RESOLVING DISPUTES UNDER A CHANGING GAS SALES AGREEMENT

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This article considers how changes in the natural gas and LNG markets will affect the resolution of disputes between parties to long-term trading and financing arrangements. It argues in favour of a shift towards including clauses allowing for the renegotiation of contracts and reducing reliance on arbitration or the court process as a means of dispute resolution.

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The decision of the US to withdraw from the Paris Agreement may have created doubt in relation to the implementation of those arrangements. However the role of natural gas and liquefied natural gas (LNG) as participants in a lower-carbon future seems undoubted. Existing long-term arrangements are being undermined, and uncertainty is being exacerbated, by:

- The displacement by natural gas and LNG of coal and oil consumption in the large consumer markets of China and India.
- The introduction of LNG to the energy markets of new jurisdictions such as Pakistan and the Philippines.
- The terms of new LNG supplies from the US.

The pace and scale of change in the international LNG business over recent years has been remarkable, particularly for an industry that has been "comfortable" for so long. An innate resistance to change has been tested by the development of aggregators, the influence of commodity traders and moves towards floating facilities and smaller-scale developments. What were once the predictable provisions of a long-term gas and LNG sale and purchase agreement (GSA) have been largely undone in many areas. As have the once-connected links of the LNG chain.

There are two main areas in which the traditional models are shifting. The first is the way in which LNG is bought and sold. The second is the way in which developments are financed. There is also perhaps a third: at a time when there are growing difficulties in achieving binding yet flexible contractual provisions under long-term sales and financing arrangements, some have been turning to the traditional, if temporary, palliative of joint ventures. More interestingly, some have been pursuing a model of aligned participations as producers, lenders and off-takers. This integration is seen to reduce the dependency on contractual arrangements and the rule of law as the means of managing the risks along what used to be the LNG chain. This approach might once have been the exclusive province of state-affiliated entities, but there are now emerging examples of these "structural" approaches being promoted for broader participation.

How, then, will these changes affect the many existing long-term trading and financing arrangements on which the international LNG business has been built?

"KEEP YOUR EYES WIDE OPEN BEFORE MARRIAGE, HALF SHUT AFTERWARDS"

Recent events in the global gas market have shown that where the parties' financial and economic interests diverge, each party will be inclined to favour its own interests and seek to enhance its own position from time to time. At times of commercial stress, the parties are likely to look to the specific terms of their agreement, and the interpretation of the meaning of the words used in their agreement will attain primary importance. Very often, the parties will be facing changed circumstances which were not in contemplation when the GSA was made. In the absence of specific wording, the law will be slow to provide relief for a party which considers itself to be

suffering hardship or commercial imbalance. The law will be equally slow to find that the contract has come to an end in those circumstances, unless that is what the parties have specifically provided in their agreement.

The troubled party will seek its refuge in the written words of the contract and the other will seek words to the opposite effect. The vindication of accidental, express contractual rights is likely to be pursued. Commercial self-interest will subdue the relational influences on which the contract was based and opportunistic amnesia will tend to subordinate ethical considerations and recall of the context of the agreement at the time of its making and its operations since. The ties of trust, confidence and loyalty will be stretched.

"OUR WORLD IS A PROCESS OF OUR THINKING: IT CANNOT BE CHANGED WITHOUT CHANGING OUR THINKING"

The consideration of the parties' performance of their obligations under a GSA in changed circumstances contrasts two established principles of law:

- On the one side is the sanctity of contract (the principle that contracts are to be performed in the context of the rule of law).
- On the other is the principle of contracts adjusting to changing circumstances.

The apparent pursuit of providing for every point that may arise over the following 20 years or so in written detail will have the effect of subduing relational elements, trust and mutual reliance. But can the parties really foresee and negotiate all matters that may arise over that very long period?

The potential inconsistency of those two principles is exacerbated in long-term and international arrangements where social, political, legislative, economic and cultural changes will often result in changes to the contractual equilibrium on the basis of which the parties contracted. It will not be unusual for the parties to a GSA to seek to take account of these often unforeseeable events with "meet and discuss" clauses or contractual reopeners.

