

The Paris Energy Series No. 2: Predicting the Unpredictable: Gas price re-openers

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*"The future is called 'perhaps', which is the only possible thing to call the future. And the important thing is not to allow that to scare you."*¹

*"The future ain't what it used to be"*²

This article will address the following issues:

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1. Introduction

While gas price re-openers have been part of the landscape for many years, the recent upheavals in the energy sector – whether it be movements tracking volatile oil prices, market liberalization, the effects of the global recession, or growth in demand for higher quality energy – have produced a spate of referrals to arbitration or alternate dispute resolution.

One of the most recurring themes these past years, however, has been the effects of domestic gas prices "decoupling" from the price of oil.

The phenomenon of the separation of gas prices from oil prices in various domestic markets has, of course, been around from some time, but its effects may become a more important part of the landscape in the years to come. As John Ruggins stated several years ago:

*"The effects of the break in the price link will become clear over the next year or two when we are likely to see a repeat of the situation in the mid-1990s when British Gas was forced to renegotiate all its long-term contracts and many companies resorted to the courts in endeavouring to extricate themselves from uneconomic contracts. The difference this time is that it will affect companies Europe-wide, not just in the UK. Another effect is likely to be the cessation of merger and acquisition activity in the energy sector because of the difficulty of valuing companies during the period of upheaval."*³

It is against this background that this article looks at the type of price formulae existing and how and when they can be revisited, before turning to some of the more contentious issues affecting gas price renegotiations today. It suggests in addition, a simplified ("pendulum") form of dispute resolution, where the parties are unable to agree on a given price or basis for redetermination.



Michael Polkinghorne*
Partner
mpolkinghorne@whitecase.com

For the more observant among you, you may have noted that this article had earlier existed on our website in a different form. I more recently discovered, however, that the firm's internal work product to which I referred (and, yes, substantially incorporated) was, in fact, largely taken from an excellent piece written in the 1990s by Niall Trimble. He let us know, and we obviously took the piece off of our website. Hence this new version.

I hope that this is nevertheless of interest; the issues facing the industry have never been more apparent.

* White & Case LLP, Paris. Email: mpolkinghorne@whitecase.com. The writer would like to thank Nathalie Vidrascu and Paul Giraud for their immeasurable assistance in preparing this note.

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2. Gas price formulae

2.1 The “tasks” of a gas price formula

Gas price formulae serve a number of interests in long-term sales agreements.⁴ To accommodate the interests of the buyer and seller, they must in addition accommodate a number of desires:

- the desire of the seller to maximise returns vs. the desire of the buyer to minimise outlays;
- the desire of both parties for certainty, coupled with;
- the (often contrary) desire to ensure flexibility in arrangements designed to last for many years; and
- the desire of both parties to ensure long-term market-share.

2.2 Gas price formulae: How they (try to) work

Often, in markets lacking sufficient information on traded gas prices, the parties will have to look to an agreed base price, coupled with reference to periodic indexation.

Long-term contracts in continental Europe usually fit this model.

The indexation formula is obviously geared to trying to meet the aims outlined above, notably to permit the gas to remain market-competitive. As a result, it will often refer to a number of items which themselves are capable of determination by reference to international exchanges. These elements will be given a weighting, together (often) with a reference to inflation; all in order to try and provide a formulae which remains relevant to the conditions in which the gas will ultimately be marketed. The parties have also often attempted to provide some form of protection against “freak” occurrences, by way of insertion of a “ceiling” and a “floor” price. Others seek to iron out the more extreme variations by way of “S-curve” pricing, whereby the parties agree that (for example) oil-gas pricing clauses would “level-off” the gas price increase where oil prices rise to great heights or descend to great depths.⁵

An example, from a 2010 paper is reproduced below:⁶

$$P = P_0 + 0.6 \times f_1 \times k_1 \times (GO - GO_0) + 0.4 \times f_2 \times k_2 \times (LSFO - LSFO_0)$$

Where:

P_0 – base price in eurocent per kWh (€/kWh)

GO – price of gas oil in €/tonne net of all taxes and duties

$LSFO$ – price of low sulphur fuel oil with sulphur content of 1% or less in €/tonne net of all taxes and duties

