Extractives Hub

Gas Price Re-openers and Other Remedies

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1. Introduction

Gas sales and purchase agreements typically bind parties over long durations, are technically complex, and have significant commercial value. Given the reality that the contract sales price can become disconnected from the prices in the markets where the gas is ultimately destined to be sold, these agreements traditionally include price re-openers, or price review clauses, which allow for the periodic review and adjustment of price levels and/or provisions generally. Contractual gas price re-openers are usually the result of negotiations between sophisticated partners seeking to reconcile stability and responsiveness to change – parties will want some flexibility to allow for changes in circumstances, but not too much. Indeed, attempts at price renegotiation should not occur too frequently, given their cost and time commitment, and when they do occur, the parties will want to have a reasonably clear idea as to whether the trigger conditions have been met and how to remedy the situation. Adding to movements tracking volatile oil prices (often the basis of long-term price formulae in the noughties), market liberalization, the effects of the global recession, or growth in demand for higher quality energy, the COVID-19 pandemic is yet another stress test for long-term contracts – adequate planning for disruptions caused by unexpected future events becomes all the more essential.

Outside of contractual gas price re-openers, other remedies may still lie open, and very often do, for parties seeking to amend their contract.

2. Contractual gas price re-openers

The price clauses in a given contract have to accommodate a number of aims: the seller's aim is – not surprisingly – to maximize returns, while the buyer wishes to minimize its outlays or cost of purchase (in order to maintain a healthy margin compared to the price at which it can sell the gas). Overall, the parties also want to ensure long-term market-share for them both, and they pursue their somewhat conflicting desires for certainty and flexibility in arrangements designed to last for many years.

Gas price provisions must accommodate these interests in long-term sales and purchase agreements. Often, in markets lacking sufficient information on traded gas prices, the parties will have to look to an agreed base price, coupled with reference to periodic indexation. In Europe, the indexation formula is geared towards meeting the interests outlined above, notably to permit the gas to remain competitive in the market of the buyer. As a result, the formula will often refer to a number of items, themselves capable of determination by reference to international exchanges. These elements will be given a weighting, together (often) with a reference to inflation, with the aim of providing a formula that remains relevant to the conditions in which the gas will ultimately be marketed.

Given the long-term nature of these agreements, the changing nature of the markets themselves, and the absence of clear market-wide indicators of price, these agreements frequently contain a further clause providing for a price review – these are the contractual gas price re-openers to which we have referred above.

Of course, during contractual negotiations, parties are free to agree what they want, including with regard to price provisions, but contractual gas price re-openers generally contain the following elements:

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

A "typical" price re-opener will involve a trigger, which, once it has occurred, permits a party to seek to re-open the price formula. Once a gas price re-opener is activated, it usually provides for a period of negotiation, often limited in time, during which the parties will seek to find a solution. As to the nature of that solution itself, price review clauses are often silent on this point, so that it is for the parties to tailor a solution that works. To the extent the parties agree that sale conditions must change, they must choose from various options. The obvious and most frequent approach is to modify the base price and/or adjustment formula themselves (there was some debate about the power of tribunals to alter the price formula itself in the past, but it is now more often accepted – subject of course to contract – that price reviews in Europe can involve this type of structural change).

This being said, negotiations can often involve factors outside a given price formula, meaning, for example, that the supply conditions themselves can be – and sometimes are – modified (generally, as a matter of negotiation rather than pursuant to any given contractual basis). This can be achieved by a myriad of amendments, including by amending a take-or-pay obligation (percentage of annual contract quantities imposed, and changes in the measurement or make-up period), or changing delivery point, gas delivery nomination procedures, time for payment, or other conditions.

However, the price review clause itself is very often more limited in scope: by way of example, the Energy Charter Secretariat provided the following "stylized" price review clause a number of years ago:

> "*a. If the circumstances beyond the control of the Parties chance significantly compared to the underlying assumptions in the prevailing price provisions, each Party is entitled to an adjustment of the price provisions reflecting such changes. The price provisions shall in any case allow the gas to be economically marketed based on sound marketing operation.*
>
> *b. Either Party shall be entitled to request a review of the price provisions for the first time with effect of dd/mm/yyyy and thereafter every three years.*
>
> *c. Each Party shall provide the necessary information to substantiate its claim.*
>
> *d. Following a request for a price review the Parties shall meet to examine whether an adjustment of the price provisions is justified. Failing an agreement within 120 days either Party may refer the matter to arbitration in line with the provisions on arbitration of the Contract.*
>
> *e. As long as no agreement has been reached or no arbitration award has been rendered all rights and obligations under the agreement ‑ including the price provisions ‑ shall remain applicable unchanged. Unless otherwise agreed or decided by the arbitral award, differences to the newly established price shall be retroactively compensated inclusive of interest on the difference calculated at a rate reflecting the conditions on the international financing market.*"[1]

Outside of contractual price reopeners, other remedies may still lie open, and often do, for parties seeking to adapt their contract owing to a – usually dramatic or at least problematic – change of circumstances.

