THE ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH: ARBITRATION MEETS HUMAN RIGHTS

by Kate Bontekoe

On 17 January 2018, Switzerland-based labour organizations UNI Global Union and IndustriALL Global Union reached a $2.3 million settlement with a multinational fashion brand in arbitration proceedings brought under the 2013 Accord on Fire and Building Safety in Bangladesh. The Unions had settled with a different global brand in December 2017. These were the first arbitrations to be brought under the Accord. Although the exact terms and brand names remain confidential, the Unions reported that these historic settlements would ensure remediation of over 200 supplier factories and provide $300,000 to the Unions' joint Supply Chain Worker Support Fund.

THE ACCORD

The Accord is a legally binding agreement among the two global Unions, eight Bangladeshi unions and more than 200 clothing brands and retailers worldwide, including Adidas, Benetton, H&M and Marks & Spencer. It was negotiated in the aftermath of the 2013 collapse of the Rana Plaza factory in Dhaka, which killed 1,135 garment workers.

As stated in its preamble, the signatories to the Accord are "committed to the goal of a safe and sustainable" Bangladeshi ready-made garment industry. The independent inspection and safety training systems established under the Accord cover more than 1,600 factories and 2 million workers in Bangladesh. Fashion brands must ensure that their suppliers participate fully in those systems and perform all required remediation. The brands are also required to negotiate commercial terms with suppliers to enable the financial feasibility of their compliance. The Accord expires in May of this year, to be replaced by the new three-year 2018 Accord, which has thus far been signed by more than 60 brands.

LANDMARK ARBITRATIONS

Under the unique terms of the Accord, disputes arising between parties to the agreement are brought first to a Steering Committee made up of representatives from both brands and unions and chaired by a non-voting representative of the ILO. In what was a watershed development for business and human rights, the Accord provides that a party may "appeal" the decision of the Steering Committee in binding arbitration.

The arbitrations initiated by the Unions in 2016 were the first test of this dispute resolution mechanism, which had not specified either the applicable arbitration rules or the arbitral seat. These proceedings were administered

by the Permanent Court of Arbitration (the "PCA") in The Hague and conducted under the 2010 UNCITRAL Arbitration Rules, choices that are reflected in the improved dispute resolution provision in the 2018 Accord. Although the two arbitrations were brought separately against different respondents and remained formally distinct, the parties agreed for the cases to be heard together before the same arbitral tribunal, composed of Donald Francis Donovan of the United States, who was appointed by the PCA as chair, together with Graham Dunning QC of the United Kingdom and Hans Petter Graver of Norway.

On 4 September 2017, the Tribunal confirmed its jurisdiction and held the claims admissible. Acknowledging the unique quasi-public character of these cases, sitting somewhere between public law arbitrations against (or between) States and commercial arbitrations between private entities, the Tribunal struck a balance on confidentiality. Although the brand names would not be revealed and proceedings would be held in private to protect the brands' reputations, the Tribunal ordered that certain case documents would be released in redacted form in recognition of the public interest in the dispute.

LOOKING AHEAD

The right to an effective remedy remains the weakest pillar of the United Nations Guiding Principles on Business and Human Rights. The ground-breaking Accord proceedings demonstrate that international arbitration can be an effective, attractive choice for business-related human rights disputes for a number of reasons:

- **Neutrality.** The neutral arbitral forum avoids courts not viewed as sufficiently independent or competent. The fashion brands party to the Accord were not prepared to submit to the Bangladeshi courts, but they did agree to ground-breaking dispute resolution through binding arbitration.
- **Flexibility.** The flexibility of arbitration, manifest in the Tribunal's carefully-balanced confidentiality order and its decision to hear two cases at once, permits parties to craft procedures tailormade to their particular circumstances.
- **Efficiency.** Arbitrations typically conclude more quickly than national court proceedings, in particular because arbitral awards are final and not subject to appeal.
- **Expert adjudicators.** As was the case in the Accord arbitrations, parties are free to choose arbitrators with expertise in business and human rights, or to have experts selected by an appointing authority.

- **Enforceability.** International arbitral awards are enforceable with relative ease in more than 140 countries through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention. There is no equivalent multilateral treaty for the recognition and enforcement of foreign court judgments.

The Accord arbitrations also offer answers to criticism about the viability of business and human rights arbitration. The main obstacle often raised is whether international corporations would consent to arbitration where they might otherwise avoid court proceedings or enforcement. As the Accord shows, in the face of rising global commitment to corporate social responsibility, companies increasingly agree to arbitrate these disputes to avoid negative press and encourage consumer loyalty.

The potentially high cost of international arbitration is raised as another disadvantage, namely the issue of "inequality of arms" between large corporations and individual victims or labour unions. Again, the Accord arbitrations demonstrate one possible answer: the Unions were represented by pro bono counsel. Another solution could be the creation of a trust fund modeled after the PCA's Financial Assistance Fund for developing countries to meet their costs in international arbitrations administered by the PCA.

The 2018 Accord confirms the success of its model, providing in the preamble that it "could possibly be expanded to other related industries beyond" the ready-made garment industry. Ultimately, a broader set of fit to purpose rules will best serve the international arbitration of business and human rights disputes. Such efforts are already underway. In December 2017, a drafting committee was constituted, chaired by former Judge of the International Court of Justice Bruno Simma, to prepare the Hague International Business and Human Rights Arbitration Rules. These are to be modeled on the UNCITRAL Rules and will be offered to international arbitral institutions, including the PCA, which already has a specialized set of optional rules for environmental disputes. The drafters will surely look to the experience of the Accord as they craft new rules for the arbitration of business and human rights disputes.