F – “delivery point” adjustment factors

K – energy conversion factors

“Comparators” upon which the price may be based include the following:

- Gas oil (GO)
- Low Sulphur Oil (LSO)⁷
- Electricity Retail Prices
- Coal
- Gas to Gas (i.e. the UK)

By way of illustration of the types of pegging seen in Europe, the ECT in an earlier paper observed as follows:

“The final report of the 2007 sector inquiry by the European Commission’s DG Competition shows a very similar pattern of average indexation for exports from the Netherlands, Norway and Russia to EU 25 countries with indexation to gas oil between 52 and 55% and indexation to heavy fuel oil between 35 and 39%, the total pegging to fuel oil products being between 87 and 92%, with the rest more individually linked to inflation, coal, crude oil or fixed.⁸ Also the price level shown by the sector inquiry is very similar between Russia and Norway, while the somewhat higher price for Dutch gas reflects the better delivery structure of Dutch gas.

By contrast, Algerian gas, which is priced at a level similar to Russian and Norwegian gas, is predominantly pegged to crude oil with about 70% against 6% and 19% for heavy fuel oil and gas oil respectively, the rest being inflation.

Gas from the UK has a price level very close to Russian gas. It is not explicitly clear from the sector inquiry but it seems to refer to all gas produced on the UKCS whether exported or landed in the UK itself. Not unexpectedly, 37% are pegged to the gas price on the NBP, while the links to gas oil and heavy fuel oil are 11 and 9% respectively. Surprisingly high is the pegging to inflation, at 28%, which seems to be a left over of early contractual patterns in the UK.

The report also compares the average pegging of import contracts between Western Europe (countries from EU 15) and Eastern Europe (countries from EU 10). While the pegging to gas oil is rather similar, with 50% in Western Europe vs. 47% in Eastern Europe, the rest is almost completely pegged to heavy fuel oil in Eastern Europe (48%) against only 30% in Western Europe, with the rest being pegged to more sophisticated indices.⁹

While times have obviously changed in the several years since the ECT paper was produced, many of its reflections appear to remain accurate today. This is due, in part, to the number of arrangements out there which date back to even before this time.

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3. Price reviews

3.1 Price review clauses

i) What are they?

Given (i) the long-term nature of these agreements, (ii) the changing nature of the markets themselves, and (iii) the absence of clear market-wide indicators of price, these agreements frequently contain a further clause providing for a price review. While the terminology may vary, these can be “regular” (i.e. at agreed dates), or “special,” occurring at the option of either party.

These clauses – often called “price re-openers” – usually contain several elements:

- (a) a limited number of times (or periods) when a review may be requested;
- (b) a “road map” or indication of what information may be taken into account in any review; and
- (c) the consequences if the parties are unable to agree.

By way of example, the ECT Paper provides the following “stylized” price review clause:

- (a) *“If the circumstances beyond the control of the Parties change significantly compared to the underlying assumptions in the prevailing price provisions, each Party is entitled to an adjustment of the price provisions reflecting such changes. The price provisions shall in any case allow the gas to be economically marketed based on sound marketing operation.”*
- (b) *“Either Party shall be entitled to request a review of the price provisions for the first time with effect of dd/mm/yyyy and thereafter every three years.”*
- (c) *“Each Party shall provide the necessary information to substantiate its claim.”*
- (d) *“Following a request for a price review the Parties shall meet to examine whether an adjustment of the price provisions is justified. Failing an agreement within 120 days either Party may refer the matter to arbitration in line with the provisions on arbitration of the Contract.”*
- (e) *“As long as no agreement has been reached or no arbitration award has been rendered all rights and obligations under the agreement – including the price provisions – shall remain applicable unchanged.”*

Unless otherwise agreed or decided by the arbitral award, differences to the newly established price shall be retroactively compensated inclusive of interest on the difference calculated at a rate reflecting the conditions on the international financing market.”¹⁰

ii) The trigger

A “typical” price re-opener will involve a trigger permitting one party to reopen the price formula. The trigger is the subject of some angst-ridden consideration. The parties will want some flexibility to allow for changes in circumstances, but not too much, since (a) given their cost and time commitment, attempts at price renegotiation should not occur too frequently, and (b) when they do occur, the parties will want to have a reasonably clear idea as to whether the trigger conditions have been met or not (see Part 4 below).

iii) The discussion

The clause will then usually provide for a period of negotiation, often limited in time, during which the parties will seek to find a solution.