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[1] Energy Charter Secretariat, "Putting a Price on Energy – International Pricing Mechanisms for Oil and Gas" (2007) 155.

3. Force majeure

Force majeure clauses in long-term international contracts have become standard practice. They provide for unforeseen events that are beyond the control of the aggrieved party and that render the performance of contractual obligations impossible (as a rule), whether temporarily or permanently.

In the event of unforeseen end market problems, can parties invoke a force majeure clause to adapt their contract? Past practice shows that such attempts have frequently failed, whether in the United States in the 1980s, the United Kingdom in the mid-1990s or Asia in the later part of that decade.[2] Changed market circumstances generally do not qualify as force majeure events because they tend to make performance commercially impractical or onerous, rather than impossible, which is the usual (but not unique) test for a force majeure event. Further, force majeure clauses generally foresee a suspension or termination of the relevant contractual obligations, rather than their renegotiation (although examples exist whereby the parties undertake to negotiate an accommodation). Therefore, force majeure clauses are rarely the best tool for parties looking to amend their contract as a result of end market problems. This being said, as force majeure is a contractual phenomenon under common law, skillful drafting of a force majeure clause may lead to a different result.[3] In fact, it is undeniable that buyers, notably in Asia,[4] have sought to invoke force majeure under their long-term sales agreements in light of the chaos wrought by the COVID-19 pandemic.

4. Hardship

The doctrine of hardship – or the principle of *rebus sic stantibus* – offers another form of relief to parties that fall victims to changed circumstances. It refers to circumstances that radically change the contractual equilibrium between the rights and obligations of the contracting parties, rendering performance excessively more onerous for the obligor.[5]

Both price review and hardship mechanisms look at ways of dealing with the unexpected, and deal with the tension – inherent in any long-term arrangement – between the opposing aims of predictability and flexibility. While indexation and price adaptation clauses are most frequently specific to the question of price, hardship usually allows literally any part of the entire contract to be reviewed. Also, as explained in ICC Case 3344, the main difference between a price adaptation clause and a hardship clause lies in the "automaticity" of the adaptation of the price: the parameters of adaptation set out in the contract generally need to be objective and lead to a single solution, whereas hardship allows for more flexibility in the outcome.[6]

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2 *See*, e.g., *Thomas Valley Power Ltd & Total Gas & Power Ltd* [2006] 1 Lloyd's Rep 441, where an increase in the market price (leaving the contract price at uneconomic levels) was not considered to be caught by the contract's force majeure clause.

3 For example, it is generally accepted under English law that a clause referring to performance being "hindered" involves a lesser standard than impossibility, so that such language may permit a court to intervene in circumstances falling short of impossibility to perform. See M. Polkinghorne, "Changes of circumstances as a price modifier" in *Gas and LNG Price Arbitrations, A Practical Handbook* (Global Law and Business, 2019), 42. Similarly, in France, chances of successfully relying on a force majeure argument can be improved where the parties have explicitly provided for force majeure events in their contract and have defined what circumstances will trigger the clause. See M. Polkinghorne, "Roundtable: Contract Enforceability in the Age of Covid-19: France", Business Law International Vol 21 No.3 (September 2020), 223-225, where arguably an event falling short of impossibility was considered force majeure in the light of the relevant clause's drafting.

4 A. Ason, "Scenarios for Asian long-term LNG contracts before and after COVID-19", The Oxford Institute for Energy Studies, NG 160 (July 2020), 5.

5 W. Melis, "Force Majeure and Hardship Clauses in International Commercial Contracts in View of the Practice of the ICC Court of Arbitration" 1 Journal of International Arbitration (1984) 212, 215-216.

6 Award rendered in 1981. See S Jarvin and Y Derains (eds), Collection of ICC Arbitral Awards 1974–1985 (Kluwer Law & Taxation/ICC Publishing, 1990) 440 cited in G Block, "Arbitration and Price Renegotiation in Energy Contracts" 2 ICC Dispute Resolution Bulletin (2017) 52.

