

MORGAN WATKINS*

**NEGOTIATING PRICE REOPENER CLAUSES
IN LONG-TERM SALES OF NATURAL GAS**

Submitted for the LLB (Honours) Degree

Faculty of Law

Victoria University of Wellington

2017

* Paper submitted as part of LLB(Hons) programme at Victoria University of Wellington. The author would like to acknowledge the commentary and support of Dr Petra Butler and Birte Bruce in the preparation of this paper.

Abstract

This paper examines the use of arbitration for resolving disputes about price formulae in contracts regarding long-term gas supply agreements. Arbitration is preferred because it results in binding awards enforceable under the New York Convention. However, arbitrators frequently treat the dispute as adversarial and put significant weight on the technical language of reopener clauses. A closer look at the nature of gas price disputes and their contractual underpinnings suggests that standard arbitral process and values are inappropriate. Reopener clauses are tools of co-operation designed to preserve the original bargain over a long period of time. They are typically drafted in a context of significant uncertainty about future economic trends and neither of the parties are at fault for failing to agree how to apply their contract to the facts surrounding a price review. Another process is needed which emphasises the distinctive nature of gas price arbitration. A possible solution arises in the form of "conciliation-arbitration". Conciliation-arbitration is a process where arbitrators deliberately attempt to encourage settlement through informal evaluation of the dispute, and only use standard adversarial processes if parties still fail to reach settlement. Conciliation-arbitration poses nominal ethical risks that are managed by giving parties the power to opt out at the end of the conciliatory stage. Not every arbitral regime will permit use of this process but the decision should be one for the parties to make.

Key words: contractual interpretation, conciliation, mediation, arbitration, natural gas, price negotiation, dispute resolution

Word Count: The text of this paper (excluding cover page, abstract, table of contents, epigrams, footnotes, long quotes, and bibliography) comprises, by agreement, approximately 16,250 words.

Table of Contents

I	Introduction.....	4
II	Arbitration in Gas Price Renegotiations	7
III	Preserving Arbitration's Contractual Character	17
IV	Aiming at the Actual Dispute.....	26
V	Alternatives to Arbitration	34
VI	Drafting Future Reopener Clauses	38
VII	Reframing Arbitration.....	42
VIII	Conclusions.....	55
	Bibliography	58

"When I use a word" Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less. When I make a word do a lot of work like that, I always pay it extra."

Lewis Carroll¹

If an evil gremlin sought to bring international arbitration into disrepute, two starkly different routes would present themselves. One course would allow service by biased arbitrators, thus tarnishing the neutrality of the arbitral process. An alternative path to shipwreck would establish unrealistic standards for independence and impartiality, permitting spurious challenges intended to derail proceedings and abusive annulment motions aimed at vitiating the arbitrator's decision.

William W Park²

I Introduction

The price of natural gas matters because affordable and accessible energy underpins much of the increases in prosperity that modern societies have enjoyed since the beginning of the industrial revolution.³ With many things, from cars to computers, unable to function without electricity or other sources of power it is hard to overstate the centrality of energy to modern social organisation and everyday life. Many governments try to strike a balance between the competing domestic policy priorities of developing competitive energy markets, ensuring security of supply, and promoting energy sustainability.⁴ Doing so is in the public interest in terms of

1 Lewis Carroll *Through the Looking Glass* (1887) at ch 6, cited in KJ Keith *Interpreting Treaties, Statutes and Contracts* (Centre for Public Law, Occasional Paper 19, May 2009) at 2.

2 William W Park "Foreword" in Sam Luttrell *Bias Challenges in International Commercial Arbitration: The Need for a 'Real Danger' Test* (Kluwer Law International, Alphen aan de Rijn (NL), 2009) at ix.

3 Steven Chu and Arun Majumdar "Opportunities and challenges for a sustainable energy future" (2012) 488 *Nature* 294 at 294.

4 See for example art 194 of the Treaty on the Functioning of the European Union which expresses at a high level the three aims of European Union energy policy as ensuring a functional and competitive market, ensuring security of energy supply, and promoting energy efficiency and sustainability: Treaty on the Functioning of the European Union 2702 UNTS 6 (concluded 13 December 2007, entered into force 1 December 2009), art 194. New Zealand's regulatory framework is similar: see Energy Efficiency and Conservation Act 2000, ss 5–6.

environmental,⁵ health,⁶ and economic outcomes.⁷ Fossil fuels still drive industry despite the environmental costs they impose.⁸ So, although future fossil fuel use must be curbed to meet carbon budgets, use of natural gas will likely increase in the foreseeable future because it is comparatively less polluting.⁹ Producers are incentivised to maximise gains while they still may. Getting gas price arbitrations right affects more than just the energy industry.