Many clauses will provide details of the matters the parties may consider (or not consider) in their discussions.

Two examples of such attempts (admittedly still quite general) are provided below:

“Parties shall take the following into account: (1) an assessment of the weighted average price of long term LNC contracts under which deliveries into [●] are taking place at the time of the price review; and (2) an assessment of the weighted average price of new binding, unconditional long-term LNG contracts concluded since the commencement date, or the previous price review, as applicable, under which deliveries into [●] are to take place within the period until the next price review or if there is no further price review then until the end of the term.”

“For this purpose, contract prices for liquefied natural gas to be delivered into [●] on FOB or CIF terms will be adjusted to allow for comparison on a DES basis. Parties shall also have regard to: (1) the terms recorded in the Agreement and other comparable binding unconditional long-term liquefied natural gas contracts for delivery into [●]; (2) the reliability and security of LNG supply from Sellers; and (3) trends in world prices of substitutable energy.”¹¹

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iv) The consequences

Another question may involve what the relevant clause permits by way of resolution of the matter. The clauses are frequently silent on this point, so it is really up to the parties to work out what makes the most sense. Indeed, some clauses may be held to oblige the parties to do no more than **discuss** the matter and not go on to agree a solution (see Part 5.2.2 below).

Once it is agreed that sale conditions must change, however, this can be treated in a number of ways.

The obvious (and most frequent) candidate is to modify the base price and/or adjustment formula themselves. This being said, the supply conditions themselves can be modified, whether speaking of amending a take-or-pay obligation (percentage of annual contract quantities, changes in the measurement period), or changing gas delivery nomination procedures, time for payment, etc.

It may well be that changes of matters other than the base price and indexation formula are easier to achieve outside contractual arbitration, which tends to see matters in more black and white fashion than negotiation or indeed institutional mediation (although the latter is in the writer's experience surprisingly rare in this field).

3.2 Hardship or force majeure clauses

Long term international contracts almost always contain some type of force majeure clause. The law reports are, however, replete with failed attempts to invoke end market problems as grounds for a force majeure claim, whether one looks to the US in the 1980s, the UK in the mid-1990s or Asia in the later part of that decade.¹² As a general rule, force majeure is not the best tool for dealing with changed market circumstances (for a start, few clauses foresee anything more than a suspension or termination of the relevant obligations, not their renegotiation).¹³

Hardship clauses rarely co-exist in contracts containing a re-opener clause, as they are more or less intended to deal with the same type of issues. That being said, the two are not exactly the same and care needs to be exercised in considering the two.

Hardship clauses accord to a party the right to require renegotiation of the agreement where it can demonstrate that – because of changed circumstances – it is suffering hardship under the (previously agreed) arrangement.¹⁴ I turn again to the UNIDROIT Principles which offer an excellent exposition of the principle:

“Article 6.2.1 (Contract to be observed)

Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

Article 6.2.2 (Definition of hardship)

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

- (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;*
- (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;*
- (c) the events are beyond the control of the disadvantaged party; and*
- (d) the risk of the events was not assumed by the disadvantaged party.*

Article 6.2.3 (Effects of Hardship)

- (1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.*
- (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.*
- (3) Upon failure to reach agreement within a reasonable time either party may resort to the court.*
- (4) If the court finds hardship it may, if reasonable.
 - (a) terminate the contract at a date on terms to be fixed, or*
 - (b) adapt the contract with a view to restoring its equilibrium.”**

Hardship is of potentially greater interest than that of force majeure, and aims at maintaining the commercial equilibrium of the contract.

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Hardship provisions also exist in the national laws of a number of countries (a fact some negotiating parties in the writer's experience, have not even realised; see below).