Hardship also differs from force majeure to the extent that where "classical" force majeure requires that performance become impossible, hardship is satisfied with performance that becomes excessively more onerous but falling short of impossibility. Further, where force majeure leads to the suspension or termination of the contract, hardship generally opens the right for the court or arbitral tribunal to readjust the contract and bring it back to what it considers a reasonable equilibrium.[7] Of course, and this is a recurring theme, the parties can fashion their force majeure (or hardship) clause as they see fit.

Hardship need not be the subject of a given clause; it can often arise as a matter of applicable law. Hardship provisions, insofar as they are found in national legal systems, are geared to apply to an undisclosed variety of events, and look more broadly to their overall effect on the parties rather than more limited aspects of the deal struck (although even these more limited aims can themselves be the subject of a hardship provision).

4.1 Growing acceptance in civil law countries

In the civil law context, the notion of hardship is found in a surprisingly large number of systems.

In South America, the Civil Codes of Argentina, Peru and Paraguay, for example, expressly admit changes of circumstances as a ground for relief for the affected party. The exception to this rule appears to be Chile, where the hardship doctrine appears not to have been embraced by the courts outside the area of administrative contracts.

The hardship doctrine is also prevalent in modern Arab contract law. The Egyptian Civil Code was in many respects the first to recognize this doctrine, and other Arab Civil Codes, such as the Iraqi, Libyan, Algerian and Qatari Civil Codes, were then inspired from the Egyptian model.[8]

Today, Arab States seem to be divided into those whose codes were amended in the twentieth century to include references to *Shari'a* law on the one hand, and those whose codes remain heavily inspired from the Napoleonic Code of 1804 on the other.

Arab States whose codes are influenced by *Shari'a* law all still basically provide for the doctrine of hardship as an exception to the principle of the binding force of the contract. Article 147(2) of the Egyptian Civil Code illustrates this:

> "*The contract makes the law of the parties. It can be revoked or altered only by mutual consent of the parties or for reasons provided for by the law.*
>
> *When, however, as a result of exceptional and unpredictable events of a general character, the performance of the contractual obligation, without becoming impossible, becomes excessively onerous in such way as to threaten the debtor with exorbitant loss, the judge may, according to the circumstances, and after taking into consideration the interests of both parties, reduce to reasonable limits, the obligation that has become excessive. Any agreement to the contrary is void*."

The last sentence emphasizes the importance of the hardship principle under these national laws. Indeed, a number of Arab laws expressly state that the doctrine of unforeseeable circumstances is a

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[7] H. Konarski, "Force Majeure and Hardship Clauses in International Contractual Practice" International Business Law Journal (2003) 405, 407. It should be noted that under some national laws, hardship may indeed lead to contract termination.

[8] A. Amkhan, "The Effect of Change in Circumstance in Arab Contract Law" 9 Arab LQ (1994) 258, 261.

matter of public policy.[9] As such, contracting parties cannot (as they can in France, see below) purport to exclude the application of this doctrine or the court's authority to adjust the terms of the contract. Likewise, the parties may not expressly seek in their contract to have one party bear all the risks of a fundamental change in circumstances.[10] This may be interesting to consider in light of Article 6.2.2 of the UNIDROIT Principles,[11] on the basis of which the Supreme Court of Canada recently stated that "*unforeseeability cannot be relied on where it is clear that the party who was disadvantaged by the change in circumstances had accepted the risk that such changes would occur*".[12]

The Civil Codes of Lebanon, Comoros, Morocco, and Tunisia, all of which are based upon the Napoleonic Code of 1804, do not provide for the doctrine of hardship or the French notion of *imprévision* in private law. To date, only the Djiboutian Civil Code of 2018 was inspired by the new French Civil Code resulting from the 2016 reform, and thus includes the doctrine of *imprévision*.

Indeed, French administrative law had traditionally admitted the notion of hardship, although, until very recently, the same principle did not exist in private law. It was only in 2016 that the more generally applicable theory of *imprévision* was introduced in the French Civil Code by a reform of contract law.[13] The new Article 1195 now provides for a multi-phased procedure in the event of an unforeseen change of circumstances, the risk of which had not been accepted by the parties, and which renders performance excessively onerous:

- First, the parties go through an amicable phase of renegotiation of the contract, during which all contractual obligations remain valid.

- Second, in the event of the other party's refusal to renegotiate, or if the renegotiation is not successful, the parties may agree either to terminate the contract, or to mutually request the judge to adapt the contract.

- Third, absent an agreement within a reasonable time period, the judge may, at the request of either party, adapt the contract or terminate it as from the date and on the conditions determined by the judge.

