



Gas and LNG Price Arbitrations

A Practical Handbook, Second Edition

Consulting Editors **James Freeman** and **Mark Levy QC**

Table of contents

Drafting an effective price review clause _____ 5
Mark Levy QC
Allen & Overy LLP

The trigger phase _____ 19
Marnix Leijten
Martje Verhoeven-de Vries Lentsch
De Brauw Blackstone Westbroek NV

Changes of circumstances as a price modifier _____ 37
Michael Polkinghorne
White & Case LLP

Procedural issues in gas price review arbitrations _____ 75
Oliver Browne
Philip Clifford QC
Latham & Watkins

Evidence in gas pricing arbitration _____ 87
Augustin Barrier
Noradèle Radjai
LALIVE

Confidentiality in gas price reviews _____ 103
Philippe Pinsolle
Quinn Emanuel Urquhart &
Sullivan LLP

The arbitrator's role _____ 121
Rahul Donde
Laurent Lévy
Lévy Kaufmann-Kohler

The client's perspective _____ 133
Nikolas Hübschen
Uniper Global Commodities SE

Expert evidence in price reviews and disputes _____ 147
Christopher J Goncalves
Anthony J Melling
Berkeley Research Group LLC

The adjustment phase in gas price reviews under long-term gas supply contracts _____ 169
Michelle Glassman Bock
Steven Finizio
Wilmer Cutler Pickering Hale
and Dorr LLP

Natural gas price review arbitrations: issues in adopting hub indexation _____ 181
Luis Agosti
Boaz Moselle
Compass Lexecon

The potential for price _____ 197
disputes in hub-indexed
gas contracts

Valentina Bonetti

Dan Harris

Carlos Lapuerta

The Brattle Group

Gas price reviews in _____ 213
Asia-Pacific

David Jenaway

Allen & Overy

Current and future trends ____ 225
for price reviews

James Freeman

Allen & Overy LLP

About the authors _____ 241

Index _____ 251

The arbitrator's role

Rahul Donde

Laurent Lévy

Lévy Kaufmann-Kohler

1. Introduction

The majority of gas sold to European (and other) buyers is sold through long-term supply contracts with 'take or pay' obligations that require the buyer to pay for an agreed volume of gas. The price of the gas sold under these contracts tracks the value of natural gas as it changes over time. If the gas is bound for a market that has a market index for natural gas, the price formula may be based on such an index. The National Balancing Point in the UK and the Henry Hub in the US are some examples. However, if the gas is destined for a market that does not have a reliable natural gas index, or if the gas is sold under an older contract that was in place before market indexation, then the gas price is normally indexed to the prices of alternative fuels, usually oil prices. These latter contracts usually contain price review clauses.¹

As the name suggests, a price review clause allows the parties to the contract to seek a revision and adjustment of the gas price (or the price calculation formula) in specific circumstances so that the price/price formula reflects the relevant changes in the market as identified in the contract.² Typically, these clauses contain a procedure under which one party (or both) may notify the other of its claim for a price adjustment. The parties are then to negotiate the price for a defined period of time. If negotiations are unsuccessful, either party may initiate the specified dispute resolution process, which is usually arbitration.

A gas price arbitration is one in which an arbitral tribunal is tasked with determining whether the economics of a contract are to be adjusted, and, if so, to establish a new gas price/price formula. In effect, the parties in a gas price arbitration are asking the arbitral tribunal to operate the price review clause and set a new price or price formula, as the parties are themselves unable to do so.

While gas price arbitration is not a recent occurrence, the number, size, complexity and increasing public scrutiny of these arbitrations is notable. Indeed,

1 Ben Holland and Spencer Ashley, "Natural Gas Price Reviews: Past, Present and Future" (2012) *Journal of Energy & Natural Resources Law* 35.

