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# **PIPELINE COORDINATION: THE IMPORTANCE OF PROPERLY DEFINING AN ARBITRAL TRIBUNAL'S AUTHORITY IN GAS PRICE REVIEW ARBITRATION**

Aikaterini (Katerina) Karamousalidou

## **ABSTRACT**

Unprecedented events in international gas commerce have significantly increased gas pricing disputes. International arbitration, as a neutral and binding process, offers a plethora of advantages to international players of the energy industry who are interested in resolving their disputes in an efficient way. However, gas price review is extremely complex. In particular, a gas price review clause is what delineates an arbitrator's mandate and hence, arbitrators must be prudent to pay careful attention to act within the boundaries of their authority. Failure to do so may result in the award being set aside. This paper addresses: (1) the determination of arbitral tribunals' authority to revise the contract price according to the scope of parties' agreements; (2) the effects of tribunals' excess of powers in relation to the recognition and enforcement of the award; and (3) potential strategies in drafting gas price review arbitration clauses.

## **I. INTRODUCTION**

Recent developments in the global liquefied natural gas (LNG) markets have significantly increased gas pricing disputes in

the energy sector.<sup>1</sup> Geopolitical events; the global economic crisis; development of liquid hubs for natural gas in European, American, and Asian markets; ongoing price volatility; and the fall in oil prices are only some of the reasons why gas pricing disputes have been more and more frequent in our days.<sup>2</sup> It is worth mentioning that the industry's geological, technical, and political risks<sup>3</sup>—in combination with the market's vulnerability to price fluctuations—indicate why conflicts have always been inherent to the market's reality.<sup>4</sup> This “perfect storm”<sup>5</sup> of unprecedented events that started in 2008 in the international gas commerce has made gas pricing disputes considerably increase over the last two decades.<sup>6</sup>

One of the most difficult issues in the energy sector—and one of the most common causes of disputes within the field—is determining the price of liquefied natural gas in long-term energy contracts.<sup>7</sup> Long-term LNG contracts are normally concluded for at least twenty years.<sup>8</sup> Agreeing to a fixed price in such long-term agreements is not only difficult, but in fact impossible.<sup>9</sup> For this reason, price review clauses have become a new commonplace.<sup>10</sup>

A price review clause enables the contracting parties to realign the gas price or its calculation formula according to the existing circumstances of the market, and reflect the economic market changes.<sup>11</sup> A price review provision typically requires

<sup>1</sup> SIMON VORBURGER & ANGELINA M. PETTI, *ARBITRATION IN SWITZERLAND: THE PRACTITIONER'S GUIDE* 1294 (Manuel Arroyo ed., 2d ed. 2018).

<sup>2</sup> For a more detailed analysis, see Prof. Jonathan Stern in *GAS PRICE ARBITRATIONS: A PRACTICAL HANDBOOK* 5 (Mark Levy ed., 1st ed. 2014).

<sup>3</sup> For a detailed description of risk factors, see THOMAS WALDE, *LEADING ARBITRATORS' GUIDE* 2008 754–56 (2008).

<sup>4</sup> See Philip R. Weems, *Evolution of Long-Term LNG Sales Contracts: Trends and Issues*, 1 *OIL, GAS & ENERGY LAW* (2006).

<sup>5</sup> Ben Holland & Phillip Spencer Ashley, *Natural Gas Price Reviews: Past, Present and Future*, 30 *J. ENERGY & NAT. RESOURCES L.* 29, 35 (2012).

<sup>6</sup> See generally Marco Loreface, *Gas Price Review Arbitrations*, *GLOB. ARB. REV.* (2020), <https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/4th-edition/article/gas-price-review-arbitrations>.

<sup>7</sup> Lisa Bohmer, *Arbitrating International LNG Disputes: Lessons Learned Over Two Decades*, 8 *J. WORLD ENERGY L. & BUS.* 485, 489 (2015).

<sup>8</sup> Niloofar Heydari Roochi & Nasrollah Ebrahimi, *Gas Price Arbitration in the Light of Experts' Role: A Conceptual Analysis with a Reference to Iran–Turkey Case*, 3 *PETROLEUM BUS. REV.* 15 (2019).

<sup>9</sup> *Id.* at 15.

<sup>10</sup> *Id.* at 17.

<sup>11</sup> MICHAEL POLKINGHORNE & SVEN-MICHAEL VOLKMER, *THE LEADING PRACTITIONERS' GUIDE TO OIL AND GAS ARBITRATION* 525 (James Gaitis ed., JurisNet LLC, 2015).

certain conditions to be met before a price review can take place, which are often referred to as “trigger events” (e.g., reviewing the price every two years or providing parties with the opportunity to review the gas price under a periodic trigger during the life of the contract).<sup>12</sup> The contracting parties often prefer to include a special trigger, which enables them to respond more quickly to market changes.<sup>13</sup> Other times, parties may select to combine a periodic trigger with a special trigger.<sup>14</sup> In addition, price review clauses describe the procedure for a price adjustment, and the parties then engage in negotiations.<sup>15</sup> If negotiations are not fruitful, the parties will then engage in a dispute resolution process, which is usually defined in their contract.<sup>16</sup> For many, arbitration is the ideal method of resolving this type of dispute.<sup>17</sup>

The international energy sector is characterized by large, complex projects with long life spans.<sup>18</sup> The rapid changes in economic circumstances, political landscapes, and parties’ corporate interests often affect international gas projects and lead to high-value disputes.<sup>19</sup> International commercial arbitration—as a neutral, confidential, and binding process—offers a plethora of advantages to international players of the industry interested in resolving their LNG disputes efficiently in an efficient way.<sup>20</sup> Arbitration is a legally binding process that provides considerable flexibility to disputing parties as to how they would like to resolve their disputes.<sup>21</sup> Not only does arbitration allow parties to select the

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<sup>12</sup> Holland & Ashley, *supra* note 5, at 37.

<sup>13</sup> *LNG Price Review Disputes*, MCNAIR CHAMBERS, at 3 (Dec. 10, 2013), [https://www.mcnaichambers.com/client/publications/2013/LNG\\_PRICE\\_REVIEW\\_DISPUTES\\_.pdf](https://www.mcnaichambers.com/client/publications/2013/LNG_PRICE_REVIEW_DISPUTES_.pdf).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 2.