The introduction of the theory of *imprévision* in the French Civil Code (and, in particular, the possibility for a party to unilaterally ask the court to adapt or terminate the contract) has been enacted despite criticism from many fronts, with French authors[14] and practitioners fearing for the parties' autonomy and the binding force of the contract.[15] Ultimately, the government had to clarify that contractual parties remained free to set aside the application of Article 1195 and/or declare that they assume the risk inherent to an unforeseen change of circumstances.[16]

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9 See Egyptian Civil Code, art 147; Emirati Civil Code, art 249; Algerian Civil Code, art 147; Kuwaiti Civil Code art 130; Iraqi Civil Code, art 146; Jordanian Civil Code, art 205; Omani Civil Code, art 159; Qatari Civil Code, art 171.

10 Adnan Amkhan, "The Effect of Change in Circumstance in Arab Contract Law" 9 Arab LQ (1994) 258, 275.

11 "*There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and … (d) the risk of the events was not assumed by the disadvantaged party.*"

12 *Churchill Falls (Labrador) Corp v Hydro-Québec* (2018) SCC 46, para 89.

13 Under Article 9 of Ordinance n° 2016-131 of 10 February 2016 reforming French contract law, the codified scope of *imprévision* applies only to contracts concluded after 1 October 2016.

14 H Le Nabasque, "L'imprévision revisitée", Bulletin Joly Sociétés n°01 (January 2018), 1.

15 Article 1195 of the French Civil Code does not apply to obligations resulting from operations on financial securities, owing to the naturally inherent risks of such products. See the French Monetary and Financial Code, art L211-40-1.

16 Report to the President of the Republic relating to Ordinance No. 2016-131 of 10 February 2016 on the reform of contract law, the general regime and regime on the proof of obligations, JORF No. 0035 of 11 February 2016, 25.

4.2 Reluctance in common law jurisdictions

Many gas contracts, notably Liquefied Natural Gas sales and purchase agreements, are English or New York law beasts. It seems fairly settled that English law will not admit a (non-contractual)[17] power to amend a contract on the basis of changed circumstances.[18] Perhaps the closest one might come to the hardship doctrine under English law is the doctrine of frustration.[19] It can excuse performance in cases of extreme economic or commercial loss, but English courts have no power to adapt the contract to changed circumstances, and, in any event, frustration is very rarely invoked successfully.

One area which remains the subject of some debate is the application of good faith in long-term contracts; in other words, can an obligation to negotiate in good faith be enforced *per se*, and/or could a tribunal take the analysis even further to impose what it would have expected as a negotiated solution, had the parties indeed negotiated in good faith?

In the 2013 *Yam Seng* case,[20] Mr. Justice Leggatt (as he then was) revisited the established position of good faith under English law – he asserted that the general view in English contract law, that there is no overriding principle of good faith, is "*swimming against the tide*", and even though he doubted that English law was ready to recognise good faith as a duty implied by law into all commercial contracts, he found that there was "*nothing novel*" in implying such a duty into an ordinary commercial contract, based on the presumed intention of the parties. Mr. Justice Leggatt went on to emphasise the importance of recognising such a duty in long-term agreements, which require a high degree of communication, cooperation and predictable performance based on mutual trust, confidence and loyalty. In fact, in a lecture given recently, Lord Justice Leggatt (as he now is) specifically employed the hypothetical case of a change of circumstances in a contract for the supply of Liquefied Natural Gas, so as to illustrate ways in which "*legal and practical content could be given to a promise to negotiate in good faith*".[21]

The *Yam Seng* reasoning has been cited[22] and/or explicitly approved[23] by other common law courts. This developing case law seems to resist implying a duty of good faith in the contractual negotiation phase, but seasoned commentators have suggested that the common law does appear ready to move towards a default rule of performance of certain contracts in good faith.[24] Nevertheless, it is early days yet…

Interestingly, in 2015, an ICC tribunal found breach of an implied duty of good faith, even though the parties had argued that there was no such obligation in the contract or under the law governing the agreement.[25] Although this is an investment treaty case, it is interesting to note that the tribunal

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17 For an example of an English court's treatment of a contractual hardship clause, see *Superior Overseas Development Corporation v British Gas Corporation* [1982] 1 Lloyd's Rep 262. A French example can be seen in CA Paris, 28 December 1976, *EDF v Shell France*, JCP G 1978, II, 18810, obs J Robert.

18 See, e.g., *Total Gas Marketing v Arco British Ltd* [1998] 2 Lloyd's Rep 209 (House of Lords).

19 *Davis Contractors v Fareham Urban DC* [1956] UKHL 3, [1956] AC 696 , [1956] 2 ALL ER 145 cited in AH. Puelinckx, "Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances" 3(2) J Int'l Arb 47 (1986) 50: "*frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from which was undertaken by the contract… it was not this that I promised to do*".