2 Michael Polkinghorne and Sven-Michael Volkmer, "Price Re-openers in Long Term Gas Supply Agreements" in James Gaits (ed), *The Leading Practitioners' Guide to Oil and Gas Arbitration* (JurisNet LLC, 2015) 525.

gas price arbitrations are now commonplace.³ They are predicted to increase significantly in the Asia-Pacific, as that region is undergoing a transition similar to that seen in the European gas markets in the past decade that triggered a significant number of gas price reviews.⁴ In early 2018, an award was issued in an over US\$ 100 billion gas price dispute between the state-owned gas companies of Russia and Ukraine – one of the highest-value commercial arbitrations known to date.⁵ The over 1000-page award provides a good illustration of the kind of complex technical questions arbitral tribunals in these type of disputes are expected to master.⁶ That award, along with others, have been thoroughly debated in the mainstream media,⁷ with some clamouring for more responsible behaviour.⁸ Other multi-billion dollar gas pricing arbitrations are currently ongoing.⁹

Gas price arbitrations are markedly different from 'traditional' adversarial arbitration proceedings where arbitrators are tasked with determining fault in respect of breaches of a contract or other legal wrongs. In a gas price arbitration, while legal issues may also arise, the arbitrators are to find a commercial arrangement reflective of commercial realities that is, at the same time, rooted in the parties' agreement such that the parties can continue their relationship. Technical skill and expertise is paramount – a change of just a few cents per unit of gas (or even less than a cent) can result in the transfer of millions of dollars between the parties because of the high volumes of gas delivered under the contract. Further, a tribunal's interpretation of the price review clause may resonate throughout the life of the contract, causing additional difficulties if done incorrectly or unclearly. Misunderstanding or misapplication of technical parameters may render the price formula unworkable, with the result that the parties may have to abandon the price review process altogether.

All of these factors tie in to make gas price arbitration highly sophisticated,

-
- 3 Stephen Anway and George von Mehren, "The Evolution of Natural Gas Price Review Arbitrations" in William Rowley (ed), *The Guide to Energy Arbitrations*, 3rd edn (GAR, 2018) 199. See <https://globalarbitrationreview.com/chapter/1142622/the-evolution-of-natural-gas-price-review-arbitrations>, accessed 24 February 2019.
 - 4 Sabrina Lee, "Asia: The new battleground for gas price reviews?" (CDR, 28 June 2018), at www.cdr-news.com/categories/taiwan/8313-asia-the-new-battleground-for-gas-price-reviews, accessed 24 February 2019.
 - 5 Douglas Thomson, "Naftogaz and Gazprom both declare win in pricing dispute" (Global Arbitration Review, 16 January 2018), at <https://globalarbitrationreview.com/article/1152787/naftogaz-and-gazprom-both-declare-win-in-pricing-dispute>, accessed 24 February 2019.
 - 6 Naftogaz published the awards on its website "in response to significant public interest". See Naftogaz, "Naftogaz publishes Stockholm awards" (2018) at [Financial Times, 2018\) at \[www.ft.com/stream/658a2980-46c8-4a31-887e-c135133ad80b\]\(http://www.ft.com/stream/658a2980-46c8-4a31-887e-c135133ad80b\), accessed 24 February 2019.](http://www.naftogaz.com/www/3/nakweben.nsf/0/OBAC9D7A7656AFBC2258355002C25B8?OpenDocument&year=2018&month=11&nt=News&(Naftogaz, 30 November 2018), accessed 24 February 2019.7 See for instance, the reportage by the <i>Financial Times</i>,)
 - 8 Marc-Antoine EYL-MAZZEGA, "The Gazprom-Naftogaz Stockholm Arbitration Awards: Time for Settlements and Responsible Behaviour" (Edito Energie, March 2018) at www.ifri.org/en/publications/editoriaux-de-lifri/edito-energie/gazprom-naftogaz-stockholm-arbitration-awards-time, accessed 24 February 2019.
 - 9 Sebastien Perry, "New phase of 'gas wars' begins in Stockholm" (Global Arbitration Review, 31 January 2019) at <https://globalarbitrationreview.com/article/1179842/new-phase-of-%E2%80%9Cgas-wars%E2%80%9D-begins-in-stockholm>, accessed 24 February 2019.

specialised and complex. An arbitral tribunal tasked with resolving a gas price dispute is thus in unique circumstances and faced with particular challenges.

With this background, the next section reviews the ‘arbitrators’ role’ in a gas price arbitration.

2. Arbitrators’ role

The arbitrators’ role in a gas pricing arbitration in essence involves interpretation and application of the relevant contractual price review provisions following the law governing the contract. The arbitrators will have to determine whether the procedural and substantive conditions for a price review have been satisfied, and, if so, how to adjust the price/price formula. While this sounds simple enough, there are, however, some important nuances. A few of these are considered below. It should be noted, however, that there is no ‘standard’ price review provision, arbitrators must be fully conscious of the idiosyncrasies of the parties’ contract in the case before them.