Long-term gas supply contracts typically include a "reopener clause" which permits periodic renegotiation of the contract price. If there is a substantial change in the energy market that affects the value of gas then parties will begin the process of reviewing the price paid—usually, buyers give notice because the value of gas has declined over time.¹⁰ Where parties do not agree, gas price disputes are typically referred to international commercial arbitration.¹¹ These clauses aim to maintain the original bargain between the parties over the contract's lifetime.¹²

The European gas market has fluctuated over the past fifteen years for various reasons. As the market liberalises and commodity prices fall, the number of gas price claims going to arbitration has noticeably increased due to parties

5 See, for one example, discussion of carbon dioxide emission and its effects on the oceans: Peter J Glecker and others "Industrial-era global ocean heat uptake doubles in recent decades" (2016) 6 *Nature Climate Change* 394 at 396, and Jelle Bijma and others "Climate change and the oceans – What does the future hold?" (2013) 74 *Marine Pollution Bulletin* 495 at 502.

6 See discussion of "substantially, and increasingly, negative" effects of climate change on human health: Anthony McMichael, Hugh Montgomery and Anthony Costello "Health risk, present and future, from global climate change" (2012) 344 *BMJ* 1359.

7 See discussion of "bidirectional causality" between natural gas usage and gross domestic product: Nicholas Apergis and James E Payne "Natural gas consumption and economic growth: A panel investigation of 67 countries" (2010) 87 *Applied Energy* 2759 at 2762.

8 See for example the United States, where petroleum, coal and natural gas provide 69 per cent and 90 per cent of the energy supply for electricity generation and industrial use respectively, which together account for 57.4 per cent of the United States' energy use: MIT Energy Initiative *The Future of Natural Gas: An Interdisciplinary MIT Study* (Massachusetts Institute of Technology, June 2011) at 4 (figure 1.1), 10. The United States accounts for 18 per cent of global energy use; in comparison China consumes 20 per cent of global energy use, 70 per cent of which occurs in its industrial sector: Ali Hasanbeigi and others "Retrospective and prospective decomposition analysis of Chinese manufacturing energy use and policy implications" (2013) 63 *Energy Policy* 562 at 562.

9 Natural gas is seen by some as a potential "bridge" to a low carbon future: Antonio A Golpe, Monica Carmona and Emilio Congregado "Persistence in natural gas consumption in the US: An unobserved component model" (2012) 46 *Energy Policy* 594 at 594.

10 Robert Blackett "Pricing Arbitrations: It's a Gas, Gas, Gas" *The Arbiter* (Andrews Kurth, United Kingdom, 2014) at 7.

11 Arbitration, defined more fully in Part II(A), is a private dispute resolution process where parties remit their dispute to an independent and mutually acceptable third party: Nigel Blackaby and Constantine Partasides *Redfern and Hunter on International Arbitration* (6th ed, Oxford University Press, Oxford, 2015) at [1.04]–[1.05].

12 Blackett, above n 10, at 9.

"aggressively" protecting their interests.¹³ Now that the Asia-Pacific natural gas market prepares to follow suit,¹⁴ it is timely to ask whether arbitration is the best process for resolving gas price disputes. While arbitration is preferred for its ease of enforceability, this paper argues that gas price arbitrations should be conducted in a more conciliatory, no-fault manner in order to maximise prospects of early and amicable settlements.

"Conciliation-arbitration" is the most promising of several possible improvements to arbitration procedure because its amicable approach reflects the disputes' underlying difficulties.¹⁵ Parties do not agree to certain and clear reopener clauses in advance due to information scarcity regarding future events,¹⁶ resulting in comparatively imprecise clauses—but as these clauses are the main basis of gas price renegotiations, arbitral tribunals must have regard to them. This tension unduly emphasises parties' initial choice of words, causing lack of sensitivity to their positions at the time of dispute. This has had sometimes perverse results.¹⁷

Mediated settlements via conciliation-arbitration are the best option for reconciling parties' markedly conflicting interests because gas price disputes do not centre on party fault. Settlement is more likely to lower costs while recognising party autonomy and, if conducted under an arbitral framework, a binding award still results. Constraining awards to be within final negotiating positions or adopting expedited processes will also reduce the cost and risk of arbitration. Though the observed rise in arbitration shows settlement is difficult, conciliation-arbitration works in this reality. It will help as it is sensitive to the lesson presented by gas price renegotiation: where reopener clauses give imperfect guidance, relationships are

13 Phillip Ashley "Energy disputes heat up as oil and commodities prices crash" (05 September 2016) CMS <www.cms.law>. To give an idea of the scale of the energy industry's comparative reliance on arbitration, in 2014, 65 per cent of cases filed with the International Centre for the Settlement of Investment Disputes were from energy industry participants: Howard Rosen and Matthias Cazier-Darmois "Expert Evidence" in J William Rowley, Doak Bishop and Gordon Kaiser (eds) *The Guide to Energy Arbitrations* (Law Business Research, London, 2015), at 260.

14 See generally Stephen Stapczynski, Tsuyoshi Inajima and Dan Murtaugh "More than \$600 Billion Is at Stake as Japan Probes LNG Deals" *Bloomberg* (online ed, 21 July 2016).