20 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111. The Court concluded that the distribution agreement in question contained an implied and enforceable obligation on the parties to act in good faith, and that International Trade Corporation had knowingly concealed from Yam Seng its true pricing arrangements and a crucial distribution channel in Singapore, thus causing a repudiatory breach justifying Yam Seng's termination of the distribution agreement.

21 G Leggatt, "Negotiation in Good Faith: Adapting to Changing Circumstances in Contracts and English Contract Law", Jill Poole Memorial Lecture, Aston University, 19 October 2018, paras 10–59.

22 *The One Suites Pte Ltd v Pacific Motor Credit Ltd* [2015] SGCA 21.

23 *Globe Motors Inc v TRW Lucasvarity Electric Steering Ltd* [2016] EWCA Civ 396; *National Private Transport Services Company Limited v Creditrade LLP* [2016] EWHC 2144 (Comm).

24 P Griffin, "Principles of price reviews and hardship clause in long-term gas contracts" in *Liquefied Natural Gas: The Law and Business of LNG* (Globe Law and Business, 2006) 122.

25 D Charlotin, "ICC Tribunal finds that international agreement includes an implicit good faith obligation", IA Reporter, 7 December 2018.

found the fact that the deal had been made between sovereign states, entailing substantial quantities of gas and significant investment by all parties, to be "*particularly compelling*".

The United States has a doctrine of commercial impracticality, pursuant to which several commentators have posited that the court may not only arrive at a fair distribution of losses, but also modify the parties' agreement going forward.[26] That said, the courts appear to have been parsimonious in the exercise of such powers.[27]

In essence, in common law countries in general, parties are stuck with what they agreed – or did not agree – under their long-term contract. In this context, and assuming the parties feel such protection is warranted (by no means a foregone conclusion), a well-drafted hardship clause becomes essential. Negotiators are generally advised to first systematically verify the rules on change of circumstances in the applicable law, and then depart from such legal provisions (if they can) in case they are not satisfied.[28] Of course, that enquiry is likely to be a brief one under English law, as explained above. In any event, the UNIDROIT Principles contain a detailed description of the hardship principle, and can serve as a starting point for drafting a hardship clause:

> "ARTICLE 6.2.1
>
> *(Contract to be observed)*
>
> *Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.*
>
> ARTICLE 6.2.2
>
> *(Definition of hardship)*
>
> *There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and*
>
> *(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;*
>
> *(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;*
>
> *(c) the events are beyond the control of the disadvantaged party; and*
>
> *(d) the risk of the events was not assumed by the disadvantaged party.*
>
> ARTICLE 6.2.3

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[26] For a general discussion, see Fred Fucci, "Hardship and Changed Circumstances as Excuse for Non-Performance of Contracts – Practical Considerations in International Infrastructure Investment and Finance", 4(5) TDM (2007).

[27] See *Aluminium Co of America v Essex Group Co* 499 F Supp 53 (WD Pa 1980) cited by Fucci (id) at p. 2, not followed in later cases; White & Peters, "A Footnote of Jack Dawson" 100(7) Michigan Law Review (1973) 202. See also *Florida Power & Light Co v Westinghouse Electric Corp* (517 F Supp 440 (ED Va 1981)), in which the court noted: "*Generally, however, the fact that performance has become economically burdensome or unattractive is not sufficient for performance to be excused … We will not allow a party to a contract to escape a bad bargain because it is burdensome*."

[28] M Fontaine, "The Evolution of the Rules on Hardship" in F Bortolotti and D Ufot, *Hardship and Force Majeure in International Commercial Contracts* (International Chamber of Commerce, 2018) 37.

(Effects of hardship)

(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.

(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.

(4) If the court finds hardship it may, if reasonable,

(a) terminate the contract at a date and on terms to be fixed, or

(b) adapt the contract with a view to restoring its equilibrium."

4.3 Issues that a hardship claim may face

The existence of a hardship clause, or of a hardship doctrine under the applicable law, is not the end of the story for parties seeking to rely upon either. Generally speaking, for hardship to apply, the following three conditions must be met: (i) a fundamental change in circumstances, (ii) which was unforeseeable at the time of contract, (iii) must have rendered the performance of the contract excessively more burdensome for one of the parties. As introduced above, the manner in which these general principles of hardship are applied will vary not only between different jurisdictions, but even within those jurisdictions themselves.