2.1 Awareness of mandate

As is the case in other commercial arbitrations, in gas price arbitrations, the mandate of the arbitral tribunal depends on the terms of the arbitration agreement. Gas price renegotiation clauses typically include multi-tier clauses requiring the parties to negotiate before entering into an arbitration to determine whether gas prices should be revised, and, if so, how.

Arbitrators must pay careful attention to these pre-arbitration pre-requisites. Indeed, if these pre-requisites are couched in mandatory terms, then, subject to the applicable law, arbitrators may not immediately entertain the parties’ dispute.

Consider the following example:

*The request for price revision shall be made in writing and be properly substantiated by the requesting Party. Upon receipt of the above-mentioned request by the Party concerned, the Parties shall enter into negotiations within 20 days and, if an agreement is reached, sign the respective addendum to this Contract.*¹⁰

In this (and other) cases, arbitrators would be prudent to pay careful attention to the terms of the price review clause. Subject to the specificities of each case, in some jurisdictions such as Singapore, non-compliance with mandatory preconditions to arbitration could deprive a tribunal of its jurisdiction. In other jurisdictions such as France, arbitrators would be faced with an issue of admissibility and could stay the proceedings to give the parties an opportunity to comply with the specified preconditions.¹¹

10 Naftogaz’s translation of the price review provision at issue in *Naftogaz of Ukraine v Gazprom*, SCC Arbitration No. V2014/078/080.

11 See generally George Vlavianos and Vasilis Pappas, “Multi-Tier Dispute Resolution Clauses as Jurisdictional Conditions Precedent to Arbitration” in Doak Bishop and Gordon Kaiser (eds), *The Guide to Energy Arbitrations*, 2nd edn (Law Business Research, 2017) 217.

Another facet which is perhaps unique in a gas price arbitration is that the parties may limit the mandate of the arbitrators to decide the dispute 'in accordance with' the requirements for a price review set out in the contract. These requirements may be fairly detailed, and it is for the arbitrators to follow them closely. Take for instance the following example:¹²

First, the price review clause sets out the arbitrators' remit:

(j) Any arbitration regarding a Price Review shall be made in accordance with [the price review clause]. The [arbitrators] engaged to conduct any arbitration regarding a Price Review shall be instructed to ascertain a Price Formula resulting from a Price Review in accordance with the terms and conditions of this [price review clause].

The price review clause then provides details of how the arbitrators are to "ascertain a Price Formula":

[the arbitrators] shall take into account the change, between the Reference Date and the Review Date, in the value of [the Parties'] respective Price Benchmarks [...] compared to the change, on the same dates, in the value of the Price Formula.

Any Price Benchmark shall be based on import price data available for large-scale supplies and long-term supplies of natural gas at the border of [...].

Only the following import price data [...] can be utilised for the elaboration and calculation of such Price Benchmark.

The credibility of a Price Benchmark shall be assessed [by the arbitrators] taking into account, inter alia, the relevance, significance, and reliability of the price references included in such Price Benchmark.

Evidently, the provision closely delineates the scope of the tribunal's mandate in a gas price arbitration. Parties will expect the arbitrators to follow these steps closely in setting the new price/price formula.

Other price review clauses state that arbitrators do not have the authority to amend or change any part of the contract other than the price formula. Consider the following example:

For the avoidance of doubt, any adjustment awarded shall only operate to amend the Contract Sales price and shall not extend to any other provisions of this Agreement.¹³

In these instances, arbitrators should be careful of their boundaries. In *RWE v Gazprom* for instance, despite the parties' agreement to link the contract price to oil prices, the arbitrators linked the contract price to gas spot prices.¹⁴

12 Gas supply contracts containing price review clauses are confidential. The examples referred to here (and elsewhere in this chapter) are extracts of relevant price review clauses that the authors have seen, adapted where necessary not to reveal the parties or any commercial information.

13 George von Mehren, "The Arbitrator's Role" in Mark Levy (ed), *Gas Price Arbitrations* (Globe Law and Business, 2014) 94.