<sup>16</sup> See Rahul Donde, Laurent Lévy & Lévy Kaufmann-Kohler, *The Arbitrator's Role*, in *GAS AND LNG PRICE ARBITRATIONS: A PRACTICAL HANDBOOK* 121 (James Freeman & Marc Levy eds., 2d ed. 2020), <https://lk-k.com/wp-content/uploads/2020/04/DONDE-LEVY-in-FREEMAN-LEVY-Eds-Gas-LNG-Price-Arbitrations-2020-The-Arbitrators-Role-pp.-131-141.pdf> (“If negotiations are unsuccessful, either party may initiate the specified dispute resolution process, which is usually arbitration.”).

<sup>17</sup> Agnieszka Ason, *Oxford Inst. for Energy Stud., Price Reviews and Arbitrations in Asian LNG Markets* 10 (2019), <https://doi.org/10.26889/9781784671334>.

<sup>18</sup> Tim Martin, *Dispute Resolution in the International Energy Sector: An Overview*, 4 *J. WORLD ENERGY L. & BUS.* 332, 332 (2011).

<sup>19</sup> *Id.*

<sup>20</sup> Benoit Le Bars, *Recent Developments in International Energy Dispute Arbitration*, *J. INT’L ARB.* 543, 543 (2018).

<sup>21</sup> Martin, *supra* note 18, at 339.

arbitral tribunal, venue, and forum, it also provides them with the enormous advantage of recognition and enforcement of arbitral awards in foreign jurisdictions.<sup>22</sup> It is therefore clear as to why arbitration is considered the most widely used mechanism of dispute resolution in the international energy sector.<sup>23</sup> Specifically, in gas price disputes, where market conditions rapidly change due to unforeseen events that affect the contract's balance, parties prefer to submit their disputes to arbitration with the aim of adapting the contractual terms to the actual market circumstances.<sup>24</sup>

In gas price arbitrations, the arbitral tribunal's role is to operate the price review clause and determine if the economic elements of the contract need to be adjusted by establishing a price formula.<sup>25</sup> A typical price review clause provides one of the following options: (1) that the value of gas refers to the value of gas in the market of the buyer, regardless of the reference to the end-user market; or (2) that the value of gas refers to the value at which it can actually be obtained, directly or indirectly, by a prudent and efficient gas company.<sup>26</sup> Many argue that the latter applies.<sup>27</sup> However, some parties nowadays claim that the wording of a gas price review clause may also "allow[ ] for a shift from the valuation of gas versus alternative fuels to the valuation of gas versus gas."<sup>28</sup> Such an approach may enable parties to define the value of gas, according to the value at which the buyer actually obtains gas in its market and hence, an obtainability test would then be applicable, instead of technical market value.<sup>29</sup>

Therefore, it is apparent that gas price arbitrations are extremely complex, sophisticated, and under the pressure of high public scrutiny. Especially if one considers national courts' lack of expertise in understanding the nuances of international energy contracts, arbitration is—not unfairly—the most preferred method of dispute resolution.<sup>30</sup> It is worth mentioning that gas price review arbitrations are significantly different from traditional arbitral proceedings where tribunals determine parties' faults regarding breaches of a contract or other legal issues. Technical expertise in gas price arbitrations is crucial since misunderstanding technical or

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<sup>22</sup> *Id.*

<sup>23</sup> *See id.*

<sup>24</sup> *See* Donde, Lévy & Kaufmann-Kohler, *supra* note 16, at 121.

<sup>25</sup> *See id.*

<sup>26</sup> Heydari Roochi & Ebrahimi, *supra* note 8, at 16.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 17.

<sup>29</sup> *Id.* (internal citation omitted).

<sup>30</sup> Stavros L. Brekoulakis, Julian David Mathew Lew & Loukas A. Mistelis, *The Evolution and Future of International Arbitration*, 37 INT'L ARB. L. J. 1, 6 (2016).

economic parameters of the contract may result in altering or misapplying the price formula and, consequently, abandoning the entire price review process.<sup>31</sup> However, what are the boundaries of an arbitrator's mandate and how easy are they to determine in practice?

The scope of an arbitration agreement is a recurring issue in international commercial arbitration since a tribunal's excess of powers may result in challenging the recognition and enforcement of the award.<sup>32</sup> Considering the long-term nature of gas sale agreements, parties often include mechanisms in their contracts by which a pricing formula can be reviewed upon future changes in circumstances.<sup>33</sup> Thus, most sale and purchase agreements in the gas sector determine the contract price according to the price formula as of a contractually specified "review date."<sup>34</sup> In any case, the tribunal must ensure it does not go beyond its mandate when revising the contract price, since defining the scope of the arbitral tribunal's authority is itself a difficult task for arbitrators.

Recognition and enforcement of an arbitral award is considered by many the most important issue in arbitration. To enforce a binding and valid arbitral award, parties must ensure the absence of any grounds to refuse enforcement.<sup>35</sup> To ensure the recognition of the finality and enforceability of the award, parties initially need to understand conditions that might oppose enforcement of the award, if met, and then try to avoid them. Given the specific characteristics of gas price review arbitration and the risks of arbitrators exceeding their power, parties need to carefully define the arbitral tribunal's mandate with respect to the price review provisions according to the scope of their agreement, and arbitrators also need to carefully exercise that mandate. However, there is no universally accepted method to ensure that arbitrators understand and respect the limits of their authority. For this reason,

<sup>31</sup> See, e.g., Heydari Roochi & Ebrahimi, *supra* note 8.

<sup>32</sup> See Gary B. Born, *International Commercial Arbitration*, 81 INT'L J. ARB., MEDIATION & DISP. MGMT. 110 (2014).

<sup>33</sup> VORBURGER & PETTI, *supra* note 1, at 1294.

<sup>34</sup> See Loreface, *supra* note 6; Bohmer, *supra* note 7, at 486; Jonathan Stern, *Preface*, in MARK LEVY, GAS PRICE ARBITRATION: A PRACTICAL HANDBOOK 5 (2014).