For the sake of completeness, there are in addition clauses dealing with changes in the agreed index or reference itself¹⁶, and – a rarity – clauses in the industrial gas sector allowing parties the right to demand an increased price on the basis of a third party offer.¹⁷

3.3 Applicable Law: Renegotiation in the absence of a re-opener clause

Even if the contract is silent on questions of renegotiation or hardship, provisions on adjustment can sometimes be found in national legal systems. Some systems have provisions of law or judicially established guidelines allowing revision of contract due to changes in circumstances. For instance, article 258 of Book 6 of the Dutch Civil Code provides, *inter alia*, that the Court may upon request of one of the parties modify the effects of an agreement or terminate it in part or in its entirety on the basis of unforeseen circumstances, where such circumstances are of such a nature that the other party may not, according to the criteria of reasonableness and fairness, expect the agreement to be maintained in an unmodified form. The Italian Civil Code and the Brazilian Civil Code have adopted the concept of “excessive” onerousness,¹⁸ and Algeria has a potentially broad power of modification enshrined in Article 107(3) of its Civil Code (note also several Gulf countries). In these cases, if the performance by one of the parties becomes excessively onerous, the disadvantaged party may request the modification of its obligations. That being said, many other legal systems, such as English or certain civil law systems lack statutory provision for adaptation of commercial contracts due to hardship.¹⁹ This is not to exclude the possibility, of course, that other factors may militate in favour of revision (see below).

But whatever the position, the notion of hardship has its limits. In certain cases, the courts have held that one must look not only to the contractual arrangement under scrutiny to determine whether a party is unduly prejudiced, but also to the effect of the arrangement on a party's **overall** financial position.²⁰ (This need not be the case of course, and each case has to be treated on its own merits). In addition, hardship provisions in national laws generally provide very little in terms of a “road map” for any tribunal to follow in terms of restructuring an agreement once a hardship situation is found to exist, and while this is not – and should not – be a bar to an otherwise valid request for adjustment of an agreement, it can and does add to the tribunal's task in arriving at an appropriate solution.

This raises the question whether, even without a specific contractual clause, international contracts include an inherent duty to renegotiate in the light of changed circumstances. This tension between sanctity of contract and flexibility is still a subject of debate.²¹ In the context of international contracts, for example, the existence of an obligation to renegotiate based on the civil law duty of good faith cannot be excluded,²² although the prospects of such an obligation under contracts subject to English law (such as many LNG sale and purchase agreements) must nevertheless be considered remote.²³

4. The trigger?

The defining of a particular event which will trigger the relevant review is a salient feature of the renegotiation clause. As can be seen from the examples above in footnote [10], the parties generally leave this quite open, the resultant lack of particularity meaning that a party seeking renegotiation may not know – throughout any disputed attempt to renegotiate – whether the trigger has been activated at all.

This is presumably why some parties seek to insert in some clauses a numerical reference for any divergence, such as the need to demonstrate a 5% or 10% deviation from the prevailing market price.

5. Price renegotiation and arbitration

If the parties fail to reach an agreement, they will generally submit their dispute to a third party, either an expert or an arbitral tribunal. The choice can be an important one. The writer has already written in this regard in the context of unitisation,²⁴ but the position can be summarised as follows:

- Referral to an expert is usually quicker and cheaper than arbitration;
- That being said, parties are often nervous of leaving their fate in the hands of a single expert;
- This may mean that one has a two-tiered approach, referral to an expert with subsequent recourse to arbitration by a disaffected party;²⁵ and
- If one resorts to an expert, certain legal systems are vigilant to the possibility that the expert stray into questions of a “juridical” nature, which is often considered outside the expert's scope of authority.

In the context of gas pricing, it is the writer's experience that the parties commonly refer their dispute to arbitration.

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Arbitrators are obviously faced with a number of issues, but this section will look to the nature of their powers (5.1) before addressing certain practical issues which can arise in the context of gas price renegotiation (5.2). It will then conclude with some reflections on certain aspects of European law which may come into play (5.3).

