



Gas Supply and LNG Arbitrations

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Introduction

The natural gas and liquefied natural gas (LNG) markets are in a state of flux. Even prior to the covid-19 pandemic, the evolution of the natural gas markets was sufficiently rapid so as to disrupt existing long-term supply contracts and result in waves of gas price review arbitration, predominantly in Europe. Since these initial arbitrations, attention has also turned to Asia, where the LNG market accounts for 68 per cent of global imports.^[2] Asia was spared Europe's arbitration wave, thanks in large part to the systemic differences between the Asian and European gas markets – but that may be about to change.

In the first half of 2020, the gas and LNG markets have been confronted by not only a collapse in prices, but also the covid-19 pandemic and its economic repercussions. Combined with the increasing willingness of Asian businesses to arbitrate disputes, gas and LNG disputes may be right around the corner as risk and uncertainty increase.

This chapter offers a survey of the legal and practical considerations of which businesses and lawyers facing gas and LNG arbitration in Asia may have to take account. It begins with some relevant industry background, including the growth of the LNG market in Asia. The following sections summarise salient features of gas and LNG supply contracts, and then discuss the instructive experience of the European price review arbitrations of recent years. The chapter concludes with a

discussion of the most likely legal issues to arise in LNG arbitrations in Asia, including price review and *force majeure* disputes, that may emerge from the current economic crisis.

Industry background

Traditional gas supply and pipelines

Natural gas is the fastest-growing fossil fuel in the world, representing nearly a quarter of global primary energy demand and electricity generation.^[3]

Like other resource projects, the upstream stage of natural gas production is notable for large up-front capital costs (and financing requirements) associated with geological exploration, drilling and extraction. But at the midstream stage, natural gas becomes even more challenging: efficient transportation of natural gas must almost always rely on expensive pipeline networks. These networks – sometimes crossing multiple borders – will then deliver the gas to buyers, usually utilities that use the gas to generate electricity, or pass it on to smaller regional or municipal distribution networks providing natural gas for heating or cooking.

Historically, these buyers have been state-owned, quasi-state-owned or formerly state-owned monopolists.^[4] The involvement of public utilities also means that the downstream market remains particularly exposed to government regulation of electricity and gas provision.

Growth of LNG and the Asian market

By cooling natural gas to its liquid form (i.e., liquefaction), producers can store and transport significantly higher volumes of the resulting LNG (nearly 400 times more than natural gas) in specialised containers and seaborne vessels, thereby alleviating some of the distribution challenges noted above. This process implicates additional capital and financing requirements in the form of liquefaction facilities found at pipeline terminals – usually ports – where gas is received from production

fields, liquefied and loaded onto tankers or stored. On the buyer side, regasification facilities are required to receive LNG ships, convert the cargo back into gas, and then inject it into local gas distribution systems for consumers.

Technological developments in this type of shipping capacity, combined with burgeoning demand, have resulted in an explosion of the LNG market in Asia. With little domestic production and limited pipeline access to natural gas production from Russia, Central Asia and the Middle East, the largest Asian economies have begun to rely on imported LNG to provide a cheaper and cleaner alternative to coal.

Asia now represents 68 per cent of all global LNG imports.^[5] Since receiving its first transpacific shipment of LNG from the United States in 1969, Japan has remained the leader of LNG imports and consumption, importing 76.9 million tons in 2019 – 22 per cent of the global market.^[6] Perhaps not surprisingly, Chinese demand and imports have rapidly grown to second place during the past two decades, with some projecting China to overtake Japan by 2024.^[7] Other major importers include South Korea, India and Taiwan.^[8]

On the production side, Australia is the dominant exporter to Asian markets, particularly to Japan and China, followed by Qatar. And just as LNG methods enabled Asian buyers to access gas supply without transnational pipelines, so too have they enabled island nations such as Malaysia and Indonesia to tap offshore gas fields to become the third and fourth largest exporters of LNG, respectively, to other Asian countries. Despite being the third largest global exporter of LNG, the United States is only the sixth largest exporter to Asia, behind Russia.^[9]