15 The choice of name to be conciliation-arbitration rather than mediation-arbitration is deliberate, for reasons more fully articulated in Part VII. In short, conciliation better describes the situation where an arbitrator informally pushes towards settlement.

16 See generally Part III.

17 For example, in *Atlantic LNG Company of Trinidad and Tobago v Gas Natural Aprovevisionamientos SDG SA (Award)* UNCITRAL 17 January 2008, the seller (Atlantic) initiated a price review on the basis that Spanish prices were not reflective of the market the gas was actually being delivered to. At arbitration, the price was reviewed downwards. This has caused some controversy regarding the scope of arbitral awards.

paramount and nobody is at fault, it is best not to assume there is a correct answer to a dispute about which the parties are mistaken.

Part II of this paper describes the commercial and legal context of arbitration in cross-border gas disputes. Part III argues that, due to uncertainty about the future, long-term contracts like those underpinning gas price arbitrations should be permissively interpreted to enhance co-ordination between parties and uphold the commercial function of the reopener clause. Part IV argues that, as neither party is at fault, dispute resolution procedures should push parties towards settlement. Part V explains the significance of party autonomy and a final, binding award in gas price disputes by contrasting arbitration with less suitable means of dispute resolution. Part VI argues that more automatic contractual drafting will help avoid issues in gas price arbitrations in the future. Last, Part VII provides some suggestions for arbitral reform, focussing on a proposed conciliation-arbitration process and whether existing arbitral rules permit it.

II Arbitration in Gas Price Renegotiations

Contracts in the upstream energy production and transport industry frequently provide a process, called a "price reopener" clause, to navigate structural changes in markets which affect the appropriateness of the contract price.¹⁸ Here is one famous example:¹⁹

If at any time either Party considers 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, if after a price review, at the time of that price review] and the Contract Price [...] does not reflect the value of Natural Gas in the Buyer's end-user market, then such Party may, by notifying the other party in writing and giving with such notice information supporting its belief, request that the Parties should forthwith enter into negotiations to determine whether or not such changed circumstances exist and justify a revision of the Contract Price provisions and, if so, to seek agreement on a fair and equitable revision of the above-mentioned Contract Price provisions [following the process outlined in the contract].

Price review processes normally involve negotiation to attempt to agree on a renewed gas price formula. If parties cannot reach agreement the dispute is usually

18 Ben Holland and Phillip Ashley "Natural Gas Price Reviews: Past, Present and Future" (2012) 30(1) *Journal of Energy & Natural Resources Law* 29 at 32.

19 *Gas Natural Aprovevisionamientos SDG SA v Atlantic LNG Company of Trinidad and Tobago* DC New York 08 Civ 1109 (SD NY 2008), 22 September 2008 [*Atlantic LNG*].

referred to arbitration.²⁰ Fear of favouritism by national courts is likely why the international energy market is the largest user of international arbitration.²¹ Rising use of arbitration suggests standard dispute resolution methods are failing to successfully rebalance price risk allocation among parties.²² Accordingly, resort to arbitration is likely to remain a feature of gas price renegotiations.

Combining confidentiality, speed, finality and enforceability in one process ensured arbitration's widespread adoption as method-of-choice in resolving disputes about gas price formulae. Although rules about how to conduct arbitration are growing more complex, arbitration is a process with a long pedigree and an essentially "rudimentary" character.²³ This paper aims to bring that character back to the forefront in gas price disputes.

A *Arbitration Defined*

Arbitration is a private dispute resolution process chosen by the parties to resolve disputes without recourse to regular courts.²⁴ Parties select an independent third party as arbitrator to judge the dispute on its factual and legal merits.²⁵ Arbitration's private character has several practical implications. The most important are that costs, including arbitrator fees, are shared by parties,²⁶ and that proceedings are confidential.²⁷ Last, the process is fundamentally contractual.

Though parties control applicable process, arbitration still relies on national laws and international treaties.²⁸ As an adjudicative legal process there can be rules of evidence regulating expert testimony, discovery, hearings and other aspects of curial procedure.²⁹ Parties can choose which laws apply and may dispense with all

20 Richard Power "Gas price reopeners – is there a better way?" *International Arbitration 1/3LY* (issue 7, Clyde & Co, United Kingdom, 16 June 2016) at 12; Marco Loreface "Crossroads in Gas Price Review Arbitrations" in Rowley, Bishop and Kaiser, above n 13, at 161.

21 Doak Bishop, Eldy Quintanilla Roche and Sara McBrearty "The Breadth and Complexity of the International Energy Industry" in Rowley, Bishop and Kaiser, above n 13, at 1. See again Rosen and Cazier-Darmois, above n 13, at 260.

22 Mark Levy and Rishab Gupta "Gas Price Review Arbitrations: Certain Distinct Characteristics" in Rowley, Bishop and Kaiser, above n 13, at 173.

23 Fouchard *L'Arbitrage Commercial International* (1965), cited in Alan Redfern and Martin Hunter *Law and Practice of International Commercial Arbitration* (4th ed, Sweet & Maxwell, London, 2004) at 2.