5.1 The Nature of the powers of the arbitrators

As long as a tribunal examines whether the conditions for renegotiation are fulfilled, it will ordinarily act clearly within the bounds of the parties' reference to arbitration. If tribunal rules that the conditions are not met, its job is done and the agreement should continue in full force and effect. But if the tribunal's decision is affirmative, it will have to take further action such as proceeding to the re-determination of the price.

This raises the issue of arbitration as a mean of contract revision. Once the tribunal has ruled that the conditions to renegotiate the price are met, how should that tribunal proceed to determine the manner in which the terms of the agreement should be revised? If the clause is silent about tribunal's authority with regards to the revision of the contract, does he or she in fact have the power to impose the agreement which the parties were unable to reach? Some have argued that the reference to arbitration may not in and of itself be deemed to be sufficient to imply such a power, and that express consent is needed for the giving of power to the arbitrator to adapt the contract. However, this appears not to reflect the prevailing consensus. As one well-known practitioner has said "*the evolution is certainly in the direction of considering that the arbitrator's role, particularly in contracts of long duration, embraces more and more functions which do not strictly partake of a purely jurisdictional nature but aim at regulating a contractual element with a view of securing the stability of the contract*"²⁶

Of course, if the renegotiation clause spells out in detail the type of criteria that should guide the arbitrator, the arbitrator should necessarily have the power to apply those criteria and reach a result.

5.2 Some practical issues arising from gas renegotiation arbitration

5.2.1 The trigger event

Arbitrators have first to address the issue of the interpretation of the trigger event, as they must decide if the requesting party is entitled to ask for a renegotiation. The parties may disagree on the very principle of renegotiation and one party may consider that the conditions set forth in the contract to trigger the renegotiation are not met. The arbitrator must determine whether and to what extent the event(s) alleged by one of the parties meet the

conditions set forth in the relevant clause of the agreement. For example, if the trigger event provided for a "*significant change in the economic circumstances*"; when is the change significant enough to give rise to renegotiation?

5.2.2 The scope of the renegotiation

Arbitrators must determine to what extent they can intervene in the contract, and the basis upon which their authority is vested. It is, of course, preferable for the arbitrators to base their decision on defined criteria, even if those criteria are the more general ones of fairness or equity in adapting contracts.²⁷ This being said, even if the arbitrator bases his or her decision on such criteria, it often remains difficult to determine in practice the true scope and nature of the arbitrator's mission. If, for example, a clause provides for a price formula linked to a basket of fuel, can the renegotiation reflect changes in the end-market where gas-to-gas competition has become a significant player? Can an element be added to the initial formula? In such cases, the requesting party may well allege that including a changed or new fuel indice in the price formula better reflects the competitive situations in the end-user market and hence would comply with the renegotiation formula provided in the contract. The opposing party, on the other hand, would doubtless argue that there is no contractual basis for changing the best substitutes as agreed in the price formula. In some (rare) cases there may well be a debate as to whether the parties' obligation is limited to employing best efforts to agree but not reaching an agreement itself.²⁸

The arbitrator will have to find a way to answer such claims, and it may well be that the relevant contract clause provides little guidance in this regard.

Procedural issues often arise in these cases as well. A clause frequently found in price clauses states that while each party must substantiate its own claims, no party shall be obliged to disclose business secrets, or even – in some contracts – to provide information that the **other** party may require to substantiate its claim. This writer has written elsewhere in more general terms on this subject, suggesting that a party's failure to produce evidence which it alone possesses may have an effect on the burden of proof (or the ability of a tribunal to draw an adverse inference), but it remains to be seen how this principle – if accepted – would operate in the context of contractual language which actually appears to condone the withholding of that evidence.²⁹

5.2.3 An idea: "pendulum" arbitration

Given the complexities of price re-openers, and the temptation among many to take extreme positions once a dispute arises, the writer would like to suggest one manner of simplifying the task for all concerned.

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On several occasions (with, it must be admitted, varying degrees of success), the writer has seen or suggested a pendulum approach to disputes of a highly technical/financial nature, whether they be price re-openers, unit re-determinations or even price adjustments in acquisition disputes. Under this approach, each party is obliged to provide their “best guess” of the true value or adjustment required. The arbitrator(s) then has to select either one party’s suggestion or the other.