Long-term contract characteristics

Owing to the capital intensive nature of the market, agreements for the purchase and sale of natural gas (including LNG) have been dominated by long-term contracts, covering the sale of gas for at least 20 years. As buyers, utilities require a stable, predictable and secure gas supply for the long-term provision of vital electricity and power. As sellers, producers need a secure revenue stream that can cover the initial sunk costs of exploration and extraction and generate future profits. Lenders will moreover require that producers present a guaranteed revenue stream to ensure that the lender can recoup its investment in the underlying project. This need in particular gave rise to take-or-pay obligations in long-term contracts.^[10]

Take-or-pay provisions oblige buyers to either accept delivery of a set volume of gas per period (usually a year), or pay some minimum amount if delivery is not accepted. However, imposing this type of obligation on buyers for 20 or more years requires a counterbalance against unpredictable market forces, including seasonal variation in energy demand. Hence, long-term agreements use flexible pricing formulas that react to market indices and, in theory, assure buyers that they will not be stuck with long-term, large-scale uneconomical purchase obligations.^[11]

Historically, gas pricing was benchmarked to the price of oil. Thus, as explained in Chapter 8 of this guide:

buyers and sellers often agreed to a contract price with two fundamental components: first, a fixed base value referred to as 'P₀'; and second, an indexation component tied to the evolution of oil-derived products. This latter component, called an 'escalator clause', is a multiplier to the base value that allows the contract price to fluctuate during the term of the contract in accordance with the price movement of the oil products.^[12]

Yet the fixed base value, with any upper and lower limits to the escalation factor, still anchor the ultimate payment price despite more aggressive market movement. Specifically, the escalation formulas typically

resulted in an 'S-curve', meaning that outlying high or low price movements would have a more limited effect on the final price.^[13]

Parties also realised that the use of oil pricing as a benchmark was not a perfect corollary to the natural gas market. Therefore, long-term contracts generally also incorporated price review clauses.^[14] Price review clauses enable parties to revisit their price formulas and renegotiate new pricing terms either periodically or based on trigger events such as 'substantially changed' economic circumstances.^[15]

Gas price review arbitrations: the European experience

Disputes in the gas sector may arise from a variety of issues, ranging from delays in the construction of upstream facilities to the quality of gas delivered. One survey in 2016 reported 72 known disputes in the LNG sector. Most were between buyers and sellers but many involved governments, ship owners and financing parties.^[16]

In the early 2000s, the European gas sector began to experience a surge in disputes about price review clauses. Not only do these arbitrations present a unique category of dispute in and of themselves, they also highlight how broader market changes, such as the changes currently brought about by the covid-19 pandemic, can trigger a wave of arbitrations across an entire sector. It is worth taking a closer look, therefore, at what we can learn from these arbitrations.

Market shifts created price imbalances

In the simplest terms, price review arbitrations emerged because, over time, the pricing provisions of long-term contracts stopped making economic sense for one of the parties. Price escalators in these contracts historically had been indexed to the price of oil because a reliable European gas reference price did not exist at the time of

contracting. During the 2000s, a series of developments began to create problems with using oil as a price reference.

The first development was the European Union's gas market liberalisation scheme, particularly its 1998 Directive 98/30/EC.^[17] Prior to this, European vertically integrated gas monopolies controlled national or regional pipeline distribution networks, and consumer supply (i.e., the utilities selling gas or electricity to end users).^[18] The EU Directive initiated a process of 'unbundling' these incumbents' supply and distribution functions to allow third-party suppliers access to their distribution networks on a non-discriminatory basis. This change allowed European consumers to have a choice of utility companies, which could compete with each other, including by negotiating purchase agreements directly with gas producers. This dynamic created a downward pressure on gas prices disconnected from oil price movements.^[19]

The European liberalisation project was gradual, involving a series of Directives between 1998 and 2010, with each Member State enacting its own implementing legislation.^[20] In the meanwhile, a storm of market forces exerted additional downward pressure on price. The 2008 financial crisis and subsequent recession tightened consumer demand, leaving importers with take-or-pay obligations scrambling to sell volume. By 2011, the 'shale revolution' had begun in the United States, further contributing to an oversupply.