24 Blackaby and Partasides, above n 11, at [1.04]–[1.05].

25 Donald Gifford *Legal Negotiation: Theory and Practice* (2nd ed, Thomson/West, St Paul (MN), 2007) at 225–228.

26 Blackaby and Partasides, above n 11, at [1.123]–[1.125].

27 At [1.105], and see generally ch 2(g) for a discussion of confidentiality in arbitration.

28 At [1.08].

29 At [1.07].

or none of these as their legal and commercial interests favour.³⁰ Besides conforming to relevant *lex arbitri* (laws of the place of arbitration) and the governing contract, the only basic requirement is that arbitrators are independent and impartial between parties.³¹

Independence and impartiality are especially important because there are limited grounds to appeal an arbitral award. Though the precise rules vary by jurisdiction, defects of jurisdiction or process, error in applying law, and incongruence with the enforcing state's public policy objectives are general grounds for challenging an award.³² Mistake of fact is conspicuously absent as a ground of appeal.³³

Arbitral legitimacy has a contractual pedigree as it is derived from disputing parties' agreement. Among other things, this means an arbitrator's authority is bounded by the terms of the contract. Thus in gas price arbitrations, the precise task arising is ascertainable from the language of the reopener clause, the price formula, applicable law chosen by parties (including laws of interpretation), the arbitration clause, and the context of the reopener clause as one part of a wider agreement. In short, the contractual context is everything.³⁴

B Commercial Function of Reopener Clauses

Commercial practice and parties' particular need to hedge against unknown future economic events strongly justify the development of gas price arbitrations. Reopener clauses exist to secure a proper basis upon which to renegotiate prices over the fifteen years or more of a contract's life.³⁵ In Europe, renegotiations have occurred in response to gas price volatility caused by a "perfect storm" of regulatory liberalisation, demand uncertainty, increased market liquidity, and an oversupply of gas.³⁶

30 "[Arbitration] is not a Procrustean bed, enforcing conformity without regard to individual variation." Blackaby and Partasides, above n 11, at [1.77]–[1.79]. See also arbitral rules which permit parties to contract out of standard *lex arbitri*, for example: United Nations Commission on International Trade Law Arbitration Rules 2010, art 1.1 [UNCITRAL Rules 2013]; American Arbitration Association/International Centre for Dispute Resolution International Arbitration Rules 2009, art 1.1 [ICDR Rules 2009]; International Institute for Conflict Prevention and Resolution Rules for Administered Arbitration of International Disputes 2014, r 1.1 [CPR Rules 2014].

31 Gary B Born *International Arbitration: Cases and Materials* (Kluwer Law International, Alphen aan den Rijn (NL), 2011) at 653. Dependence and partiality can result in annulment or non-recognition of an award: at 1179–1180.

32 Blackaby and Partasides, above n 11, at [10.34]–[10.88].

33 At [10.77].

34 Holland and Ashley, above n 18, at 36.

35 At 29. See also Levy and Gupta, above n 22, at 173.

36 Holland and Ashley, above n 18, at 35.

Expecting long-term commodity prices to be static is unrealistic,³⁷ and it is unlikely either party would agree to static pricing over a decades-long contract term.³⁸ Instead gas sales contract prices are typically expressed as a formula,³⁹ set at a level which covers a producer's costs of capital assets, including the costs of lending used to purchase those assets, operating costs, provisions to account for risks in production, and then a margin of profit.⁴⁰ Producers frequently expect substantial support in the form of long-term take-or-pay purchasing commitments before investing in production facilities,⁴¹ particularly as assignment of their contract's minimum proceeds is often a condition of project financing.⁴²

There is a real prospect of "catastrophic" medium-term shocks which cause the contractual price to diverge from the true market value.⁴³ The utility of reopener clauses is neatly demonstrated by the 1990s British Gas saga, in which the recently privatised company had inherited long-term purchase commitments at prices that were no longer commercially justified.⁴⁴ Delay to the construction of gas-fired power stations undermined demand at the same time as a supply glut, depressing downstream gas prices. Most of British Gas' agreements had no contractual mechanism to amend the price paid—the resulting settlements, being extra-contractual, allowed the suppliers to provide further price competition by directly supplying the British market. As one commentator puts it:⁴⁵

From a legal point of view, the lack of contractual mechanisms in many of the contracts for resolving the price problem was unsatisfactory and could only be resolved by the willingness of the parties to renegotiate their agreements.

Price reopeners seek to avoid this commercial mischief.⁴⁶ Though some contracts in the industry already had price review clauses,⁴⁷ their widespread adoption in most

37 At 30.

38 At 31.

39 Levy and Gupta, above n 22, at 173.

40 Blackett, above n 10, at 7.

41 In a take-or-pay contract, the buyer agrees to buy a minimum quantity of goods every year regardless of their demand or alternatively pays a fee; the buyer takes or pays. These terms arise most frequently in long-term capital-intensive industries like energy production and manufacturing. Their function is to reduce demand uncertainty for the producer over the term of the contract. For more on take-or-pay provisions in the European context, see Directorate-General for Competition *DG Competition Report on Energy Sector Inquiry* (European Commission, SEC(2006) 1724, 10 January 2007) at [125]–[140].