In this way, the parties are dissuaded from making outlandish demands, or suggesting extravagant bases for claims, since if they were to do so, the chances of those claims being accepted are all the less; this should reduce the possibility for both sides of an extreme adverse result. The tribunal, on the other hand, will be less distracted by irrelevant or unhelpful arguments, and should be more comfortable in arriving at what its see as the correct result. In addition, the scope for appeal should be reduced, as the “choice” of result has been contractually stipulated.

5.3 EU considerations

While a detailed consideration is beyond the scope of this article, EU considerations are coming to the fore at this time in the context of both price renegotiations and in the broader context of treaty arbitrations involving EU member states of the European Union.

Without in any way meaning to be exhaustive, the writer has already had to contend with the following issues:

- a) liberalization generally of end-user markets³⁰;
- b) the impact of EU emissions trading schemes;

- c) destination clauses, agreed with either suppliers external to the EU or, perhaps even more problematic, suppliers concerned with Accession States pre-accession struck down. And if these clauses are struck down, does this enable the purchaser to redefine its end-user market with a view to modifying the price clause?); and
- d) consideration of state aid, monopolies and other arguably anti-competitive practices in terms of price support; (what is their status once the relevant state has acceded to the European Union and how should this be taken into account in the context of a price re-opener or hardship claim?).³¹

These and numerous other issues will have to be addressed by courts and tribunals in the years to come.³²

* * *

This article does not aim at giving solutions to many of the issues encountered in the context of adaptation and renegotiation of contracts. However, it is important to bear in mind that price renegotiation, as well as dispute resolution, clauses must be carefully drafted to enable a third party to intervene efficiently in order, as and where appropriate, to restore the equilibrium of the contract. And given the particular nature of these arrangements, remedies and principles related to short-term agreements may not be sufficient to dispose of a given case in adequate fashion. Parties, counsel and arbitrators would do well to cast a wide net in considering how to deal with drafting questions which – while having been with us for some time – are having to deal with increasingly novel situations.

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Endnotes

- 1 Tennessee Williams [Attr.]
- 2 Yogi Berra [Attr.]
- 3 Ruggins, *The End of Oil Indexation in European Natural Gas Contracts* (AIPN Advisor, June 2007).
- 4 As for the economic justification for long-term agreements, one can look at the writings of Ronald Coase and his theory of transaction costs. Perhaps in homage to his theory, he waited over fifty years to be awarded the Nobel Prize for his efforts (1991).
- 5 This is, admittedly, more common for LNG plays in, for example, north-east Asia. See, for example, the ECT Paper "*Fostering LNG Trade: Developments in LNG Trade and Pricing*." http://www.encharter.org/fileadmin/user_upload/document/LNG_2009_ENG.pdf

"One of the features of the Pacific Basin market was the development of "S curves" as a means of reducing price risk. As oil prices became more volatile, oil-linked pricing clauses posed significant risks to the original price expectations of the contracting parties. For the sellers, an oil price collapse risked making the venture unprofitable and suppliers became interested in some form of price floor. But as a trade off for granting such a shift in risk, buyers wanted upside protection. In simplest form this could be a core relationship (called the "slope") where the linkage between oil and gas prices operated, but floor and ceiling prices could be added to offset risk. But more common is a change in the oil/gas price relationship – or slope – above and below certain price levels ("pivot points")...

Since the "S curves" limit price response in times when oil prices are high or low, they can have the effect of decoupling oil and gas prices when oil prices rise above the upper pivot point. Until the recent oil price collapse, suppliers were contesting S curves who argued that S curves were designed for "temporary" oil price volatility and high oil prices were the new norm."
- 6 Provided by Morten Frisch in *Current European Gas Pricing Problems: Solutions Based on Price Re-opener Provisions*, 24 February 2010, found at <http://www.dundee.ac.uk/cepmip/gateway/index.php?news=30777>
- 7 One debate centres around the future relevance of Gas Oil and Low Sulphur Fuel Oil as benchmarks, and what may take its place (a subject beyond the scope of this paper!).
- 8 DG Competition, Report on Energy Sector Inquiry, 103 SEC (2006) 1724 (Brussels, 10 January 2007), accessible at: http://ec.europa.eu/comm/competition/antitrust/others/sector_inquiries/energy/fr_part1.pdf (visited 24 January 2007).
- 9 ECT Paper, *Putting a Price on Energy* (available on the ECT Secretariat website), p. 170.
- 10 ECT Paper, *Supra* n. 9 at page 161. Other examples of the type of language commonly used include:

"If... economic circumstances in the buyer's market... have substantially changed as compared to that expected when entering into the contract for reasons beyond the parties' control... and the contract price... does not reflect the value of natural gas in the buyer's market." (Susan Farmer, "LNG Sale and Purchase Agreement," in *Liquefied Natural Gas*, Paul Griffin (ed.), 2006, p. 49).

"Either party may request a review of the method of determining the Contract Sales Price set forth in clause X if it has a good faith basis for believing that, for reasons outside its control, there has been a material change in the value of imports into Y and/or re-gasified LNG in the Y gas market which is anticipated to have lasting effect." (P. Hodges, "LNG – a minefield for disputes?" in *Liquefied Natural Gas*, Paul Griffin (ed.), 2006, p. 115).

As for the general test, a simple example of the overall principle could be:

"[T]he price payable hereunder shall at all times enable the buyer to resell the gas competitively in its end-user market." (G. Coop, L. Gouiffès, "Arbitration and Pricing Mechanisms in International Gas sale Contracts", *Oil, Gas & Energy Law Intelligence*, Vol. 1, issue #02, March 2003).
- 11 The writer cannot recall where he found these. Anyone finding these familiar is invited to contact me to gain attribution!
- 12 See, for a relatively recent example, *Thomas Valley Power Ltd & Total Gas & Power Ltd* (2006) Lloyd's Rep 441, where an increase in the market price (leaving the contract price at uneconomic levels) was not considered to be caught by the contract's force majeure clause.
- 13 It is, of course, all a question of drafting, and the writer has seen clauses which speak to a lower threshold than the usually strict trigger of impossibility of performance, (for example, use of the word "hinder" rather than "render impossible"), or even the citation of end market problems as a grounds of force majeure.
- 14 Another (shorter) example could be:

"If a substantial change that was not predicted at the time of execution takes place in the circumstances on which the Agreement was based so that a party suffers or is foreseen to suffer substantial hardship, which is likely to continue, arising from that change, then the parties shall immediately consult and make mutually acceptable revision of the terms and conditions appropriate to 'alleviate or eliminate the hardship, in a spirit of mutual understanding and cooperation.'"
- 15 See, for a general discussion of hardship, Frederick Fucci's excellent article, "*Hardship & Changed Circumstances as Grounds for Non-Performance or Adjustment of Contract*", *Transnational Dispute Management*, February 2006, pp. 9-11.
- 16 For example:

"Should the [index] be abolished or abandoned, non longer published, or its basis for calculation changed in a material respect, then the parties agree to meet in good faith to agree upon a similar index as a substitute and, failing agreement, the matter shall be referred to dispute resolution."
- 17 For example:

Negotiation initiated by the Seller

Seller shall have the right to request a renegotiation of the price for LNG if Seller has received a bona fide firm written offer from a third party to purchase a comparable quantity to the quantity of LNG that Buyer is committed to purchase hereunder, with similar terms and conditions, for a price that is at least X% higher than the then current price of LNG thereunder.

Negotiation initiated by the Buyer

Buyer shall have the right to request a renegotiation of the price for LNG if Buyer has received and presented to Seller a bona fide firm written offer from a third party offering to sell comparable quantities of LNG to Buyer pursuant to similar terms and conditions, and for a price that is at least X% lower than the current price of LNG purchased hereunder."

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18 Supra n. [] pp. 9-11.

19 The administrative doctrine of *imprévision* is not, per se, applied in civil contracts engaged between private parties, although other circumstances may exist where a renegotiation is appropriate. By way of a general example, the UNIDROIT Principles of International Commercial Contracts provide:

“**Article 6.2.1** (Contract to be observed)

Where the performance of a contract becomes more onerous for one of the parties that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

Article 6.2.2 (Definition of hardship)

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

- (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
- (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
- (c) the events are beyond the control of the disadvantaged party; and
- (d) the risk of the events was not assumed by the disadvantaged party.