14 The details of this case are not publicly available. Several commentators have however, criticised the decision for departing from the parties' bargain. See for instance, Bryan Cave, "Gas Price Reviews: Is arbitration the problem?" (2014) at www.bclplaw.com/en-US/thought-leadership/gas-price-reviews-is-arbitration-the-problem.html, accessed 24 February 2019.

Arbitrators should be careful not to alter other contract terms, however tempting it may be to do so. Provisions such as source and quality, volume flexibility, shipping expenses, diversion rights and others that have a significant effect on price but are not part of the price formula should be left untouched unless the arbitrators can root their decision in some form of parties' consent, the governing law or usages. It is, no doubt, a difficult balancing act: on one hand, these terms affect the gas price (ie, one of the 'essentia negotii', one of the core terms of the contract that are indispensable constituents of the parties' consent) and arbitrators may well have to consider and interpret them in the context of determining the appropriate gas price. On the other hand, arbitrators have to be careful not to amend these terms as they may not have the authority to do so. Parties too often complicate matters by seeking amendment of unfavourable provisions through the price review process.¹⁵ Resolving these tricky issues often requires considerable vigilance of the arbitrators: it is for them to ensure that they fully exercise their mandate of determining the appropriate gas price, while at the same time being careful that in doing so, they do not amend the other provisions of the contract.

The same concern – of respecting the parties' bargain – applies even in those cases where the price review clause affords arbitrators some discretion in setting the gas price/price formula. In *Gas Natural v Atlantic*,¹⁶ for instance, subject to the fulfilment of certain conditions, the arbitrators were authorised to determine "a fair and equitable revision" of the contract price. In exercising their mandate, the arbitrators introduced a two-step pricing formula, which was not requested by either party. Both parties to the arbitration eventually challenged the award.

Arbitrators must be fully aware of their mandate which is usually set out in the price review clause and must carry it out diligently. Failure to do so may well result in the award being set aside.

2.2 Compliance with formal requirements

Arbitrators in a gas price review arbitration will usually have to decide whether procedural requirements of the price review mechanism have been complied with. Common issues include the timing, form and content of the request. These issues are usually advanced by the party responding to a gas price review request, as it seeks a preliminary dismissal of the price review claim for want of compliance with these formal requirements.

The timing of the price review request is a particularly critical issue to which the arbitrators may have to pay close attention. Some sales and purchase contracts provide that price reviews can be initiated only at prescribed intervals

15 A party may, for instance, request a change of the underlying index on which the price is based. This change may, in turn, render other provisions of the contract unworkable.

16 *Gna v Atlantic LNG Co of Trinidad Tobago*, 08 Civ. 1109 (DLC) (SDNY 16 September 2008).

– for instance every four years. Others may be more specific, requiring a price review notice to be sent 'before March 28'. Still others contemplate periodic price reviews, as well as 'extraordinary' price reviews ('jokers'), which may be requested at any time depending on the occurrence of certain specified events. Subject to applicable law, if the party seeking a price review has not complied with the specified timing requirements, the arbitrators may have to dismiss the claim.

Often, the timing of the price review is linked to specified qualitative changes in the relevant market that are said to merit revision of the price formula. Take, for example, the following price review clause offered by Gazprom in all sales purchase contracts of a duration longer than four years:

The frequency and timing of the price review

The right of a Party to ask for a regular price review once in each two years based on the reasons and procedure under paragraph (19)(i)

And

The right of a Party to ask for an extraordinary price review once in each five years based on the reasons and procedure under paragraph 19(i).¹⁷

These 'reasons' are quite diverse and include, for instance, a 'significant change' in the economic circumstances in the European gas markets beyond the control of the parties compared to what they could have reasonably expected when entering into the contract, and/or that the prevailing contract price no longer reflects the development of gas prices at the relevant generally accepted liquid hubs in Continental Europe.

In every case, arbitrators have to be particularly careful when assessing satisfaction of given contractual requirements. Failure to fulfil the necessary requirements may require the dismissal of the price review arbitration altogether. In *Esso Exploration & Production UK Limited v Electricity Supply Board*,¹⁸ for instance, the English High Court found a price review notice invalid as the party requesting the price review had failed to show deviation from the market price by a fixed percentage as required by the contract. As a result, the court found that no dispute had arisen that was capable of being referred to arbitration and that any arbitrators appointed would necessarily lack jurisdiction.