42 Holland and Ashley, above n 18, at 29.

43 At 32.

44 See discussion of British Gas situation, at 31.

45 At 31.

46 Loreface, above n 20, at 162–163.

47 Contract between Sonatrach and Distrigas Corporation regarding sale and purchase of LNG 88-37-NG (13 April 1976), available at <www.fossil.energy.gov> at cl 20.

long-term gas supply agreements is a direct consequence of the British Gas issue.⁴⁸ A reopener clause accordingly reflects a bargain where buyers assume daily volume risk in exchange for sellers accepting the periodic risk of a contract price change.⁴⁹ Where billions are spent on natural gas production and there is significant uncertainty about the future, price formulae represent a conscious allocation of risk while reopener clauses ensure the original bargain is maintained.

C Preferences for Arbitration

Arbitration's appeal in gas price disputes derives principally from a perception of neutrality and that it results in a decision enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).⁵⁰ Other reasons include the confidentiality of awards and proceedings, which are commercially sensitive, and the ability to control procedure to both parties' satisfaction.⁵¹ No procedure will suit parties that does not have these three features in some way.

Gas price disputes are frequently cross-jurisdictional and international in nature.⁵² Arbitral awards are easier to enforce across borders as they are, in principle, enforceable in any of the 156 jurisdictions party to the New York Convention.⁵³ This importantly avoids any issue inherent to seeking contractual enforcement in national courts, including that the courts may apply different laws of contract. Final judgment and resolution of pricing disputes in this way is a major argument for arbitration in any international commercial context—gas is no different.⁵⁴

48 Holland and Ashley, above n 18, at 32.

49 Steven P Finizio "Destination Restrictions and Diversion Provisions in LNG Sale and Purchase Agreements" in Rowley, Bishop and Kaiser, above n 13, at 185.

50 Blackaby and Partasides, above n 11, at [1.101]–[1.102]. See also Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 38 (opened for signature 10 June 1958, entered into force 7 June 1959).

51 At [1.104]–[1.105].

52 Bishop, Roche and McBrearty, above n 21, at 1–13.

53 Power, above n 20, at 12; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art 3. Sometimes, a dispute referred to arbitration may be required by the laws of the state in which enforcement is sought to show that it is "international" rather than domestic. This may be done by reference to the nature of the dispute, the nationality of the parties or by agreement of parties: see discussion of the internationality of disputes in Blackaby and Partasides, above n 11, at [1.19]–[1.34].

54 Some states may elect to only apply the New York Convention to legal differences which are "commercial" in terms of that state's domestic law (art 1.3). Argentina, China, and India are three examples of such states: Blackaby and Partasides, above n 11, at [1.35]–[1.38]. It is unclear in what sense gas supply agreements would not be "commercial" but the general limitation ought to be noted.

Another key reason is that awards bind regardless of parties being able to strike a deal.⁵⁵ Increases in arbitration demonstrate the difficulties of coming to agreements despite the best attempts of sophisticated negotiators. Methods whose results depend upon parties, like negotiation, are not suitable in gas price reviews because they cannot break impasses should they arise. Binding adjudication is needed as a backstop to parties' disagreement.

The best alternative to arbitration, in terms of a final and binding result, is likely to be litigation in a national court. However, litigation is also the only process frequently open to the public. Commercially sensitive information about the energy markets become public knowledge when filed in pleadings for a case; parties favour arbitration precisely to avoid this disclosure.⁵⁶ Indeed, many known price reopener clauses are ones exposed by the court process.

Arbitration's procedural advantages over litigation allow for the prompt consideration of relevant information.⁵⁷ Gas price reviews typically turn on technical questions of contractual interpretation and changes in market conditions. The profoundly commercial nature of gas price arbitrations is seen to need a tailored response, involving the legal expertise of a panel of lawyers who are supported by flexible rules of procedure and heavy reliance on economic experts. National judicial systems are unlikely to be flexible enough to cope.

In the international energy arena, it is misleading to say that arbitration is cheaper than litigation would be because parties are responsible for all costs of arbitral proceedings—and, for significant or complex cases, expenses can easily rival and exceed national litigation.⁵⁸ Parties will always wish to reduce costs, yet in light of the other advantages this may be less of a concern.⁵⁹

55 An arbitral award will need to conform to the New York Convention and *lex arbitri*. Besides mandatory rules of contractual interpretation and the like, a dispute will have to be "international" and "commercial" within the meanings of the seat's domestic laws. "Awards by consent", defined at n 202, also bind parties.

56 Levy and Gupta, above n 22, at 178.

57 Power, above n 20, at 12.

58 Blackaby and Partasides, above n 11, at [1.123]–[1.124].

59 At [1.125]. "In international arbitration, the principle of finality is typically given more weight than the principle of correctness": Rudolf Dolzer and Christoph Schreuer *Principles of International Investment Law* (1st ed, Oxford University Press, Oxford, 2008) at 277, cited in Luttrell, above n 2, at 274.