Article 6.2.3 (Effects of hardship)

- (1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
- (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.
- (3) Upon failure to reach agreement within a reasonable time either party may resort to the court.
- (4) If the court finds hardship it may, if reasonable,
 - (a) terminate the contract at a date and on terms to be fixed, or
 - (b) adapt the contract with a view to restoring its equilibrium.”

20 See Fucci, supra.

21 A. Kolo, T.-W. Wälde, “Renegotiation and Contract Adaptation in the International Investment Projects: Applicable Legal Principles & Industry Practices,” *Transnational Dispute Management*, Vol. 1, issue #1 (February 2004).

22 See K.-P. Berger “Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Negotiators” 36 *Vanderbilt J Transl L* 1347, at 1356.

23 One may want to consider the American doctrine of commercial impracticability here (see, for example, section 2-615 of the Uniform Commercial Code), but the provision is construed by US courts in a conservative fashion, and at present this doctrine is most often applied only to excuse non-performance, rather than as a basis for renegotiation (which is a shame, as the official comment No. 6 to 2-615 clearly suggests a greater role for this doctrine). For one case where reformation did occur, see *ALCOA v. Essex Group, Inc.* 449 F. Supp. 53 (W.D. Pa. 1980).

24 Polkinghorne, “Unitisation and Redetermination : Right or Obligation?” *JENRL*, Vol 25, No. 3 (2007) 303, dealing with energy and natural resources disputes and their resolution.

25 Which can obviously lead to more expense and delay. One might in such a case consider a provision to the effect that the clause include a presumption of validity of the expert's decision and/or will apply pending final resolution (so that the referral to the expert has some utility).

26 P. Bernardini, “The Renegotiation of the Investment Contract”, *ICSID Review – Foreign Investment Law Journal*, vol. 13, n° 2 (1998), pp. 420-421, at p. 422. (footnote omitted).

27 Y. Gotanda, “Renegotiation and Adaptation Clauses in Investment Contracts, Revisited”, *Vand. Int. J. Transnat'l. L.*, vol. 36 (2003), p. 1471.

28 K.-P. Berger, supra n. 22 at pp 1367-1368, citing *Kuwait v. Am. Indep. Oil Co.*, 21 I.L.M. at 1004 (“An obligation to negotiate is not an obligation to agree”); *Wintershall A.G. v. Gov't of Qatar*, 28 ILM 795 at 814 (“It is clear that such a duty [to negotiate] does not include an obligation... to reach agreement ... [nor is] the Government [is not] legally required to enter into such an agreement, however reasonable it may be”).

29 Polkinghorne, “The Withholding of Documentary Evidence in International Arbitration: Available Remedies for Dealing with Uncooperative Parties”, *ADR & the Law*, 20th Edition, 2006, 199.

30 As stated in the ECT Paper :

“The concept was able to cope with and to adapt to the substantial changes that have taken place since its development for the export of Groningen gas in the 1960s. It was able to cope with extreme price developments like the two oil price shocks in 1973/1974 and in 1979/1980, as well as with the reverse oil price shock in 1985/1986, with major geopolitical changes like those triggered by the fall of the Berlin Wall, as well as changes in the regulatory framework like the ban of gas use in power generation and its abolition, not to mention the changes linked to the creation of a single market in the EU. The concept of long-term contracts has been recognised as a major instrument to create security of supply. However, some questions remain open, for example how to reconcile long-term contracts with the concept of market opening contained in the 2nd Gas Directive, i.e., the questions raised by organisational unbundling, and how to match long-term supply contracts with corresponding long-term transportation agreements”

31 The issues in this latter case are currently generating a great deal of debate.

32 See, for a more general treatment, the papers of the UIA Seminar on “The Impact of EC Law on International Arbitration” held in Brussels on 23 March, 2007.

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White & Case LLP
19, Place Vendôme
75001 Paris
France
Tel: + 33 1 55 04 15 15
Fax: + 33 1 55 04 15 16