2.3 Different mindset

Unlike most commercial disputes referred to arbitration, in gas price arbitrations, the parties' relationship does not end at this point. Quite to the contrary, in these arbitrations, the idea is very much to maintain the long-term commercial relationship between the parties.

¹⁷ Commitments submitted by Gazprom to the European Commission in respect of the latter's competition concerns, available at http://ec.europa.eu/competition/antitrust/cases/g2/gazprom_commitments.pdf.

¹⁸ *Esso Exploration & Production UK Ltd v Electricity Supply Board* [2004] EWHC 723 (Comm).

Arbitrators thus need to be particularly sensitive in their conduct (and decisions) so as not to antagonise the parties. The idea is always to set a new price that is commercially acceptable and economically sustainable for both parties (although naturally one party will be less happy) so that they can continue working together. This does require a different mindset among the arbitrators: special effort should be taken to avoid approaches that are unnecessarily litigious, provocative or likely to lead to further disputes. That said, the arbitrators must remain within the terms of their remit, that is, within the agreements of the parties and the provisions of the governing law while sometimes taking into consideration usages of the industry and the earlier practice of the parties. The arbitrators must remain aware that they are not 'amiables compositeurs' although there are some contracts that do grant such authority to arbitrators.

Compounding the issue just described is another unique feature of gas pricing disputes: parties in these disputes are not necessarily seeking resolution of legal questions (of contract breach), but economic questions (of price review). Resultantly, the parties expect arbitrators to act like lawyers in these disputes but even more perhaps as 'commercial' men and women. Indeed, the only real economic difference between a gas price arbitration and a price negotiation between a gas supplier and purchaser is that parties resort to the former to reach a binding and enforceable result that they are unable to reach themselves. Parties expect, realistically or not, arbitrators to consider economic factors including market developments, prices, customs' data and other factors in the same manner as the parties would in a price negotiation between themselves.

In spite of these expectations, it remains for the arbitrators to interpret and apply the relevant provisions of the contract within the boundaries of the applicable law. While arbitrators should aim to come up with a commercially reasonable and fair price, this cannot be at the cost of the parties' actual agreement. In practice, however, this raises several questions: should arbitrators set a price that completely ignores changes in market prices post-dating the review date when the contract does not provide clear guidance on the issue? How significant must the change be for it to be a 'significant change' in the energy market of the buyer since the contract commencement date or last price review date?

The role of arbitrators in gas price arbitrations is to endeavour to step into the shoes of the parties and act as commercial men and women while still acting as judges confronted with a dispute rather than as parties to a contract. Arbitrators are to act in accordance with the law and the contract, which contract mandates them to amend the price and possibly the price clause while maintaining the parties' agreement. They are to be 'servants of several masters' or to pursue a somewhat quixotic quest, that is, to achieve a result that will make commercial sense, enabling the parties to continue their contractual

relationship while respecting the parties' consent and the governing law. Failure by arbitrators to adopt a commercial mindset within the boundaries of the contract and the applicable law may lead (and has led) to unpredictable and commercially unsatisfactory outcomes.

2.4 Expertise

Arbitrators may have to address important legal issues before turning to examine whether and how to revise the gas price. For instance, arbitrators may have to decide whether a party can develop a new formula not contemplated in the notice triggering the price review mechanism. To answer this question, the tribunal may wish to turn to the negotiating history of the contract; whether they can do so would depend on the law applicable to the contract. Lengthy awards are common in gas price arbitrations, where arbitrators engage in pages-long analysis of relevant words for which dictionaries are of little help. Gas price arbitrations involving a party from an EU Member State may involve considerations of competition law. Constitutions may be relevant as well as civil codes providing for hardship. A great deal of law thus applies in gas price arbitrations.

While this is true, legal issues are, however, not always determinative of the principal issue in dispute – that is, whether to revise the gas price. The answer to this question normally includes consideration of whether a triggering event has occurred or not, and the triggers, in turn, are dependent on certain financial or economic parameters. Price adjustment criteria are based on the need to reflect the value of gas at different levels of the market, the need to ensure the marketability of prices or other factors. Key decisions in a gas price arbitration are thus commonly driven by economic evidence and market data, and less by the nuances of the law applicable to the contract or judicial precedent. While it is no doubt true that every case involves contractual interpretation, which is guided by the applicable law, it is equally true that interpretation often involves looking at words in their commercial context.