D Commercial Context

Long-term trends in the European gas market are causing price volatility.⁶⁰ Historically, the true price of gas has been difficult to parse due to an absence of infrastructure permitting liquid 'spot sales' and the commercial sensitivity of gas price formulae. Older formulae are typically linked to oil as a substitute for the true market price of natural gas.⁶¹ In Europe, where oil-linked formulae are common, oil price fluctuations over the past decade have reduced long-term stability.⁶²

Concurrent liberalisation has also led to the breakup of monopoly suppliers,⁶³ reducing prospects of cartel behaviour.⁶⁴ Mandated relaxation of destination restrictions has increased short-term trades and competition within the European common market.⁶⁵ The rise in short-term trades increased price information at natural gas "hubs", providing more accurate indices for gas price formulae and, also, reducing the need to use them. Consequently, newer formulae which do not rely on oil products can have substantially different expressions from their predecessors.⁶⁶ Increased environmental regulation has also pushed demand for other fossil fuels down,⁶⁷ and the long-term impact of environmental policy suggests long-term prognoses for gas demand in Europe could be poor. An overall marked decline in the gas price has encouraged buyers to seek price review in increasing numbers.⁶⁸

Infrastructural development in Europe follows the Anglosphere experience where contracts for sale of gas tend to be shorter in term.⁶⁹ Shorter-term contracts and spot

60 Levy and Gupta, above n 22, at 173–174.

61 At 173; Loreface, above n 20, at 161.

62 Brent crude oil prices were USD \$60 per barrel in early 2007, climbing to \$140 in mid-2008, crashing to around \$50 by end 2008 and then rising again; recently, prices have declined from \$110 per barrel in June 2014 to \$55 by January 2017: Jeremy Wilson and William Lowery "Trigger Happy": Considering the Requirements of Your Price Review Clause" (19 February 2015) Inside Energy and Environment <www.insideenergyandenvironment.com>; see current oil price at "Crude Oil Brent" (28 January 2017) NASDAQ <www.nasdaq.com>.

63 Blackett, above n 10, at 8.

64 At 8. For discussion on cartel behaviour and market price levels, see Karl E Case, Ray C Fair and Sharon M Oster *Principles of Economics* (10th ed, Pearson, Harlow, 2012) at 329–330.

65 Destination restrictions prevent purchasers from selling gas in other markets and reduce buyers' ability to compete with sellers in those markets: see generally European Commission "Commission confirms that territorial restriction clauses in the gas sector restrict competition" (press release IP/04/1310, 26 October 2004) and Eleonora Wåktare "Territorial restrictions and profit sharing mechanisms in the gas sector: the Algerian case" *EC Competition Policy Newsletter* (Luxembourg, 2007-3) at 19–20.

66 Holland and Ashley, above n 18, at 30.

67 See generally Hassan Yousaf "Emission Trading Scheme: Risks & Strategies for the Norwegian Petroleum Industry" (MSc Thesis, University of Nordland, 2012) at 42–43, 58.

68 See generally Blackett, above n 10, at 8

69 Holland and Ashley, above n 18, at 41.

sales linked to "hub" prices are more reflective of a fair market value.⁷⁰ More accurate "hub" prices allow continuation of a suspected decoupling between oil and gas prices,⁷¹ because linking remaining long-term contracts to them is a more direct indication of natural gas prices. The linkage to oil is no longer necessary.⁷²

Long-term demand uncertainty is more acute due to increases in the gas supply. United States shale production increases competition in the European and Asian markets, and with renewable sources of energy puts further downwards pressure on prices.⁷³ Where there are a larger number of suppliers willing to trade on short-term contracts and compete on price, sellers have incentives to reduce pace of price decreases; buyers similarly place a lower premium on the security of longer-term supply contracts.⁷⁴ It is possible that contractual links to oil prices will remain for some strategic reasons, but as the European market matures this appears less likely to be necessary.⁷⁵

Practitioners are equivocal over whether the rise in price review arbitrations is a passing phenomenon.⁷⁶ What the future holds depends on the world economy and the politics underpinning it more than anything else. Although there is a movement to price transparency worldwide, many regions are still dominated by small groups of energy suppliers capable of engaging in cartel behaviour.⁷⁷ Advances seen in Europe and the United States may simply remain there.

Notably, indexation of gas prices to oil products perseveres in the Asia Pacific.⁷⁸ Facing conflicting demand estimates,⁷⁹ Japanese regulators have indicated that they

70 At 41; Jonathan Stern and Howard Rogers *The Transition to Hub-Based Pricing in Continental Europe: A Response to Sergei Komlev of Gazprom Export* (Oxford Institute for Energy Studies, February 2013) at 4–5.