Aided by the European liberalisation programme and the increase in supply, Europe saw the emergence of gas trading hubs that offered reliable gas reference prices for the European market. Gas trading hubs can be either (1) physical destinations where multiple pipelines interconnect, such as Austria's Baumgarten (now known as the Central European Gas Hub) or the US's Henry Hub in Louisiana, or (2) non-physical 'virtual trading hubs', where inter-dealer brokers facilitate trades, akin to an exchange. The most important of these was a virtual

trading hub, the Dutch Title Transfer Facility (TTF). By the 2010s, trading at the TTF was sufficiently liquid and transparent that the Dutch TTF price began to serve as a continent-wide benchmark. Natural gas prices in Europe, which had historically been indexed to global oil prices, became decoupled from oil prices so that supply and demand in the gas market itself determined prices.^[21]

Arbitrator intervention and interpretation of economic conditions

As a result, European gas became available for purchase at spot prices well below the prices fixed by long-term contracts with prices indexed to oil. It is no surprise that European gas buyers began to trigger the price review provisions of their supply contracts.

Buyers and sellers were forced to resort to arbitration when they could not agree on a new price through the price review mechanisms. Most resulting arbitration awards are not public. However, some notable decisions in the public domain offer insight:

- Edison arbitrations: from 2011 to 2013, Italian importer Edison prevailed in a series of price review arbitrations against Russian Gazprom, Qatari RasGas, Algerian Sonatrach, and Eni, another Italian gas company, securing substantial price reductions in each case.^[22]
- *RWE v. Gazprom (RWE)*: in 2013, German utility RWE prevailed in a price review dispute with Gazprom. Most notably, the tribunal adjusted the gas purchase price formula to incorporate gas market indexation, whereas the contract's formula was previously benchmarked to oil.^[23]
- *BOTAŞ v. National Iranian Gas Company (NIGC)*: In 2016, Turkish national oil company BOTAŞ won an arbitration by the International Chamber of Commerce (ICC) in which the Iranian supplier was ordered to grant a 13.3 per cent cut in the price of gas under a 25-year supply agreement. The tribunal also applied the discount retroactively, forcing NIGC to give BOTAŞ free gas worth US\$1.9 billion as compensation for overpayment. BOTAŞ had initially sought a 37.5 per cent discount based on changes in Turkey's domestic gas market and, in a related claim that the tribunal rejected, asked for a remedy of specific performance obliging NIGC to upgrade its distribution network, which BOTAŞ claimed was unreliable.^[24]

Perhaps the most well-known price review dispute comes from a 2005 ICC arbitration: *Gas Natural Aprovevisionamientos SDG v. Atlantic LNG Company of Trinidad and Tobago (Atlantic LNG)*. In this case, the buyer, a Spanish utility, was obligated to pay for

LNG deliveries under a 20-year sale and purchase agreement. The contract allowed the buyer to accept deliveries either in Spain or to divert them to a receiving terminal in New England. When the resale price of gas in the United States became more favourable, the buyer began directing all delivery of LNG cargoes to New England. This allowed the buyer to resell the gas in the US market, where it had a higher resale value, rather than the European market. Yet the price that the buyer was obliged to pay under the contract remained indexed to European oil products, allowing the buyer to pay a lower price based on the European market, rather than on the higher price prevailing in the North American market, where the buyer ultimately accepted delivery and resold the product. Not surprisingly, the seller initiated a price review under a provision of the contract that provided:

If at any time either Party considers that economic circumstances in Spain beyond the control of the Parties, while exercising due diligence, have substantially changed as compared what it reasonably expected when entering into this Contract . . . and the Contract Price . . . does not reflect the value of Natural Gas in the Buyer's end user market, then such Party may, by notifying the other Party in writing and giving with such notice information supporting its belief, request that the Parties should forthwith enter into negotiations to determine whether or not such changed circumstances exist and justify a revision of the Contract Price provisions and, if so, to seek agreement on a fair and equitable revision of the above-mentioned Contract Price provisions. ^[25]

With the parties unable to reach a negotiated agreement, an ICC tribunal was asked to resolve the dispute, including by interpreting the rather ambiguous references to 'economic circumstances', 'substantial[] change[]' and 'fair and equitable revision'. The tribunal's resolution of the dispute ultimately imposed a remedy neither party requested: (1) it adjusted the Spanish price formula with some modifications to the base price; and (2) it added new pricing parameters that would apply when a certain percentage of gas was diverted to New England.

Arbitration heads to Asia?

Market forces in the LNG sector suggest an increase in disputes

Like Europe, the Asian market is largely dominated by long-term supply agreements. Though recent trends suggest that medium-term contracts and spot purchases are growing, long-term agreements still make up approximately 70 per cent of Asian LNG volume.^[26] These agreements likewise contain price review provisions and price formulas linked to the price of oil, usually the Japanese crude cocktail index (JCC) or Brent, although some notable agreements coinciding with the US shale boom are indexed to the US Henry Hub gas price.^[27]

Despite this similarity with Europe, market forces played out differently in Asia. Unlike in Europe, Asian gas demand surged through the 2010s, spurred by Chinese growth and the 2011 Fukushima accident, Japan's subsequent shutdown of nuclear reactors, and the corresponding flight to LNG energy.^[28] Asian LNG prices increased and by 2014, sellers, not just buyers, initiated price reviews to increase prices.^[29]

Although from 2014 to 2018 a number of price reviews took place, there was no discernible wave of arbitrations in the Asian market. Several factors probably explain why. Oil prices collapsed in the third quarter of 2014, meaning that buyers received some relief under oil-indexed contracts. Further, Asian markets did not undergo the same gas market liberalisation transition as Europe, thereby permitting price insensitivity by monopolists who could pass on any increases to end users.^[30] Some commentators have also referenced the unwillingness of Asian companies – especially state-owned entities – to let disputes reach litigation or arbitration, though any such hesitation has evidently diminished in recent years.^[31]

In any case, the respite from arbitration may now be coming to an end. Japan – the largest consumer and importer of LNG – has taken significant steps to liberalise its energy markets in the past five years. The retail electricity market was fully liberalised in April 2016, as was the retail gas market a year later. In April 2020, Japan

unbundled the distribution and supply functions of electricity providers, and is planning to implement unbundling in the gas sector in 2022.^[32] China has witnessed some market liberalisation too, with roughly 7 per cent of LNG imports now sourced by non-national companies and additional measures being developed to allow market-based access to state-owned distribution infrastructure.^[33]

The third-largest importer, South Korea, is well behind Japan in this regard but has deregulatory plans as well. The Korean LNG sector is comprehensively dominated by state-owned KOGAS – private companies are permitted to import LNG only if it is intended for their own use (i.e., not resold) and if purchased at prices lower than KOGAS's long-term contracts – but Korea has plans to liberalise the market by 2025 so that third parties can import and resell LNG in competition with KOGAS.^[34] And other Asian countries have liberalisation plans in place as well. India has announced its intent to implement unbundling and, in 2018, GAIL – India's state-owned gas distributor – allowed third-party access to its network. Thailand enacted a third-party access scheme in 2018, though it has not yet issued any actual licences permitting access to the state-owned monopolist's pipeline network.^[35]

Asian demand tapered off sufficiently in the second half of the 2010s, such that oversupply contributed to a drop in gas price.^[36] In fact, both oil and gas have more recently continued a downward trend, which has begun to create circumstances mirroring the European experience.