<sup>35</sup> See U.N. Comm'n on Int'l Trade Law (UNCITRAL), UNCITRAL Model Law on Commercial Arbitration art. 34, U.N. Doc. A/40/17, U.N. Sales No. E.08.V.4 (2008), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf> [hereinafter "UNCITRAL"]; U.N. Convention on the Recognition and Enf't of Foreign Arbitral Awards art. V (New York, 10 June 1958), <https://www.newyorkconvention.org/english> [hereinafter "New York Convention"].

one can at least address potential strategies in drafting price review arbitration clauses to help parties and arbitrators achieve this purpose.

## II. SCOPE OF AN ARBITRATION AGREEMENT AND DETERMINATION OF AN ARBITRAL TRIBUNAL'S POWERS

The arbitration agreement is the cornerstone of international commercial arbitration and the main source of arbitral tribunals' authority.<sup>36</sup> Tribunals derive their powers from the parties, directly or indirectly: directly from the parties' arbitration agreement and indirectly from the parties' selection of rules governing their arbitration.<sup>37</sup> However, it is crucial that the tribunal does not go beyond its mandate when it is called upon to decide the merits of a dispute. This is provided by the United Nations Commission on International Trade Law (UNCITRAL) Model Law, which states that "the arbitral tribunal shall decide in accordance with the terms of the contract,"<sup>38</sup> and it must also be in accordance with the general principle of *pacta sunt servanda*.<sup>39</sup> In the unfortunate scenario in which the tribunal exceeds its mandate, the award may be refused recognition under the New York Convention<sup>40</sup> and the UNCITRAL Model Law.<sup>41</sup>

When parties draft a price review clause, the scope of the tribunal's authority must be considered.<sup>42</sup> For example, disputes may arise as to whether the tribunal is entitled to merely amend the price formula, whether it has the authority to change the basis of

<sup>36</sup> NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 12 (6th ed. 2015).

<sup>37</sup> See generally JANE JENKINS, INTERNATIONAL CONSTRUCTION ARBITRATION LAW (2nd ed. 2013).

<sup>38</sup> UNCITRAL art. 28(4) ("In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.").

<sup>39</sup> See Sigvard Jarvin, *The Sources and Limits of the Arbitrator's Powers*, 2 ARB. INT'L 140, 140 (2014).

<sup>40</sup> Art. V(1)(c) provides that recognition and enforcement of the award may be refused upon proof that "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . . ." New York Convention art. V(1)(c).

<sup>41</sup> See UNCITRAL arts. 34(2)(iii), 36(1)(a)(iii).

<sup>42</sup> Michael Polkinghorne, *The Paris Energy Series No. 2: Predicting the Unpredictable:*

*Gas Price Re-openers* (2011), <https://www.lexology.com/library/detail.aspx?g=81e269f9-11b4-4df1-9bd5-1fd532e57ec5>.

indexation from oil to spot gas prices,<sup>43</sup> or whether it is entitled to adjust or replace the index or the price formula as appropriate. Therefore, to determine its specific scope of exercise, the tribunal shall carefully consider the parties' wording in the price review clause.<sup>44</sup> Unfortunately, even though a price review clause may sound easy to draft, significant legal issues do arise in the process. For example, a vague provision may give rise to significant problems due to the specific characteristics of the contract or the idiosyncrasies of the parties.

The arbitration agreement is the "core source of jurisdiction" under Article II(1) of the New York Convention and Article 7(1) of the UNCITRAL Model Law.<sup>45</sup> However, arbitrators' spectrum of powers is not always easy to determine since the tribunal may take different approaches in interpreting its wording.<sup>46</sup> Due to the key importance of confidentiality in price review arbitrations, limited data is available to the public domain.<sup>47</sup> However, arbitrators' mandate to adjust the price formula must be clearly addressed, and the following cases precisely emphasize this issue.

#### **A. GAS NATURAL APROVISIONAMIENTOS V. ATLANTIC LNG COMPANY OF TRINIDAD AND TOBAGO—THE *ATLANTIC* CASE**

The *Atlantic* case became publicly known in 2008 when Atlantic LNG Company of Trinidad and Tobago (Atlantic) challenged an arbitration award in U.S. federal court.<sup>48</sup> The case involved a price review dispute that arose in a twenty-year gas supply agreement between Atlantic and Gas Natural Aproveisionamientos (GNA), seated in New York and conducted

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<sup>43</sup> Steven Sparling, John Magnin, Peter Morton, John Gilbert & Anna Farren, *Taming Price Review Clauses: Lessons from the Transactional and Arbitration Battlefields*, K&L GATES, LLP (Apr. 11–15, 2016) [https://marketingstorageragrs.blob.core.windows.net/webfiles/taming\\_price\\_review\\_clauses.pdf](https://marketingstorageragrs.blob.core.windows.net/webfiles/taming_price_review_clauses.pdf).

<sup>44</sup> *Id.*

<sup>45</sup> See New York Convention art. (II)(1); UNCITRAL art. 7(1).

<sup>46</sup> See generally Andrea Bjorklund & Jonathan Brosseau, *Sources of Inherent Powers in International Adjudication*, 6:2 EUR. INT'L ARB. REV. 1, 1–49 (2017).

<sup>47</sup> Philippe Pinsole & Quinn Emanuel Urquhart & Sullivan LLP, *Confidentiality in Gas Price Reviews*, in GAS AND LNG PRICE ARBITRATIONS: A PRACTICAL HANDBOOK 103 (James Freeman & Marc Levy eds., 2d ed. 2020).