The corollary to this characteristic of gas price arbitrations is that experts, whom usually the parties rather than the tribunal will retain, are the norm rather than the exception. Arbitrators are usually confronted with a host of expert reports on a variety of issues, from developments in the gas markets to developments on a regulatory level to the value of gas in a particular market. Financial experts and industry experts opine on the appropriate economic risk allocation in practice of gas supply agreements in general, and reports setting out complex calculations on pricing, value and profitability are common.

Further, a good part of the legal submissions in these arbitrations usually corresponds to the expert evidence. Although they also address contractual interpretation questions, the real focus of the legal submissions is on presenting the economic evidence in a cogent fashion. These submissions will thus explain whether the relevant criteria for a price review have been met and, if so, the

mode and level of adjustment to be made. As the parties' experts address these issues, legal submissions largely focus on the evidence contained in the expert reports.

The resolution of gas pricing disputes, therefore, turns on the arbitrators' ability to manage, understand and assess technical evidence to ensure that the parties' legal and commercial criteria have been met. Arbitrators need to have a firm grasp over the fundamentals of gas pricing as well as the role they are being asked to perform.

2.5 Economic evidence in its proper context

Another issue requiring equal vigilance from arbitrators stems from the very evidence-intensive nature of gas price arbitrations described above. The parties' experts usually diverge significantly based on the differing instructions they may receive and on the data and methodologies they find to be best suited to the facts. Often, the dispute before the arbitrators becomes a debate about which methodology or price data the price review clause directs the tribunal to use to decide various issues.

Arbitrators must be careful in these circumstances not to allow their analysis to be tainted by the volumes of economic evidence presented by the parties. Take, for example, an arbitral tribunal tasked with interpreting the words 'comparable products' in a price review clause. Parties may themselves differ significantly on whether the term should be interpreted on the basis of the 'comparable products' at the time of the parties' agreement or at the review date, or both. Arbitrators may be tempted to decide one way or the other depending on the expert evidence presented to them. They might decide that 'comparable products' must refer only to the fuels with which the relevant gas competed when the parties agreed the contract, not the fuels with which it will compete at each future review date. In doing so, however, they may miss other indicators in the contract that point to the parties' agreement to look afresh at the basket of competing fuels each time the parties ask for a review. Likewise, what should the arbitrators do if a comparator that existed at the time of the contract, and which the contract expressly refers to, subsequently disappears?

Arbitrators must be careful to ensure that their interpretation of the contract is legally sound, even in those circumstances where cogent evidence is presented to them to the contrary. Strictly speaking, arbitrators should interpret the contract in accordance with the law applicable to the contract and not the technical evidence presented by the parties, unless the applicable law itself allows for consideration of such evidence. Arbitrators should consider interpreting price review clauses in such a way that enables those clauses to function in a way that the parties intended, usually consistent with the economic or market conditions at any particular time and not fully dependent on such conditions if the parties' agreement did not consider them.

The discussion above evidences the sensitive push and pull seen in a gas price arbitration. On the one hand, arbitrators are expected to act as commercial men and women and give serious consideration and weight to the voluminous economic data presented to them, while on the other they are to remain vigilant and not allow the tail to wag the dog. Economic evidence must be considered and given weight in its proper context and must not control contractual interpretation.

2.6 Knock-on effects

Price review clauses are usually not 'single use' clauses; typically they usually allow for multiple price reviews at specified times or on the occurrence of specific events throughout the life of the contract. Put differently, parties may repeatedly submit the same core issue to an arbitral tribunal for different periods in the course of their relationship: seeking repeatedly to determine whether and how the contract price should change. Sometimes both parties simultaneously request adjustments in opposing directions: indeed, contracts may allow a party to file a request to adjust prices within a certain period running from an adverse request to adjust prices. In deciding whether and how the contract price should change, every arbitral tribunal in a gas price arbitration will follow more or less the same steps: (i) interpret the price review clause; (ii) apply the relevant facts to that interpretation (ie, decide whether circumstances exist requiring a price review); (iii) set the new price/price formula; and (iv) direct back payments if necessary.