The nature of the underlying event is one such topic of discussion. In Arab States, the change in circumstances need as a rule be of a general character (rather than specific to the parties to a given agreement).[29] As stressed in the Egyptian Explanatory Memorandum of the Civil Code, this ensures that the sanctity of the contract is preserved to the extent possible, and limits the effects of the hardship doctrine to what is considered strictly necessary.[30] In the same spirit, the condition pertaining to the excessively burdensome performance of the contract is generally interpreted restrictively, with the parties having to establish that the loss goes beyond what is expected or normal, and that it causes them significant harm.[31] In determining whether their intervention is justified, Arab courts tend to take an objective approach. That involves an analysis of the nature of the contract and the benefits that the obligor would have derived from it had the change in circumstances not occurred, and they do not, as a rule, take into account the financial situation of each party.[32] The latter position seems to be at odds with certain authorities discussed in the European context.[33]

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29 A. Razzaq al-Sanhuri, "Treatise in the Explanation of Egyptian Civil Law", vol 1 (2008), 534, para 420; See also Syrian Court of Cassation, Judgment of 22 October 1974. The converse appears to be the case in other countries, namely under Hungarian civil law – see Nochta, "A gazdasági válság mint szerződési kockázat" (The economic crisis as contractual risk) in Tamás Nótári, (ed), *Ünnepi tanulmányok Sárközy Tamás 70. születésnapjára* (Lectum, Szeged, 2010) 211; BD 200.277 cited in T Papp, "Connection between the economic crisis and contractual circumstances in Hungary and in the European Union" 2 Juridical tribune (2012) 114–120, 117.

30 A. Amkhan, "The Effect of Change in Circumstance in Arab Contract Law" 9 Arab LQ (1994) 258, 267.

31 Ibid.

32 A. Razzaq al-Sanhuri, "Treatise in the Explanation of Egyptian Civil Law", vol 1 (2008), 534, para 420.

33 For example, in a case governed by Swiss law, an ICC tribunal expressed the view that if the contract in dispute constituted only a small part of the seller's overall revenues, it would be difficult for hardship to apply (which, in the authors' view, suggests a subjective test). See ICC Case 2508 (1976), reported in Journal du Droit International No. 4 (October/November/December 1977), 939.

Further, the notion of what was foreseeable at the time of contract will vary on a case-by-case basis, and the issue of price variations may elicit different views from one jurisdiction to the next. The Federal Supreme Court of Iraq, for example, has ruled that a debtor could not rely on an increase in the general pricing level of raw materials and wages to request the amendment of its contract, since "*the increase of prices is a predictable event that cannot be considered as an exceptional general unforeseeable event*".[34]

The inquiry may focus not merely on whether an event itself was foreseeable, but also on whether its gravity was foreseeable (which could be highly relevant in the current pandemic). Commentator Fred Fucci cited the following events a number of years ago as having been ruled as foreseeable (thus excluding the application of the hardship doctrine): dramatic changes in market prices for products, unfavorable general economic circumstances in a country, currency fluctuations, even severe, amongst others.[35] As Fucci also points out, the following events appear to have constituted events of hardship (and were hence, by definition, unforeseeable): a tenfold increase in price due to a post-contracting change in government regulation and the imposition of new safety regulations after conclusion of a contract to build a plant requiring installation of additional equipment and "*making* [the contractor's] *performance substantially more onerous*", a sudden devaluation of a country's currency in the order of 80 percent, and the disappearance of a market for a contracted product.[36] It seems clear, to the authors at least, that each case must turn on its own facts.

The same subjectivity seems to apply when considering the extent of changes required to trigger hardship. One example of circumstances under which hardship was allowed to operate comes from an Algerian law arbitration in the 1990s. In this case, brought under the UNCITRAL Rules, the tribunal had to rule under a dollar-denominated contract entered into by an Italian construction company and the government of Kuwait, for the construction of a new embassy in Algeria. A majority of the three arbitrators accepted that a depreciation of about 35 percent in the value of the US dollar with respect to the Italian lira constituted a changed circumstance justifying compensation to the contractor (whose costs were predominantly in Italian lire). However, the award contained a strong dissent by one of the arbitrators, who felt that the depreciation was foreseeable. He also maintained that the majority's reading of the scope of the depreciation did not meet the rigorous demands of the Algerian Civil Code provision.[37]

As has been seen above, different cases have given rise to a range of apparently contradictory outcomes. This could be the result of the unique nature of each case when all matters are considered, or could reflect differing judicial attitudes as to when relief should be granted. However, some countries have sought to close this debate. Sudan, for example, has even put a figure on the requisite degree of pain, requiring that "*the loss exceeds one third of the obligation*".[38]

In terms of result, hardship clauses rarely, if ever, provide a roadmap for a tribunal to follow in resolving any impasse (whereas price reopeners sometimes do provide some idea as to where the parties may tread). The risk is that the tribunal may be wary of proceeding without a more substantial contractual arrangement, or, conversely, could rewrite the agreement in a way that neither party intended.