<sup>48</sup> See generally Gas Natural Aproveisionamientos, SDG, S.A. v. Atlantic LNG Co. of Trinidad and Tobago, 2008 WL 4344525 (S.D.N.Y. 2008).



under the UNCITRAL Rules.<sup>49</sup> The contract contained a “price reopener” provision, which either party could request, if certain conditions were met.<sup>50</sup> In 2005, Atlantic sent a request to review the price.<sup>51</sup> When negotiations failed, Atlantic started arbitration and in 2007 the tribunal issued the award.<sup>52</sup> The tribunal decided that the price reopener’s requirements had been met and established a two-part pricing scheme.<sup>53</sup> GNA then sought to confirm the award, while Atlantic contended that the award should be vacated.<sup>54</sup>

Atlantic challenged the award on the grounds that the tribunal exceeded its authority and violated Atlantic’s due process rights and, according to the Federal Arbitration Act, 9 U.S.C. § 10(a)(3) and (4), and Art. V of the New York Convention, the award’s recognition and enforcement should be refused.<sup>55</sup> Atlantic argued that the tribunal exceeded its powers because: (1) it reviewed

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<sup>49</sup> See generally *id.*; see also Paul Griffin, *Principles of Price Reviews and Hardship Clauses in Long-Term Gas Contracts*, in LIQUEFIED NATURAL GAS: THE LAW AND BUSINESS OF LNG 114–16 (Paul Griffin ed., 3d ed. 2017).

<sup>50</sup> Gas Natural Aproveisionamientos, 2008 WL 4344525 at 1. The clause reads as follows:

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 to what it reasonably expected when entering into this Contract or, after the first Contract Price revision under this Article 8.5, at the time of the latest Contract Price revision under this Article 8.5, and the Contract Price resulting from application of the formula set forth in Article 8.1 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 in accordance with the remaining provisions of this Article 8.5.

*Id.*

<sup>51</sup> *Id.* at 2. For additional details of the case, see PIETRO FERRARIO, THE ADAPTATION OF LONG-TERM GAS SALE AGREEMENTS BY ARBITRATORS 172–77 (2017).

<sup>52</sup> Gas Natural Aproveisionamientos, 2008 WL 4344525 at 2; see also FERRARIO, *supra* note 51, at 172–77.

<sup>53</sup> Gas Natural Aproveisionamientos, 2008 WL 4344525 at 2.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 4.

the price despite finding that the triggering conditions had not been met; and (2) it “impermissibly imposed a dual price scheme.”<sup>56</sup>

The court rejected both arguments.<sup>57</sup> First, it affirmed that the real test was whether the changed circumstances considerably affected the price and value of natural gas.<sup>58</sup> Since the new circumstances were not anticipated, the court decided that the new conditions considerably affected the contract price because they were substantial, beyond the parties’ control, and unforeseeable at the time of conclusion of the contract.<sup>59</sup> Second, the court recognized that the tribunal was entitled to determine any appropriate solution, as long as it was “fair and equitable[,]” because the parties had not limited the tribunal’s mandate to revise the price formula.<sup>60</sup>

As a result, the scope of arbitrators’ adaptation powers was broadly interpreted in this case, not only by the tribunal, but also by the court.<sup>61</sup> Perhaps it is the most typical example of a publicly known gas price review arbitration, in which the tribunal was provided with an extensive mandate to apply a “fair and equitable” solution and substantial authority to structure its own price review in the absence of the parties’ express limitations.<sup>62</sup> Thus, based on this example, it may be fair to argue that, when parties fail to agree on certain parameters to limit the tribunal’s extent of powers, the tribunal may be entitled to review such agreements and rebalance the contract according to the adjustment provision, in order to reach a commercial and viable solution for the parties.<sup>63</sup> However, is it not the most common threat in gas price review arbitrations that the tribunal may rewrite the price scheme in an uncontrolled manner based on its own view?<sup>64</sup> For example, the tribunal may unconsciously make a complete change of the price formula and incorporate structural changes that the parties did not intend to apply and do not reflect the actual market conditions.<sup>65</sup>

#### **B. ESSO EXPLORATION & PRODUCTION UK LTD. V. ELECTRICITY SUPPLY BOARD—THE *ESSO* CASE**

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 7.

<sup>58</sup> *Id.* at 4.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 5.

<sup>61</sup> *See generally id.*

<sup>62</sup> *LNG Price Review Disputes*, *supra* note 13, at 16.

<sup>63</sup> FERRARIO, *supra* note 51, at 194.

<sup>64</sup> Heydari Roochi & Ebrahimi, *supra* note 8, at 20.

<sup>65</sup> *Id.*

Contrary to the *Atlantic* case, such broad authority was not granted to the tribunal in the *Esso* case. In 1997, Esso Exploration & Production UK (Esso) and the Electricity Supply Board (ESB) entered into a fifteen-year natural gas sale agreement.<sup>66</sup> The contract provided two kinds of price review: one periodic review of the contract price to be made every six months, if four conditions were met regarding the price of gasoil, the price of low sulphur fuel oil, the price of natural gas, and the rate of inflation in Ireland; and one periodic review upon changes of the market circumstances and if “it is reasonably satisfied in good faith that the Energy Charge . . . is at the time of giving such Price Review Notice eighty five per cent (85%) or less than the Comparator.”<sup>67</sup>

In 2002, Esso sent a review notice to ESB, but ESB argued that the request was invalid, since the conditions triggering the review had not occurred.<sup>68</sup> When the parties failed to reach an agreement, Esso commenced arbitration.<sup>69</sup> However, ESB challenged the tribunal’s jurisdiction, claiming that the required prerequisites for a valid reference to arbitration had not been satisfied.<sup>70</sup> More specifically, ESB claimed that the condition required for the tribunal to establish its authority had not been met, because the price review request was invalid.<sup>71</sup> The case came before the High Court, which held that the tribunal lacked jurisdiction.<sup>72</sup>

In this case, the Court decided that the tribunal’s discretion was narrow at first. It held that the review clause, which provided that upon failure of the parties’ agreement the case could be referred “to arbitration to determine the Comparator and the consequent adjustment to the price,” granted the tribunal merely the authority to determine the Comparator’s amount, and not the issue of its nature and its method of calculation.<sup>73</sup> Thus, the Court ruled that the arbitral tribunal did not have jurisdiction and hence, agreed with ESB’s arguments.<sup>74</sup>

The Court’s judgment has been criticized, based on allegations that the Court failed to accurately interpret the price review clause because it incorrectly limited the scope of the parties’ arbitration agreement, and consequently the arbitral tribunal’s

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<sup>66</sup> Esso Exploration & Production UK Ltd v. Electricity Supply Board, [2004] EWHC 723 (Comm), ¶ 2 (UK).

<sup>67</sup> FERRARIO, *supra* note 51, at 190.