This feature raises particular questions of estoppel in gas price arbitrations, which are usually not seen in other commercial arbitrations involving allegations of breach of contract. Indeed, under English law (and other legal systems), "limits must be placed on the rights [to] reopen disputes".¹⁹ Therefore, "if an issue has been distinctly raised and decided [...] it is unjust and unreasonable to permit the same issue to be re-litigated afresh between the same parties or persons claiming under them".²⁰

In a gas price arbitration, an arbitral tribunal may have to (repeatedly) interpret the word 'significant', where the price review clause requires a change or a difference to be 'significant' before a price review can occur. In doing so, it might define the word for future price reviews, without actually intending to do so or without fully understanding the implications of its decision. Another relevant issue is the determination of the trigger conditions of a price review as at the review date. Depending on the trigger event mentioned in the price review clause, in the first price review arbitration, an arbitral tribunal may have to determine whether there has been a "significant change in the energy

19 Lord Wilberforce in *The Amphyll Peerage Case* [1977] AC 547 at 569.
20 Maugham LC in *New Brunswick* [1939] AC 1 at 19–20.

market” as at the review date. Arguably, that determination of the state of the market will be the starting point for assessing a change in the next price review. In a subsequent price review therefore, should a party be able to reopen the issue of the state of the relevant energy market as at the review date for the first price review? The answer may depend on the law governing the conditions and effects of *res judicata* and it is well known that laws will considerably vary in this regard. One view is that issue estoppel should extend to the state of the relevant energy market as at the review date for the first price review, but that need not always be the case. This issue is not limited to price review clauses that require examination of the relevant energy market. Similar issues will arise in any price review clause that requires a comparison between the market at two different times, two prices at the same time (eg, the contract price and the market price or average import price on the review date) and others. A decision on any change obviously involves two factual assessments, which, strictly speaking, may prevent a future redetermination in a future arbitration.

Irrespective of the legal effects of a prior decision in the same contract, such a decision on the interpretation of a price review clause will have persuasive effects at the least and may well resonate throughout the life of the contract. Arbitrators must be sensitive to the long-term effects of the issues presented to them and should be careful not to make any determinations that may affect subsequent price reviews, unless it is necessary to do so to resolve the issues in dispute. While in some instances these long-term effects cannot be avoided, it is for the arbitrators to be vigilant and carefully determine (and limit) issues that are likely to affect future price reviews.

3. Conclusion

Gas price arbitrations are easily among the highest-value, most complex arbitrations in the universe of commercial arbitration. Billions of dollars are often at stake, with a price change of just a few cents resulting in the transfer of millions of dollars from one party to the other over the life of the contract or until the next price review. By asking arbitrators to stand in for the parties and find a commercially acceptable solution preserving the parties’ long-term relationship, the parties essentially require the arbitrators to perform a role that is different to the role that the arbitrators normally perform. Arbitrators deciding these disputes therefore have a weighty and difficult task that presents some specific challenges. They must be sensitive towards the sophisticated, technical and complex nature of a gas pricing arbitration and fulfill their mandate accordingly.

Gas and LNG Price Arbitrations

A Practical Handbook, Second Edition

Gas and LNG Price Arbitrations: A Practical Handbook, Second Edition

Price review disputes have become an increasingly prominent feature in gas and LNG markets over the past decade. While the first wave of disputes was driven by the ‘triple whammy’ of recession, US shale gas and the liberalisation of the gas markets in Europe, further waves have followed with the development of increasingly liquid trading hubs across Europe, ongoing volatility in commodity prices and the continuing influx of liquefied natural gas (LNG) into Europe. Furthermore, the trends previously seen in Europe are starting to be replicated in Asian markets.

This practical second edition contains contributions from leading international arbitration practitioners and arbitrators in the field, in-house counsel and industry experts. It covers the various stages of a gas pricing dispute, from drafting the clause to triggering a review, all the way through the different stages of the arbitral process. It also builds on the first edition by containing insights into topics such as hub indexation, the impact on pricing of non-price terms like destination flexibility, and the differences between gas and LNG price reviews.

Despite the large number of high-value disputes in this area, this is one of the very few publications to draw together the various strands of gas pricing disputes into one book. It is therefore an invaluable guide for practitioners, in-house counsel and anyone else with an interest in this area.

www.globelawandbusiness.com

ISBN 978-1-787421-92-9



9 781787 421929 >