Now, in another echo of the European market, the first arbitrations have also begun. In February 2018, KOGAS filed the first known Asian price review arbitration involving Australia's North West export project and a failed mid-term contract price review negotiation.^[37] In 2019, Osaka Gas, one of Japan's incumbent importers, initiated arbitration against Exxon Mobil's Papua New Guinea vehicle. Under Osaka Gas's long-term agreement,

it was obliged to purchase LNG indexed to JCC prices at a time when the gas spot market price was nearly half the contract price. With price negotiations evidently failing, observers witnessing a traditional Japanese gas buyer initiate arbitration declared the case a potential ‘bellwether’ of things to come.^[38]

More recently, the covid-19 epidemic has prompted further market upheaval, the scale of which remains to be seen. Since the beginning of 2020, the pandemic and government-mandated lockdowns have contributed to a drop in Asian demand and a corresponding drop in price.^[39] Compounding this trend, in March 2020, oil prices were battered when Russia and Saudi Arabia entered into a price war after Russia refused to cut production in response to the covid-19 pandemic.^[40] The price war peaked in April when US oil prices reached negative levels, resulting in the offloading of oil tankers and shutdowns in production.^[41]

Since then, LNG prices also have fallen to record lows. Analysts are struggling to predict the direction in which the gas (and oil) markets will trend. Demand in Asia remains stagnant and subject to oversupply. Some think demand will slowly recover, while supply dwindles as low prices make export unprofitable, especially from North America.^[42] Indeed, production projects in the United States, and elsewhere, are already being delayed because of the broader financial pressure brought about by the covid-19 crisis. The potential delay, or even cancellation, of these production projects will have knock-on effects in other parts of the supply chain, including shipyards and regasification facilities.

And other unknown factors linger: the covid-19 pandemic persists; China continues to develop pipeline access to Russian and central Asian gas supply; Japan’s gradual reactivation of its nuclear reactors following the Fukushima disaster will eat into LNG demand; while the continuing US-China trade war may further contribute to volatility in supply and demand in the Asia-Pacific region.

Arbitrating Asian commercial disputes

With the market landscape shifting rapidly, the risk of disputes reaching arbitral tribunals will only increase. While each case will ultimately turn on the language of its underlying contract, below we identify some germane considerations for businesses and practitioners. Furthermore, since parties to long-term LNG contracts most commonly select New York or English law to govern their dispute, special reference is made to those jurisdictions' doctrines where relevant.

Arbitral institutions and seats

A contract's dispute resolution clause will usually provide for arbitration under the relevant rules of an arbitral institution. These institutions are responsible for the orderly administration of the dispute and provide for key procedural mechanisms, such as the appointment of arbitrators, the taking of evidence and exchanges of documents, particularly when the contract itself is silent on such issues. A series of long-term contracts between US sellers and Asian buyers, for example, provide for arbitration in Houston under the international rules of the American Arbitration Association.^[43] There is also a growing number of such institutions in the Asia-Pacific region, in particular, the Singapore International Arbitration Centre (SIAC), the Asian International Arbitration Center in Kuala Lumpur, the Hong Kong International Arbitration Centre and the Shanghai International Arbitration Center. Other contracts, such as a publicly available agreement between Qatargas and Pakistani State Oil, provide for ad hoc arbitration (i.e., self-administered arbitration) under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).^[44]

The actual place of arbitration can be set by the parties irrespective of the institutional rules they have selected. For instance, the Qatargas-Pakistan contract calls for UNCITRAL arbitration in London.^[45] Parties may further

agree to hold sessions, including hearings, in multiple locations for the convenience of witnesses, or even through videoconferencing.