<sup>68</sup> Esso, [2004] EWHC 723 (Comm), ¶¶ 9–10.

<sup>69</sup> *Id.* ¶ 10.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* ¶¶ 10, 12.

<sup>73</sup> FERRARIO, *supra* note 51, at 191.

<sup>74</sup> *Id.*

authority.<sup>75</sup> This case demonstrates how carefully parties should draft their gas price review clauses in long-term agreements for the supply of LNG in order to minimize their exposure.<sup>76</sup> Indeed, price formulas in the international natural gas sector are extremely complex. However, when parties fail to carefully define the tribunal's powers, unwanted results may arise and affect the outcome of the dispute. In *Esso*, the wording of the agreement was too narrow, resulting in considerably limiting the tribunal's authority and threatening its jurisdiction. In any case, even though it may be considered a viable option to derive certain guidelines from existing case law, the ad hoc determination of the scope of the arbitration agreement will always remain a challenging task. This is even more challenging in disputes where the parties have not even demonstrated their specific intentions.

### C. ICC CASE NO. 13504/2007

Contrary to the *Esso* case, the tribunal's decision in Case No. 13504/2007 is an example of how arbitrators may select to realign the price formula provided in a contract and re-establish its balance.<sup>77</sup> The dispute referred to the economic changes that occurred in the buyers' market between 1998 and 2001.<sup>78</sup> Some of those changes affected the buyers of this case, who asked for a price reduction, while at the same time the sellers requested an increase in the price.<sup>79</sup> The arbitrators upheld the request of the buyers to reduce the gas price, because they held that the changes that had occurred during that period were significant and truly affected the gas price.<sup>80</sup> The arbitral tribunal affirmed that the adaptation clause, similar to a price review clause, aims to re-establish the balance of a long-term contract that may have been affected by unforeseen events.<sup>81</sup> The arbitrators also highlighted that re-establishing a reasonable difference is based on applying the principle of good faith to the execution of such agreements.<sup>82</sup> More specifically, the arbitrators held that:

This means that the adjustment to be made should “in particular” have the effect to re-establish a reasonable difference between [Contract] prices and

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 192.

<sup>77</sup> ICC Case No. 13504/2007, 20:2 ICC INT'L CT. ARB. BULL. 96 (2009).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *See id.*

<sup>82</sup> *Id.*

market values. This does not mean, however, that “the value of Natural Gas” is the only relevant consideration when an adjustment of the price provisions is to be made. The Arbitral Tribunal considers that the general purpose of price review provisions such as Article 6.10 [of the Contract] and the like provisions in long-term contracts, is to facilitate appropriate adjustments to counter unexpected economic developments not reflected in the price provision or which could distort the long-term viability of the [Contract].<sup>83</sup>

The above interpretation that the arbitral tribunal made, in combination with the arbitrators’ “cross-check methodology” of evaluating and using the data the parties provided during the arbitration proceedings in order to resolve complex technical issues, led to adjusting the price formula by reducing the base price element and thus enhancing the contract’s viability.<sup>84</sup> The award issued in Case No. 13504/2007 was the second decision in a long-term gas sale agreement.<sup>85</sup> More specifically, the contract of this case was similar to the one in Case No. 9812/1999, where the arbitrators considered the will of the parties to be sufficient to provide the arbitrators with the power to rebalance and adjust the contract in question there.<sup>86</sup>

As demonstrated in the above case law, the issue of boundaries in arbitrators’ authority is complex and often difficult to resolve. Sometimes, the dilemma becomes even more complicated when arbitrators’ mandate affects the applicable procedural law of the case (i.e., when the applicable law does not allow arbitrators to intervene on contractual terms, and thus there is a need to determine whether the will of the parties prevails over the applicable law).<sup>87</sup> When parties’ agreements do not explicitly grant arbitrators the power to adjust the terms and rebalance the contract, it is crucial to establish whether such authority can be implicitly inferred from the review clause and the general arbitration clause.<sup>88</sup> In any case, the parties must at least consider how carefully to define the arbitrators’ mandate, and the arbitrators must in turn carefully interpret the parties’ will in order to issue a valid and enforceable arbitral award.

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> ICC Case No. 9812/1999, 20:2 ICC INT’L CT. ARB. BULL. 69–76 (1999).

<sup>87</sup> *Id.*

<sup>88</sup> FERRARIO, *supra* note 51, at 168.

### III. EFFECTS OF ARBITRAL TRIBUNALS' EXCESS OF AUTHORITY

Once an arbitral tribunal issues an award, the prevailing party normally anticipates the other party to comply voluntarily.<sup>89</sup> Besides, this is one of the attractions of international arbitration: the final and binding arbitral award the tribunal has granted.<sup>90</sup> However, it is not unusual that the losing party will attempt to challenge the outcome. In most arbitrations, the dissatisfied party may either challenge the award's validity in the courts of the seat or prevent the winning party from enforcing the award under the New York Convention.<sup>91</sup> A party, by challenging the award before a competent court, aims to declare that award invalid, and hence unenforceable.<sup>92</sup> There are mainly three grounds on which an award may be challenged: (1) jurisdictional; (2) procedural; and (3) substantive.<sup>93</sup> One of the most common jurisdictional gateway questions is the scope of the parties' agreement and the tribunal's excess of powers.<sup>94</sup>

In the complex field of gas price disputes, an arbitration agreement's scope is not always easy to determine. Disputes arising from the scope of an arbitration clause are usually attributable to that clause's wording.<sup>95</sup> Some provisions may be drafted too narrowly, while others may be simply "copied and pasted" from other contracts and hence not be reflective of the parties' idiosyncrasies

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<sup>89</sup> Margaret L. Moses, *Introduction to International Commercial Arbitration*, in *PRINCIPLES AND PRACTICES OF INTERNATIONAL ARBITRATION* 3 (3d ed. 2017), <https://ssrn.com/abstract=3663457> or <http://dx.doi.org/10.2139/ssrn.3663457>.

<sup>90</sup> See, e.g., Michael Ostrove, James Carter & Ben Sanderson, *Awards: Challenges*, *GLOB. ARB. REV.* (2021), <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/awards-challenges>.