In the same vein, hardship provisions can generally be said to seek to establish or maintain contract "equilibrium", which appears to involve an objective analysis, rather than any broader notion of

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34 Federal Supreme Court of Iraq, 7 December 2009, Decision 1289.

35 F. Fucci, "Hardship and Changed Circumstances as Excuse for Non-Performance of Contracts – Practical Considerations in International Infrastructure Investment and Finance", 4(5)TDM (2007).

36 Ibid.

37 Arbitration Proceedings between *Icori Estero SpA* and *Kuwait Foreign Trading Contracting & Investment Co*, published in (1994) 9 Int'l Arbitration Report, A-1, cited in F. Fucci, "Hardship and Changed Circumstances as Excuse for Non-Performance of Contracts – Practical Considerations in International Infrastructure Investment and Finance", 4(5) TDM (2007), 21.

38 Sudanese Law of Civil Transactions, art 117(2).

"fairness" (requiring a more subjective analysis). For some commentators, this is seen as unnecessarily restrictive.[39] (In contrast, price re-openers are often tied - at least in part - to the stricter notion of marketability.)

The aims of the two different provisions can also differ markedly. In the simplest terms, hardship is often seen as a means of sharing the pain, which in no way ensures that a buyer will cover its costs or even retain a margin in a hardship situation. This can be compared with many price re-openers, which look to the preservation of the marketability of the gas in question (although even here, these questions are the subject of serious debate). In 2015, as an example, an ICC tribunal ruled that a price revision clause providing for the buyer's ability to economically market the gas (the "in any case clause") should be read as providing a safety net and protecting the buyer from unsustainable losses, and not as an implication that he/she is entitled to anything more than a reasonable margin.[40]

4.4 A role for the hardship doctrine in long-term gas sales?

Certain tribunals and commentators believe there is little or no role for hardship principles in the area of long-term gas sales, especially in the presence of a clear price revision clause. In a 2013 ICC case, the respondent argued that the revision clause invoked by the claimant to request an extraordinary revision of the contract price was by its nature a hardship clause, so that the contractual condition of upheaval in the economic and/or energy and gas market conditions needed to be unpredictable. The tribunal decided that the will of the parties was to establish a revision clause triggered by conditions less drastic than those of hardship, and that the UNIDROIT Principles would only apply if the parties have expressly referred to them in their contract.[41] Of course, there will be cases where hardship applies as a matter of applicable law, which would involve further debate.

Even in contracts in which a revision clause is complemented by a hardship clause, it has been suggested that arbitral tribunals tend to consider hardship as the fallback, not needing to be examined if price adjustment is granted under the price revision clause.[42]

It may however be premature to be so categorical as to rule out the role of hardship completely. Indeed, where it exists as a matter of applicable law, who has the burden of explaining its role: when must the claimant establish its application and/or the respondent argue for its exclusion? In any event, hardship clauses may help parties address circumstances that are outside the scope of price re-openers. For instance, the bulk of gas price re-opener clauses look (partially or completely) at events in and affecting the buyer's end-user market alone,[43] but there may well be cases where the relevant events arise in areas such as the supply chain, which have nothing to do with the end market, or involve "non-price" issues. One can equally see arguments in favor of applying hardship in circumstances where a price review clause is found inadequate or inapplicable.

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39 W. Peter, J.-Q. de Kuyper, B. de Candolle, *Arbitration and renegotiation of international investment agreements* (Kluwer Law International, 1995) 2.

40 See ICC Case 19374 cited in G Block, "Arbitration and Price Renegotiation in Energy Contracts" 2 ICC Dispute Resolution Bulletin (2017), 55.

41 ICC Case 18123 cited in G Block, "Arbitration and Price Renegotiation in Energy Contracts" 2 ICC Dispute Resolution Bulletin (2017), 53. The tribunal notably stated that: "Understandable though it may be that the revision imposed [by hardship] outside any contractual agreement is the ultimate solution to avoid the contractor being overwhelmed by the burden of his obligations, the rebalancing agreed in advance by the contracting parties must be done under the agreed conditions."

42 See ICC Case 17648 cited in G Block, "Arbitration and Price Renegotiation in Energy Contracts" 2 ICC Dispute Resolution Bulletin (2017),53.