While party convenience and the ability to set hearings in 'neutral' locations is an attractive aspect of arbitration, parties must be aware of where they are legally 'seating' the arbitration. An arbitration can have only one geographical seat or legal place of arbitration. This location is critical because the laws of that seat's jurisdiction will govern key aspects of the arbitration, including, perhaps most importantly, the ultimate validity of any award. Under the UN Convention on the Recognition and Enforcement of Arbitral Awards (known as the New York Convention), to which most key Asian jurisdictions are signatories, only the courts of the arbitral seat have the power to vacate or set aside an award.^[46] This *vacatur* may in turn frustrate parties' abilities to enforce the award, including in the jurisdiction where the non-prevailing party has its assets.^[47] While an arbitration taking place entirely in Singapore under the SIAC rules is thus unambiguously seated in Singapore, parties may find themselves in strange waters if, for example, an ad hoc arbitration is fragmented across different jurisdictions. Parties could risk ending up in ancillary litigation in potentially undesirable national courts to determine the seat or defend the validity of an award in courts that may be less hospitable to arbitration.

Legal issues in LNG arbitrations

Revisions to price formulas

As suggested above, an Asian wave of price review arbitrations may already be beginning. These arbitrations present a unique circumstance because, unlike most contract disputes, the arbitrators are not simply adjudicating whether a breach has occurred and how the non-breaching party should be compensated. Rather, arbitrators must develop a comprehensive understanding of the parties' business and market and

then interpret whether (1) the conditions for price review had been met, and (2) come up with an appropriate revision of the contract's price formula. In other words, arbitrators are being tasked with setting forth the terms of the parties' future contractual relationship when the parties themselves were not able to do so.^[48]

Arbitrators evaluating economic circumstances may have to contend with contractual limitations on how the relevant market is defined, for example, whether it is strictly limited to the buyer's market or a broader region. That analysis will be further complicated by any resale or diversion restrictions, as evidenced in the *Atlantic LNG* dispute, discussed above.

Further, a revision to the price formula itself may entail anything from revising a base price or escalation parameters, or, as was the case in the *Atlantic LNG* and *RWE* arbitrations, introducing a gas index in an otherwise oil-indexed formula. The current economic turmoil has not only shown gas price delink from oil, but also Asian spot gas prices reaching parity with the US Henry Hub price, which does not take into account the cost of transport to Asia.^[49] If a meaningful disconnect develops between Asia and US spot prices, parties could argue for replacing Henry Hub indices with Asian spot prices. That task becomes complicated by the lack of a truly liquid Asian hub like TFF or Henry Hub. In fact, Singapore abandoned its four-year effort to develop a hub-based spot price index (the 'Sling' price) in late 2019.^[50] However, use of Platt's Japan Korea Marker – a reported spot price taken by surveying market participants – has become more widespread.^[51] Disputes could turn on whether such a survey-based price – a method used to set prices in other resource industries such as uranium – truly reflects a market price for natural gas.

Force majeure

The scale of market disruption caused by the covid-19 pandemic, and particularly the government measures requiring lockdowns and quarantines, has given rise to

the additional possibility of *force majeure* disputes. *Force majeure* clauses vary by contract but will typically excuse contract performance resulting from the occurrence of some enumerated event that renders performance by one party impossible. In March 2020, China's largest LNG importer, CNOOC, refused LNG cargo from major suppliers including Total, Shell and Qatargas on the grounds that logistical challenges at ports caused by the response to the pandemic constituted an event of *force majeure*. With all known sellers having rejected CNOOC's notice of *force majeure*, observers are now waiting to see how a dispute may develop and whether other market participants will follow CNOOC's example.^[52]

Arbitrating *force majeure* disputes involves careful navigation of the events giving rise to the invoking party's claim of a *force majeure* event, the language of the contract and broader market forces at play. For instance, agreements between a major US seller and both KOGAS and India's GAIL contain clauses that include epidemics as *force majeure* events, but exclude 'the ability of Seller or Buyer to obtain better economic terms for LNG or Gas from an alternative supplier or buyer' from the definition.^[53]

Another *force majeure* provision between Qatargas and Pakistan State Oil specifically includes 'epidemics and quarantine restrictions' but excludes 'financial hardship or the inability of a Party . . . to make a profit or achieve a satisfactory rate of return' from the definition of a *force majeure* event.^[54] Thus, interconnected events (e.g., pandemics and government responses) and their ultimate effect on contract economics must be disentangled; the very same circumstances that trigger a price review may also foreclose a *force majeure* claim.

