP's and/or the Elliott Group's share trade confirmations for all dates up to 3 June 2015 evidencing the acquisition, disposition, or holding of SC&T shares or other interests as generated by external brokers, including Citi and Bank of America; (v) EALP's and/or the Elliott Group's daily position reports for all dates up to 3 June 2015 evidencing the acquisition, disposition, or holding of SC&T shares or other interests as generated by external brokers, including Citi and Bank of America; and (vi) EALP's and/or the Elliott Group's monthly statements for all dates up to 3 June 2015 evidencing the acquisition, disposition, or holding of SC&T shares or other interests as generated by external brokers, including Citi and Bank of America.
69. The Respondent subsequently indicated that, in light of the Tribunal's ruling in Procedural Order No. 14, referred to in paragraph 47 above, it "would be content to receive a similar order in relation to the responsive documents that the Claimant continues to produce as addressed in category E," and that it would "seek adverse inferences in due course." Nevertheless, in its submission of 31 July 2020 the Respondent continued to maintain its request for an order for production as an alternative request for relief.
70. The Claimant submits that there is no reason for a further order in relation to the documents listed under category E of the Respondent's Application because, *inter alia*, the responsive documents have already been produced and no further responsive documents have been located, despite a diligent search. The Claimant has also undertaken to produce further responsive documents, even

if it does not rely on them in this arbitration, and has recently produced further evidence, including a witness statement, exhibits, and other evidence, in its Reply. Furthermore, according to the Claimant, the documents responsive to the Respondent's Request No. 14 "are a sub-set of the documents responsive to the Respondent's Requests No. 9-11."

71. In light of its ruling in paragraph 47 above, the Tribunal will deny the Respondent's primary request for an order for production of the documents listed under category E in the Respondent's Application. As alternatively requested by the Respondent, the Tribunal confirms that its determinations in this Procedural Order 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 inferences from any such failure.

#### **V. THE TRIBUNAL'S DECISION**

72. In light of the above, the Tribunal determines as follows:
- (a) The Claimant is directed to confirm that it has applied the relevant legal standard, as set out in paragraph 51 of this Procedural Order, for each of the documents listed under category A of the Respondent's Application, in determining whether or not to withhold the documents in question from production;
  - (b) The Claimant is directed to confirm that it has applied the legal standards referred to in paragraph 54 of this Procedural Order in determining whether or not to withhold from production documents listed under category B of the Respondent's Application;
  - (c) The Respondent's request that the Claimant be ordered to produce the documents listed under category C of the Respondent's Application is denied;
  - (d) The Claimant is directed to inform the Respondent of (i) the status of the Claimant's request to Deutsche Bank that the latter consent to the Claimant's production of the valuation model referred to in category C-4 of the Respondent's Application, and (ii) Deutsche Bank's response thereto;
  - (e) The Claimant is under an obligation to disclose to the Respondent the confidentiality undertaking relied upon by the Claimant to justify the redaction of the name of the party that prepared document ELPROD 0000527 in the Claimant's Document Production Index dated 6 March 2020, listed under category D of the Respondent's Application;

- (f) The Respondent's request that the Claimant remove the redactions in the documents listed under category E of the Respondent's Application is denied;
- (g) The Respondent's request that the Claimant produce the documents listed under category E of the Respondent's Application is denied; and
- (h) The Tribunal's determinations in this Procedural Order 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.

**Place of Arbitration:** London, United Kingdom



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Dr. Veijo Heiskanen  
(Presiding Arbitrator)

On behalf of the Tribunal