43 Many (not all) clauses concentrate solely on events in the buyer's market and/or affecting the marketability of the gas in that market.

While, for a number of commentators, the role for hardship appears limited – particularly in the face of a well-drafted gas price clause[44] – case law confirms that the hardship and price re-openers can coexist, and, indeed, that hardship can come into play where a gas price clause exists and is applied.[45] As noted above, some legal systems, such as those of North Africa and the Middle East, in fact insist upon a role for hardship regardless of what the parties might say.

Therefore, the possibility of raising a hardship claim should not be overlooked.

5. Arbitration as a means of achieving contract revision

The buyer and seller usually strive to resolve conflicts amicably in order to preserve a good working relationship. It is generally the case that changes to matters other than the base price and indexation formula are easier to achieve outside arbitration, which is constrained by the four corners of the price review clause itself. However, arbitration can be used to create pressure and urgency in commercial negotiations, or provide a way out of negotiation deadlocks. In fact, since around 2008, parties have commonly referred their gas price disputes to arbitration.

Arbitrators may intervene in order to adapt a contract in case of change in circumstances if the parties expressly provide for such power in the contractual provisions, or if the applicable legal provision on hardship expressly provides for the courts' intervention to adapt the contract.

Then, the trick question becomes "how should the tribunal approach the delicate task of adapting a contract?" When a tribunal examines whether the conditions for renegotiation are fulfilled, even before delving into the practical issues of interpretation discussed above, it must first determine its authority within the bounds of the parties' reference to arbitration. Having established jurisdiction, how should that tribunal then proceed to determine the manner in which the terms of the agreement should be revised? Different issues may arise under price review and hardship provisions: as is so often the case, this will be a question of contract.[46]

Of course, if the parties' agreement provides in relevant part for recourse to arbitration and spells out in detail the type of criteria that should guide the tribunal, the tribunal would ordinarily have the power to apply those criteria and reach a result. This being said, in practice, even if the arbitrators base their decision on such criteria, it often remains difficult to determine the true scope and nature of the arbitrators' mission. If, for example, a clause provides for a price formula linked to a basket of fuel, can the renegotiation reflect changes in the end-market where gas-to-gas competition has become a significant factor? Can an element be added to the initial formula? In such cases, on one hand, the requesting party may well allege that including a changed or new fuel index in the price formula better reflects the competitive situations in the end-user market, and hence would comply with the renegotiation formula provided in the contract. The opposing party, on the other hand, could argue that there is no contractual basis for changing the best substitutes as agreed in the price formula.

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44 G. Block, "Arbitration and Price Renegotiation in Energy Contracts" 2 ICC Dispute Resolution Bulletin (2017), 52.

45 G. Block, "Arbitration and Changes in Energy Prices: A Review of ICC Awards with respect to Force Majeure, Indexation, Adaptation, Hardship and Take-or-Pay Clauses" 20(2) ICC Dispute Resolution Bulletin (2009) 51, 56.

46 K. P. Berger, "Adaptation of Long-Term Contracts by International Arbitrators in the Face of Severe Economic Disruptions: Three Salient Problems", Journal of International Arbitration (2020) 596: "*the tribunal's authority may be derived from the general principle of good faith, as a rule of fairness and equity, provided that this legal principle is accepted in the relevant jurisdiction*"; P. Accaoui Lorfing, "Adaptation of Contracts by Arbitrators: Realities and perspectives" in *Hardship and Force Majeure in International Commercial Contracts* (ICC, 2018) 41: "*Arbitrators' intervention may result from the parties' implicit intention. The parties' disagreement may lead to the implementation of the arbitration clause in the absence of any specific power given to arbitrators by parties. In that case, the applicable law will determine arbitrators' powers and their scope*."

The arbitrators will have to find a way to answer such claims, and it may well be that the relevant contract clause provides little guidance in this regard. That being said, it seems safe to say that recent experience in Europe has tended to the broader view.

Given the complexities of price re-openers, a "pendulum" arbitration has been suggested as a means best serving the interests of all parties involved. Under this approach, each party is obliged to provide their "best guess" of the true value or adjustment required, and the tribunal then has to select either one of the parties' suggestions. This may dissuade parties from making outlandish demands, or invoking extravagant bases for claims, since if they were to do so, the chances of those claims being accepted are all the less. The tribunal will also be less distracted by irrelevant or unhelpful arguments, and should be more comfortable in arriving at what it sees as the correct result. That being said, this approach has yet it seems to find widespread favor (and would, in any event, face issues when the question is a structural change to the formula and not simply one of price level).