New York and English law both defer to party autonomy in contracting and will respect the parties' intent with respect to *force majeure* clauses. New York law, however, will construe them narrowly.^[55] Typically, a clause must not only provide for the specific type of event that prevents performance (e.g., natural disaster or government regulation), but the event itself must have been

unforeseeable.^[56] And, if performance is still possible in some way, even if imposing considerable hardship, New York courts may avoid a finding of *force majeure*.^[57] For instance, in two New York cases, a state regulation prohibiting fracking did not excuse a production company from performance under an oil and gas lease, despite the fact that the parties specifically intended to utilise fracking when contracting, because other drilling methods were still available.^[58] So, as a hypothetical, even if a buyer's regasification facilities were temporarily inoperative because of quarantine restrictions, but the buyer could still accept and place LNG cargos into storage for later regasification, the buyer could face an uphill battle when invoking *force majeure* based on the regasification facilities being shut down. Indeed, most *force majeure* provisions will in any case require the invoking party to take commercially reasonable measures to overcome the *force majeure* event. What constitutes commercially reasonable measures in an ongoing pandemic remains to be seen.

Damages issues

A party claiming a breach of contract from refusal to receive and pay (or process and deliver) cargo, or even outright termination, must also think about how to argue and prove its compensable damages to a tribunal. This often overlooked element of an arbitration may have very serious consequences for a party who might prevail on liability, but recover little in a pyrrhic victory.

Here again, English and New York law are in significant conformity. A contract for the sale of LNG will fall under the UK's Sale of Goods Act and New York's Uniform Commercial Code (UCC).^[59] Both statutes impose somewhat proscriptive methodologies for proving damages, which should be studied in advance of a claim.

Practical considerations in Asian arbitration

For instance, in the case of a seller who is damaged by a buyer's improper refusal to accept deliveries, under both statutes, the seller's default remedy is usually based on the difference between the contract price and the market price of LNG on the date of the breach.^[60] Given the fragmented nature of the Asian LNG market, the buyer and seller will thus have the opportunity to present the tribunal with competing arguments as to the appropriate index or proxy that reflects the LNG market price. As discussed above, this may prove challenging in the absence of a dominant Asian gas hub and the confidential nature of long-term contract pricing provisions.

Sellers may also be frustrated if the difference between the market price and contract price was minimal on the date of the breach, but the market price is expected to deteriorate. The UCC provides for the possibility of recovering lost profit damages when the above methodology is 'inadequate' to properly compensate the seller.^[61] But a seller may be hard pressed to prove such 'inadequacy', while a lost profit analysis will involve yet more complex evidence and discounted cash-flow modelling, taking into account country and project risks. Furthermore, contracts may expressly foreclose lost profit damages, leaving aggrieved sellers limited to unsatisfying market-price differentials as a remedy.

The above analysis warrants a few practical observations about arbitration in Asia or with Asian parties.

In almost all the dispute contexts described above, parties can expect to retain expert witnesses – often both economic experts and industry specialists – to opine on everything from market conditions, applicable market prices, fair price alternatives and commercially reasonable mitigation measures. In price review arbitrations especially, first-hand witnesses may even take a back seat in the arbitration unless they were personally involved in the negotiations over the contract and can assist the tribunal with resolving any ambiguity about party intent.

Further, while it is conventional wisdom that document discovery is anathema to international arbitration, the reality is that almost every international arbitration will involve some level of document disclosure and exchange, usually under the International Bar Association's Model Rules on the Taking of Evidence, unless the parties specifically agree otherwise. Furthermore, since Asian business norms lean towards negotiated resolution as opposed to defaulting towards litigation, an Asian business may not involve attorneys in its internal deliberation until far later in the dispute process. Even then, in part because of managerial styles and because attorney-client privilege is not robust in Asian jurisdictions, documents recording these deliberations may be widely circulated within a company. Therefore, an Asian client's documents that common law counsel would expect to be privileged, including sensitive internal memoranda or even settlement offers, might not carry the protections of privilege, whereas the US or Australian adversary's analogous documents might remain shielded, resulting in an informational asymmetry.