<sup>91</sup> Moses, *supra* note 89, at 3.

<sup>92</sup> Elliot Friedman, David Y. Livshiz & Shannon M. Leitner, *United States*, in *The Guide to Challenging and Enforcing Arbitration Awards*, *GLOB. ARB. REV.*, 570 (J. William Rowley, Emmanuel Gaillard & Gordon E. Kaiser eds., 2019), <https://nyiac.org/wp-content/uploads/2019/07/2019.07.22-The-Guide-to-Challenging-and-Enforcing-Arbitration-Awards-First-Edition-15-19-32.pdf>.

<sup>93</sup> *Id.* at 568–69.

<sup>94</sup> Michael D. Nolan & Kamel Aitelaj, *Jurisdictional Challenges*, *GLOB. ARB. REV.* (2021), <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/jurisdictional-challenges>.

<sup>95</sup> Irene Welser & Susanne Molitoris, *Chapter I: The Scope of Arbitration Clauses—Or All Disputes Arising out of or in Connection with This Contract . . .*, *AUSTRIAN Y.B. OF INT'L ARB.* 17, 30 (2012).

and the contract's specific characteristics.<sup>96</sup> Thus, in those cases, arbitrators may unconsciously consider themselves entitled to rewrite the price formula and issue an award based on their own interpretation thereof.<sup>97</sup> In that scenario, an arbitral tribunal's decision may go beyond the parties' submission to arbitration and exceed the scope of the arbitration agreement. Indeed, arbitrators have explicit express, implied, and inherent powers,<sup>98</sup> but how easy is it to determine them? If arbitrators fail to exercise their authority correctly and exceed their mandate, the award may be refused recognition under the New York Convention and the UNCITRAL Model Law.<sup>99</sup>

#### A. PROVISIONS OF THE NEW YORK CONVENTION AND THE UNCITRAL MODEL LAW

Both the New York Convention and the UNCITRAL Model Law include similar grounds for the challenge of arbitration awards.<sup>100</sup> The New York Convention has been characterized as “the single most important pillar on which the edifice of international arbitration rests,”<sup>101</sup> and its Article V(1)(c) provides that an award may be refused recognition and enforcement if “it contains decisions on matters beyond the scope of the submission to arbitration.”<sup>102</sup> However, the opening line of Article V of the New

<sup>96</sup> Todd Allee & Manfred Elsig, *Are the Contents of International Treaties Copied-and-Pasted? Evidence from Preferential Trade Agreements*, Working Paper No. 8 (2016), <https://www.boris.unibe.ch/89220/3/Are%20the%20Contents%20of%20International%20Treaties.pdf>.

<sup>97</sup> Loreface, *supra* note 6.

<sup>98</sup> See Margaret L. Moses, *Inherent Powers of Arbitrators to Deal with Ethical Issues*, CONTEMP. ISSUES IN INT'L ARB. & MEDIATION, THE FORDHAM PAPERS 90, 93 (Arthur Rovine ed., 2014).

<sup>99</sup> See New York Convention art. V(1)(c); UNCITRAL art. 36(1)(a)(iii).

<sup>100</sup> See New York Convention art. V; UNCITRAL art. 36.

<sup>101</sup> J. Gillis Wetter, *The Present Status of the International Court of Arbitration of the ICC: An Appraisal*, 1 AM. REV. INT'L ARB. 91, 93 (1990).

<sup>102</sup> Art. V(1)(c) of the New York Convention reads as follows:

The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced . . . .

New York Convention art. V(1)(c).

York Convention provides that “recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that [grounds for refusal].”<sup>103</sup> Here, the words “only” and “may” must be highlighted.<sup>104</sup> According to the above wording, the court has discretion to recognize and enforce an award, not an obligation.<sup>105</sup>

Indeed, the issue of whether this power is discretion or an obligation has generated a debate between scholars and academics.<sup>106</sup> On the other hand, the French text requires the judge to reject such applications because French courts are allowed to rely on treaties or laws that are more favourable according to Article VII of the New York Convention.<sup>107</sup> In other words, *shall* a Court set aside an arbitral award when one of the exhaustively enumerated provisions arises, or *may* it exclude it? In any case, by explicitly using the term “may” in Article V, the New York Convention’s drafters preferred to attribute a significant discretion to State courts and allow them to exemplify an autonomy sphere by reasonably exercising their discretion and personal judgment.<sup>108</sup>

The UNCITRAL Model Law, as influenced by the New York Convention, includes similar grounds for challenging an arbitral award.<sup>109</sup> Articles 34(2)(a)(iii)<sup>110</sup> and 36(1)(a)(iii)<sup>111</sup>

<sup>103</sup> *Id.*

<sup>104</sup> Jan Paulsson, *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics*, 14 *ARB. INT’L* 227, 227–30 (1998).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> See *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale Du L’Industrie Du Papier (RAKTA)*, 508 F.2d 969 (2nd Cir. 1974).

<sup>109</sup> See UNCITRAL arts. 34(2)(a)(iii), 36(1)(a)(iii).

<sup>110</sup> Article 34(2)(a)(iii) of the UNCITRAL Model Law reads as follows:

“An arbitral award may be set aside by the court specified in article 6 only if . . . the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.”

<sup>111</sup> Article 36(1)(a)(iii) of the UNCITRAL Model Law reads as follows:

“Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that . . . the award deals with a dispute not contemplated by or not



contemplate a situation where the tribunal has jurisdiction to issue the award but exceeds its authority in deciding on issues that were not conferred upon it by the parties.<sup>112</sup>

According to the above provisions, if the arbitrators exceed their authority in a gas price review arbitration and, for example, erroneously consider themselves entitled to rewrite the pricing formula, the losing party may challenge the arbitration award before a competent court and move to vacate it. By the time the movant prevails and the court declares the award unenforceable, parties may have lost considerable amounts of time and money to produce an unenforceable—and thus unresolved—outcome.