"THE POWER OF THE LAWYER IS IN THE UNCERTAINTY OF THE LAW"

The making of a binding and enforceable agreement under English law is likely to depend on the parties reaching agreement through terms which are certain or can be made certain within the terms of their agreement (see *Practice note, Contracts: formation*). A typical GSA will be a document of some length and complexity, but some parts of that document may not be expressed in detail, despite the inevitably long period of negotiation. These provisions may look to address circumstances which are themselves uncertain or unexpected, or cover matters which are sufficiently difficult or subordinate to the main elements of the contract that the parties are comfortable to leave them in comparatively uncertain terms in the interests of closing all other elements of the overall agreement. In such cases the parties may comfort themselves that these things may never happen. But, as Staughton J pointed out in Chemco Leasing SpA v Redifusion plc (1985) (unreported), that may be cold comfort:

> "When ... business men wish to conclude a bargain but find that on some particular aspect of it they cannot agree, I believe that it is not uncommon for them to adopt language of deliberate equivocation, so that the contract may be signed and their main objective achieved ... but if all does not go well, it will be for the courts or arbitrators to decide what those terms mean. In such a case it is more than somewhat artificial for a judge to go through the process ... of ascertaining the common intention of the parties from the terms of the document and the surrounding circumstances; the common intention was in reality that the terms should mean what a judge or arbitrator should decide that they mean, subject always to the views of any higher tribunal."

"YOU CANNOT SHAKE HANDS WITH A CLENCHED FIST"

The parties to a GSA may recognise that changes of circumstances are likely to occur during the long duration of the contract and provide specifically for revision of the GSA's terms accordingly. This provision is likely to provide for meeting and seeking to agree on revised terms, and for the consequences of the parties failing to reach agreement. This may provide for termination of the contract in the absence of agreement or, conversely, that the contract will remain in effect in accordance with its terms. Or the contract may provide for a reference to a third party to decide and effect the appropriate changes to the contractual arrangement in the context of the terms of the renegotiation clause. Under English law, the courts have powers to interpret and enforce contracts, but not to make or modify them.

The revisiting of the contractual provisions in the unforeseen circumstances will be expressed as matters for agreement, not dispute. But the partisan positions in the context of the prevailing circumstances are likely to mean that agreement will be difficult to reach.

This process is not a matter of proof among adversaries from comparatively advantaged or disadvantaged contractual positions; it is a re-setting of the parties' bargain in these circumstances of the day and in the context of potential reference to a third party in the event that renegotiation is unsuccessful. The words of the reopener provision are likely to set out the objectives of the parties in broad but representative principles, leaving room for relational matters to feature.

In circumstances where the parties have recognised the challenges of making their agreement (or of clairvoyance over a period of twenty years or more) and cast their written agreement accordingly, is it not appropriate that times of difficulty be addressed in a complementary way?

"JUDICIAL PRECEDENT MEANS THAT THE RULE OF THE PATHOLOGICAL CASE COVERS THE HEALTHY CASE TOO"

Where circumstances of comparative disadvantage are enduring or the consequences are particularly adverse and agreement cannot be reached, the aggrieved party may choose not to renegotiate but instead to pursue the formal dispute resolution procedures provided for in the GSA. These will almost always provide for arbitration. The processes and practices of arbitration will provide little opportunity for relational context to be aired. Many leading cases (and therefore precedents) concern a party wishing to escape or limit the effect of a transiently poor bargain, at exactly the time when a revised arrangement to mutual benefit may be just as accessible. The power of judicial precedent runs the risk of stifling the relational aspects of a party's case and funnelling the tribunal towards the paper deal alone. Text will come to dominate context.

The available reported cases suggest that the individuals appointed as arbitrators under GSAs are often lawyers skilled in the resolving of disputes by reference to past events, but not well-versed in the international markets for gas and LNG or the writing of GSAs. This is unsurprising. The usual commercial arbitration will deal with contractual obligations and their breach, the damage or loss caused to a party by reference to past events, and the resulting remedy or compensation. The typical reopener provision is not a matter of breach, liability and compensation, but of assessing changed circumstances and making enduring amendments to the parties' continuing commercial relationship. An award of compensating damages in a typical commercial arbitration is likely to lead to a single payment, whereas the rewriting of a GSA will have a continuing financial effect for (often) many years.

If a devout common law regime such as English law is showing signs of making early steps towards a greater recognition of the significance of relation behaviours and relational contracts, can it be long before those in the petroleum sector begin to question the ways in which they have been resolving their periodic differences under GSAs? In circumstances where neither party is able to escape its contractual marriage and there are no pre-nuptial arrangements for guidance, is it timely to consider ways in which the magic of contractual courtship might be re-awakened in a new and adjusted relationship, rather than descending into a periodic and Darwinian struggle over the transient issues and advantages of the moment? Perhaps it is timely to consider the benefits of the evolution of contractual relationships over periodic testing of the fittest, and a move towards a form of resolution which is more akin to relational behaviours and the adaptation of enduring contractual relationships over time.