Finally, the LNG context merits a parting comment on the issue of enforceability of awards. As previewed above, an award is subject to attacks for *vacatur* (i.e., set-aside) in the country where the arbitration was formally seated. In most jurisdictions, following the UNCITRAL model law, the grounds for *vacatur* are quite limited, typically encompassing misconduct such as fraud or fundamental failures of process.^[62] However, an award, even if valid and not subject to *vacatur*, may still have to be enforced against a recalcitrant debtor. This may require going to various courts where a party has its assets, including its home courts. Here, even under the New York Convention, the courts in which enforcement is sought may refuse to enforce an award if it would conflict with the public policy of the enforcing state.

Notes

Given the presence of state-owned participants in often highly regulated markets involving energy supply, parties should be mindful of this public policy enforcement risk. Notably, Japanese regulators have followed the lead of European competition authorities in concluding that destination restriction clauses may be anticompetitive in some contexts.^[63] A victorious party should take note of any potential argument by a party seeking to block enforcement that the ultimate award violates public policy to the extent that it relies on the enforcement of any such restrictions.

Some remedies may likewise prove problematic. For instance, in a case in which the authors represented a foreign investor, an award rendered against India and GAIL ordered the return to the investor of an exploration licence for natural gas that India had improperly revoked. When the investor sought to enforce the award in the United States, a district court judge ruled that enforcing the award would violate US public policy against ordering the remedy of specific performance against a sovereign.^[64] As the covid-19 crisis continues, and states are compelled to take on more interventionist measures, parties should be mindful of how they phrase both their arguments and their remedies, to avoid the risk of conflict with public policy in such a vital sector, even in the most pro-arbitration environments.

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^[2] Gillian Boccara, Mateusz Czajkowski and Neil Hamzaoui, 'Reflecting on 2019 LNG flows', McKinsey & Company (2 March 2020), available at <https://www.mckinsey.com/industries/oil-and-gas/our-insights/petroleum-blog/reflecting-on-2019-lng-flows>.

^[3] See International Energy Agency, [IEA.com](https://www.iea.org/fuels-and-technologies/gas), at <https://www.iea.org/fuels-and-technologies/gas>.

^[4] See Stephen P Anway, George M von Mehren, 'The Evolution of Natural Gas Price Review Arbitrations', *The Guide to Energy Arbitrations* (2019, 3d ed), available at <https://globalarbitrationreview.com/chapter/1178846/the-evolution-of-natural-gas-price-review-arbitrations>.

^[5] Boccara, Czajkowski and Hamzaoui (see footnote 2, above).

^[6] 2020 World LNG Report, International Gas Union (2020), at p. 18, available at <https://igu.org/resources/2020-world-lng-report/>; see also Steven P Finizio, John A Trenor and Jaren Tan, 'Trends in LNG Supply Contracts and Pricing Disputes in the Asia Pacific Region', OGEL Vol. 18, Issue 3 (May 2020), at p. 18, available at https://www.wilmerhale.com/media/files/shared_content/editorial/publications/documents/20200501-ogelintelligence-trends-in-lng-supply-contracts-and-pricing.pdf.

^[7] Finizio, Trenor and Tan (see footnote 6, above), at pp. 18 to 19.

^[8] *id.*, at pp. 8 to 13.

^[9] *id.*, at pp. 15 to 16; see, generally, 2020 World LNG Report, International Gas Union (2020), at pp. 15 to 21.

^[10] See, generally, Stephen P Anway and George M von Mehren, 'The Evolution of Natural Gas Price Review Arbitrations', *The Guide to Energy Arbitrations* (2019, 3rd ed), available at <https://globalarbitrationreview.com/chapter/1178846/the-evolution-of-natural-gas-price-review-arbitrations>.

^[11] *id.*

^[12] *id.*, at section titled 'The price review clause'.

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