In most jurisdictions, courts and tribunals interpret arbitration agreements in light of “pro-arbitration” presumptions,<sup>113</sup> thereby providing arbitrators with broad powers and an extensive mandate to revise the price formula in a dispute.<sup>114</sup> However, this does not reduce the risk that an award’s recognition may be refused. Challenging an award based on lack of jurisdiction—and hence refusing its recognition—is still a potential defense, albeit a weak one.<sup>115</sup> However, how certain can one be in a complex and expensive dispute under commercial and often political or social pressure? In any case, while arbitrators are allowed to interpret and apply the parties’ contract, they may not rewrite it.<sup>116</sup> Besides, given the magnitude of effects resulting from refusal to recognize an award, parties must be careful when drafting “midnight clauses.”<sup>117</sup>

#### IV. STRATEGIES FOR DRAFTING PRICE REVIEW ARBITRATION CLAUSES

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falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.”

<sup>112</sup> See CHRISTOPH LIEBSCHER, *THE HEALTHY AWARD: CHALLENGE IN INTERNATIONAL COMMERCIAL ARBITRATION*, Ch. V(6) (2003).

<sup>113</sup> Born, *supra* note 32, at 1326.

<sup>114</sup> FERRARIO, *supra* note 51, at 189.

<sup>115</sup> See ALBERT JAN VAN DEN BERG, *COURT DECISIONS ON THE NEW YORK CONVENTION: A COLLECTION OF REPORTS AND MATERIAL DELIVERED AT THE ASA CONFERENCE IN ZURICH 86* (Mark Blessing & Gerold Herrmann eds., 1996).

<sup>116</sup> *El Mundo Broadcasting v. United Steelworkers of America*, 116 F.3d 7, 10 (1st Cir. 1997).

<sup>117</sup> PIERRE A. KARRER, *THE POWERS AND DUTIES OF AN ARBITRATOR* 361 (Patricia Shaughnessy & Sherlin Tung eds., 2017).

Strategies to mitigate the risk of unwanted results in gas price review arbitrations vary.<sup>118</sup> For example, “baseball arbitration” is a commonly recommended tactic.<sup>119</sup> This method aims to reduce a tribunal’s dilemma by imposing a binary choice between the pricing schemes that the parties submit to the tribunal.<sup>120</sup> The rationale behind this tactic is to “subconsciously” encourage the parties to enter a “zone of reasonableness” and finally reach common ground by narrowing their differences.<sup>121</sup> However, this approach is rarely used in the industry—and especially in actual arbitration cases—where there is often a significant gap in the offers parties make.<sup>122</sup> Although it sometimes limits the distance between the parties’ pricing offers, it has little contribution in the proper review of the contract’s formula.<sup>123</sup>

In relation to a tribunal’s authority to review the price, two further philosophical approaches must be addressed. The evolutionary approach focuses on the parties’ initial economic balance and requires the tribunal to amend the contract terms to restore the parties’ initial economic balance under the changed circumstances.<sup>124</sup> On the contrary, the revolutionary approach requires contract review to reflect the newly changed circumstances.<sup>125</sup> Both approaches depend on the arbitration clause’s precise wording because it determines the intention of the parties and hence the scope of the tribunal’s authority.<sup>126</sup>

Other times, parties may attempt to considerably limit a tribunal’s discretion. For example, parties may define the factors to consider in the price review and the effect of changes in circumstances.<sup>127</sup> For example, parties may limit structural changes to the pricing formula to a specific set of circumstances, such as when a certain level of gas hub is achieved, or even exclude the power of changing certain components of the formula.<sup>128</sup> Furthermore, parties may provide the tribunal with a price range,

<sup>118</sup> See, e.g., BORN, *infra* note 119.

<sup>119</sup> GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 282 (2d ed. 2014).

<sup>120</sup> Craig Tevendale & Charlie Morgan, *Making the Most of Arbitration as a Tailored Mechanism for Resolving LNG Disputes*, 4 OTEL 15 (2017).

<sup>121</sup> *Id.*

<sup>122</sup> ANATOLE BOUTE, GAS AND LNG PRICE ARBITRATIONS: A PRACTICAL HANDBOOK 531–33 (James Freeman & Mark Levy eds., 2d ed. 2020).

<sup>123</sup> *See id.*

<sup>124</sup> MARK LEVY & PAUL GRIFFIN, GAS PRICE ARBITRATIONS: A PRACTICAL HANDBOOK 141–57 (Mark Levy & Allen & Overy LLP eds., 2014).

<sup>125</sup> *Id.*

<sup>126</sup> *See id.*

<sup>127</sup> Loreface, *supra* note 6.

<sup>128</sup> *Id.*

such as high–low figures or other quantitative limits to restrain the tribunal’s powers as to the expected outcome.<sup>129</sup>

However, such methods have been criticized for their failure to respond to the difficult reality of the energy sector.<sup>130</sup> Even if they effectively restrain a tribunal’s powers, they are not always useful for the arbitration’s overall efficiency.<sup>131</sup> If parties substantially restrict the tribunal’s authority in advance, the price review may not reflect market changes in five, ten, or twenty years’ time.<sup>132</sup> Such an outcome may dissatisfy the disputing parties and result in a future challenge of the award.<sup>133</sup> Therefore, it is important that parties invest due care in advance to avoid engagement in unenforceable arbitration proceedings.<sup>134</sup>

Some gas price review arbitrations follow a two-stage approach where, at the first stage (the “trigger” stage), the arbitral tribunal determines the changed circumstances, and, at the second stage (the “final offer” stage), determines how to adjust the price formula.<sup>135</sup> More specifically, in the trigger stage, the parties make submissions as to whether the trigger event has occurred, and in the final offer stage, each party proposes initial and final revised price formulas supported by proof.<sup>136</sup> Many argue that simultaneous submissions may reduce parties’ “gamesmanship” and the two rounds of exchanges may encourage the parties to narrow their differences and reach a commercial settlement.<sup>137</sup> It is often considered a viable option that “may ease tensions” and achieve better results compared to traditional price review arbitration.<sup>138</sup> However, there is no model clause for contracting parties in gas price arbitrations.<sup>139</sup> On the contrary, arbitration agreements and price formulas must reflect the contract’s characteristics and the parties’ specific needs and interests.<sup>140</sup>

Another approach that is typically recommended—not only in gas price review arbitrations, but in international commercial arbitrations generally—is for parties to provide the arbitral tribunal with sufficiently broad discretion to draft a commercially sound

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<sup>129</sup> *Id.*

<sup>130</sup> Ben Holland & Jeremy Wilson, *Tailoring the Arbitral Process to Suit Natural Gas Price Reviews: The Case for Two-Stage Final Offer Arbitration*, 16 INT’L ARB. L. REV. 81, 81–87 (2013).

