

Gas and LNG pricing disputes

TEN TIPS FOR SUCCESS



There has been a large number of gas pricing disputes in the European market in recent years. Continuing market changes and global political developments mean that gas pricing disputes may continue for some time to come. Changes in the global LNG market render it increasingly susceptible to pricing disputes, with the approach to their management likely to be founded in the European experience of the last decade.

There are a number of lessons that can be learned from the European gas pricing experience, and we set out below our top ten tips for success when considering exercising contractual price review rights, whether under long-term gas or LNG supply agreements.



1. RESPECT APPLICABLE TIME LIMITS

If you are the party making the request, you will want to avoid the risk of your price review request being time barred, or there being an argument that a pre-existing review process remains “on foot”; if you are the party receiving a request, these considerations might provide a means of bringing the process to an early end.



2. RESPECT CONTRACTUAL OBLIGATIONS TO NEGOTIATE

Failure to do so enables your counterparty to raise jurisdictional defences should the review proceed to dispute.



3. FULLY ANALYSE AND DOCUMENT THE TRIGGER EVENT

You will need to ensure that there is a justifiable basis for the request, but do not leave yourself without any room to manoeuvre by providing too much detail at the outset. Getting an expert on board from an early stage is advisable – and ensure communications with the expert are protected by privilege.



4. DO NOT ENGAGE IN INFORMAL CORRESPONDENCE AND DISCUSSIONS ABOUT THE REQUEST WITHOUT PROPERLY PROTECTING YOUR LEGAL POSITION

Be conscious that “without prejudice” privilege may not apply where evidential issues are governed by a civil law.



5. DO NOT CREATE OR CIRCULATE DOCUMENTS WITHOUT FULLY CONSIDERING THE IMPLICATIONS OF DOING SO

Unhelpful documents could undermine your position given the potential for requests for such documents to be made by your counterparty if the review process escalates to arbitration proceedings.



6. CONSIDER YOUR TRIBUNAL'S EXPERTISE AND EXPERIENCE

Ensure that the decision-makers are properly qualified to understand and determine the dispute and that any particular procedural issues likely to arise will not be dealt with in a way likely to come as a 'surprise'. There are few arbitrators with good experience in the area and it will be important to consider what approach arbitrator candidates have taken in other pricing disputes and arbitrations to potentially relevant procedural and substantive issues.



7. FULLY CONSIDER THE SCOPE OF THE TRIBUNAL'S MANDATE

How far is it able to change the pricing arrangements in setting a new price – can it amend only the pricing provisions or e.g. the destination clauses too?



8. CONSIDER THE SUBSTANTIVE LAW GOVERNING YOUR CONTRACT

To what extent can the contractual governing law provide you with additional or alternative remedies? In certain jurisdictions, doctrines of, for example, hardship or failed assumptions, might operate to allow a means of reopening the contractual bargain even where no formal price reopener clause exists. Competition law may assist similarly.



9. SEEK TO DEAL WITH ISSUES OF CONFIDENTIALITY AT AN EARLY STAGE

It might be necessary to incorporate confidentiality obligations into your procedural order to ensure that the fact of legal proceedings, and any information disclosed in them, remains confidential, and so that the extent to which the parties are entitled to withhold confidential pricing information is clear from the outset. A “confidentiality club” may be needed to keep sensitive pricing data away from the counterparty's eyes, restricting access to “lawyers only.”



10. DO NOT GO IT ALONE

Instruct legal counsel with experience of running such disputes in the applicable forum at an early stage. You need lawyers familiar with the “unwritten rules” as to how arbitration tribunals will run price review cases.

We have extensive experience of advising on and conducting gas and LNG price reopener arbitrations under both common and civil law regimes and can advise both on the drafting of reopener and applicable dispute resolution clauses, as well as on procedural and substantive issues should a dispute arise.

Please do get in touch if you would like to know more.

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