71 See generally Jonathan Stern *Continental European Long-Term Gas Contracts: is a transition away from oil product-linked pricing inevitable and imminent?* (Oxford Institute for Energy Studies, NG 34, September 2009) at 12–16.

72 Stern and Rogers, above n 70, at 3.

73 Holland and Ashley, above n 18, at 35.

74 At 35 and 41–42.

75 But see that Russia has strong strategic incentives to retain oil-linked prices because they tend to result in higher prices—yet most European purchasers want to see "hub"-based prices: see generally Stern and Rogers, above n 70. Compare generally Elena Mazneva "Gazprom Mulls \$6 Billion Asset Sales, Dividend Freeze" *Bloomberg* (online ed, 23 January 2017).

76 Holland and Ashley, above n 18, at 41–44.

77 At 43.

78 Jonathan Stern "International gas pricing in Europe and Asia: A crisis of fundamentals" (2014) 64 *Energy Policy* 43 at 46.

79 See generally Jude Clemente "Why Japan's Liquefied Natural Gas Demand Will Increase" *Forbes* (online ed, 25 September 2016) but compare the effect of nuclear generation restarting post-Fukushima in Huileng Tan "Natural gas crashes as Japan demand wanes, Australia supply takes off" *CNBC* (online ed, 2 March 2016).

are investigating destination restriction clauses to see if they impede competition.⁸⁰ Should the Japanese Fair Trade Commission decide as the European Commission did,⁸¹ the reliability of "anecdotal evidence" suggesting disinterest in liquidity will be tested.⁸² If mistaken, the medium-term may see gas price arbitrations continue to play an important role in the energy sector.

E Political Context

Energy is also a political issue. Rising awareness of energy security will affect the demand and supply of gas. A state has energy security when it has access to what it considers to be an affordable and reliably available supply of energy that meets its energy consumption needs.⁸³ Increasing awareness of energy dependency, unrest in some producer states, rising energy demands from developing countries, and the depletion of fossil fuel stocks significantly contribute to states' uneasiness.⁸⁴

Worldwide demand for energy is predicted to grow nearly 50 per cent between 2009 and 2035.⁸⁵ Global demand for natural gas is projected to grow 2.3 per cent year-on-year until 2030, largely driven by developing countries and in particular India and China.⁸⁶ This reflects that natural gas is a key non-renewable resource for the industrial sector and electricity generation.⁸⁷ Part of this demand increase is due to natural gas' potential to be a "bridge" to a lower-carbon future,⁸⁸ for example, liquid natural gas is being investigated as an alternative fuel for trains and automobiles.⁸⁹ Potential risks from nuclear power production further raise demand.⁹⁰ Despite advances in renewable energy technologies, innovations improving the exploitation of oil and gas products may keep natural gas competitive for decades.⁹¹

80 Stapczynski, Inajima and Murtaugh, above n 14. The relevant regulations are: Act on Prohibition of Private Monopolization and Maintenance of Fair Trade 1947 (JP), chs 2 and 3(2); Treaty on the Functioning of the European Union, above n 4, arts 101–102.

81 European Commission, above n 65.

82 Holland and Ashley, above n 18, at 42.

83 Itay Fischhendler and Daniel Nathan "In the name of energy security: the struggle over the exportation of Israeli natural gas" (2014) 70 *Energy Policy* 152 at 153–154.

84 At 152. See for example discussion of increasing European reliance on Russian natural gas in Mathias Reymond "European key issues concerning natural gas: Dependence and vulnerability" (2007) 35 *Energy Policy* 4169 at 4169–4170 and 4176.

85 Chu and Majumdar, above n 3, at 294.

86 Reymond, above n 84, at 4170.

87 Apergis and Payne, above n 7, at 2759.

88 At 2759; see also Golpe, Carmona and Congregado, above n 9, at 594.

89 Chu and Majumdar, above n 3, at 296.

90 After the 2011 Fukushima disaster and closure of nuclear plants, Japanese gas consumption increased: Howard Rogers *Asian LNG Demand: Key Drivers and Outlook* (Oxford Institute of Energy Studies, NG 106, April 2016) at 6.

91 Chu and Majumdar, above n 3, at 302.

A need for energy security is sharply illustrated by the depressive effects of the 1970s' economic stagflation caused when Middle Eastern oil producers nationalised production and cut world supply;⁹² oil shortages observed then are examples of economic disruptions that importing states seek to avoid. Exporting states have an interest in exploiting any increase in demand that stems from a desire to increase energy interdependence.⁹³ Energy security is frequently steeped in nationalism and a discourse of militarisation,⁹⁴ and may not support market-friendly practices.⁹⁵ The overall effect of securitisation politics is unclear but unlikely to favour buyers.

F Future of Arbitration in Gas Price Disputes

Arbitration is effectively the "only game in town" for international commercial disputes.⁹⁶ Yet, not considering arbitration's full implications for the dispute at hand may lead to uncommercial results outside the scope of what parties truly intend.⁹⁷ Parties' seeming default to arbitration does not entirely reflect the distinctive nature of gas price disputes,⁹⁸ and is risky in light of demonstrated party preferences for contestable and complex legal agreements.⁹⁹ Arbitral tribunals are not disposed to treat contract ambiguities with necessary sensitivity because of an implicit undercurrent of fault attribution inherent to adjudication. Confidentiality and a need for factual emphasis in price reviews both complicate the picture.