<sup>131</sup> *See id.* at 82–83.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 87.

<sup>134</sup> *Id.* at 82.

<sup>135</sup> *Id.* at 86.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 87.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 83.

price formula and later adapt it to market changes.<sup>141</sup> Following this approach, the contracting parties can adjust the arbitral proceedings to their dispute's specific needs by agreeing, for example, on "bifurcated" arbitration or by taking advantage of other procedural flexibilities arbitration provides.<sup>142</sup> Such an approach provides the arbitral tribunal with substantial flexibility to issue a valid and binding award, while simultaneously enabling parties to control the arbitrators' powers and achieve more accurate results without threatening the arbitral award's recognition.<sup>143</sup>

Furthermore, a commercially based step-by-step procedure usually followed requires the satisfaction of four specific steps of the procedure.<sup>144</sup> Only then can the review procedure be invoked, and the party asking for the revision of the price formula achieve the contract price's adjustment in accordance with the price review clause's standards.<sup>145</sup> The first step is to determine whether the industry's market conditions have changed during the relevant time.<sup>146</sup> The second step is to evaluate whether the changed circumstances had an actual and long-lasting impact on the parties.<sup>147</sup> The third step is to determine whether the changes truly affected the gas's market value.<sup>148</sup> If so, the final step is to realign the contract price to simultaneously reflect the agreement's changes and provisions (the "market test").<sup>149</sup> Indeed, the test's application depends on each price review clause and on whether the questions addressed in the four steps above are complex. While this test may seem easy to apply in theory, it is an extremely complicated task comprised of several inflection points.<sup>150</sup>

Some argue that the most vital part of resolving a gas price dispute lies in deciding whether the trigger requirements have been met.<sup>151</sup> Parties can consider addressing the following points-when drafting a gas price review clause: First, it might be sensible for parties to determine whether the change required to trigger should be assessed mechanically or rather more fluidly (however, if the

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<sup>141</sup> See generally ICC Commission Report: *Decisions on Costs in International Arbitration*, ICC DISP. RESOL. BULL., Issue 2, 9–16 (2015) <https://www.iccwbo.be/wp-content/uploads/2012/03/20151201-Decisions-on-Costs-in-International-Arbitration.pdf>.

<sup>142</sup> See Holland & Wilson, *supra* note 130, at 81, 83–85, 87.

<sup>143</sup> See *id.* at 87.

<sup>144</sup> Loreface, *supra* note 6.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Michael Young, *Procedural Issues in Price Review Arbitrations*, in GAS PRICE ARBS. (2014).

latter is chosen, the parties must consider that there will remain a considerable scope for debate)<sup>152</sup>; second, parties could explicitly define in their agreement the “review date” and its duration<sup>153</sup>; third, parties could address the issue of whether the triggering requirements refer to a specific market, and if so, which market that would be<sup>154</sup>; and fourth, parties might need to determine whether circumstantial changes are unforeseeable, and if so, to what extent.<sup>155</sup> Indeed, the issues above are challenging to determine in a gas price review clause. In fact, some of these issues may cause discomfort. Nevertheless, even if parties do not address these issues in their gas price review clause, it might be sensible to at least consider them during their contractual negotiations. Besides, negotiation is—if not the first—typically at least one of the first steps in price review processes, and it might be useful to touch upon these sensible and complex issues, which will likely arise if parties invoke the price review clause in the future.<sup>156</sup>

## V. CONCLUSION

Effectively determining the scope of an arbitral tribunal’s mandate can be difficult. The complex nature of gas price review arbitrations precisely demonstrates this difficulty. As previously discussed, gas price review arbitrations are among the most high-value and complex processes in the field of international commercial arbitration.<sup>157</sup> Apart from the potentially billions of dollars at stake, the fact that parties’ contractual and social relationship remains after arbitration and is a long-term, commercial relationship, makes the issue even more complex.<sup>158</sup> An arbitrator’s role in gas price review arbitrations is not a simple one, nor is it one the arbitrator is typically called upon to perform.<sup>159</sup> It is a role that requires reaching not only an appropriate and accurate legal judgment, but also an acceptable commercial solution that will preserve parties’ long-term relationship and corporate interests.<sup>160</sup> An arbitrator’s failure to perform these duties within the limits of their assigned discretion may give rise to the refusal of the award’s

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Bohmer, *supra* note 7.

<sup>158</sup> Weems, *supra* note 4.

<sup>159</sup> Marnix Leijten & Martje Verhoeven-de Vries Lentsch, *The Trigger Phase. Gas Price Arbitrations: A Practical Handbook*, GLOBE L. & BUS. 33, 41–43 (2014).

<sup>160</sup> *Id.*

recognition and enforcement under the New York Convention and UNCITRAL Model Law.<sup>161</sup>

For the above reasons, it is imperative that parties carefully determine the tribunal's authority to reduce the risk of a court refusing the award's recognition. It is also crucial that arbitrators are sufficiently skilled and technically experienced enough to understand the nuances of gas price review clauses and each dispute's commercial background. Furthermore, arbitrators need to make considerable efforts to find a commercial arrangement reflective of existing commercial realities by tempering their approach to decision-making to the dispute's specific needs. Such an approach is crucial in their effort to adjust the contract to the parties' needs and economic circumstances.

Overall, the more precisely parties define their arbitration agreement's scope—and hence, the arbitral tribunal's authority—the greater the chances of the award's recognition and enforceability.<sup>162</sup> How “good” or “bad” that definition is depends on the parameters of the dispute, the characteristics of the contracting parties' gas sale agreement, and the parties' specific idiosyncrasies.

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<sup>161</sup> Sherina Petit & Ewelina Kajkowska, *Grounds to Refuse Enforcement*, GLOB. ARB. REV. (2021), <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/grounds-refuse-enforcement>.

<sup>162</sup> *Id.*