The divergent interests of producers and purchasers means there is limited industry consensus on these issues.¹⁰⁰ However, arbitration may have something to learn from its less adversarial competitors when dealing with often narrow, often technical, often no-fault disputes about the market value of gas.

Natural gas' future role varies by region and depends on technological progress, climate policy and political developments.¹⁰¹ Where demand for gas increases

92 Stagflation occurs when prices rise at the same time production decreases: Case, Fair and Oster, above n 66, at 448–449. See also Fischhendler and Nathan, above n 85, at 153.

93 Holland and Ashley, above n 18, at 43.

94 See generally Fischhendler and Nathan, above n 85, at 156–160.

95 It is a mixed relationship: see generally Shah M Tarzi and Nathan Schackow "Oil and Political Freedom in Third World Petro States: Do Oil Prices and Dependence on Petroleum Exports Foster Authoritarianism?" (2012) 29(2) *Journal of Third World Studies* 231.

96 TT Landau "Arbitral Lifelines: The protection of jurisdiction by arbitrators" (paper presented to 18th ICCA International Arbitration Congress, Montreal, 2006) quoted in Blackaby and Partasides, above n 11, at [1.133]. See also Part V.

97 Levy and Gupta, above n 22, at 181.

98 See generally Levy and Gupta, above n 22; see also Part IV.

99 See Part III.

100 Levy and Gupta, above n 22, at 181; see generally Stern, above n 80, at 44–47.

101 For example, increased oil and gas production in the Arctic may mean a greater need for long-term contracts: see generally Øistein Harsem, Arne Eide and Knut Heen "Factors influencing future oil and gas prospects in the Arctic" (2011) 39 *Energy Policy* 8037.

relative to available supply, buyers' readiness to adopt long-term contracts will likely increase (and vice versa). Anything which results in more long-term contracts has, in theory, a reasonable chance of increasing the prospects of arbitration in case of exogenous market shocks. Even if gas price arbitrations pass along in the Atlantic Basin, the Pacific Basin will likely see increased activity if Japanese liberalisation spreads to other states in its region. Gas price review arbitrations will probably be a fixture of international gas contracts for some time.

III Preserving Arbitration's Contractual Character

As discussed above, arbitration is supposed to be the best dispute resolution process for gas price renegotiations; yet, to paraphrase a maxim of strategy, theory infrequently escapes contact with reality entirely intact.¹⁰² While arbitration has some natural advantages over its competitors, it is increasingly less able to fulfil its intended role because arbitrators overestimate the importance of parties' language in the initial contract. This is insensitive to the agreement's true nature, and for a contractual method of dispute resolution the importance of this critique is hard to overstate.

Arbitrators' eagerness to use wide powers of review based only on the initial contract means there is a non-zero risk parties' intentions at the time of review are undermined. This would represent stepping outside of the bounds of the properly understood contractual mandate. This Part explores how that could be so, by addressing the issues of what contracts mean and whether a focus on semantics (instead of a permissive interpretive approach) can bring that meaning about.

These issues are discussed primarily in terms of a common law legal approach, but the contract and *lex arbitri* determine applicable laws of interpretation. Yet, regardless of what rules apply, a semantic focus is to focus on the wrong point in time. That endangers the contractual character of reopener clauses and it is for that reason that a permissive interpretive approach should be expected.

A Contractual Basis

Arbitrations of gas price disputes revolve around the reopener clause. From existing examples, a reopener provision is likely to include a trigger for its use, indication of the scope of its applicability, what factors must be considered in a price review,

¹⁰² "No plan survives contact with the enemy" Helmuth von Molke the Elder, paraphrased in Correlli Barnett *The Sword-bearers: Studies in Supreme Command in the First World War* (1st ed, Eyre & Spottiswoode, London, 1963) at 35.

and what procedure the review will follow. Commercial sensitivity of price formulae reduces the number of contracts publicly available to draw on, so discussion of the contractual examples in this paper cannot be assumed to be representative. However, academic commentary treats these examples as typical of the various positions taken by market actors.¹⁰³

1 Trigger conditions

One of the first and most important parts of a reopener clause is the "trigger", or condition, that must occur before parties can give notice of a price review. If an arbitral tribunal does not find the contractual trigger is satisfied, it lacks jurisdiction to adjust the gas price.¹⁰⁴ Triggers often require some combination of a change in the underlying energy market that affects the value of gas supplied, where the change in value is large enough to justify change in the price formula.¹⁰⁵ A reopener clause exists to permit negotiations designed to preserve the merits of the original bargain. The purpose of a trigger is to regulate that power.

Relevant changes are usually required to be "substantial" or "significant".¹⁰⁶ Triggers drafted so are broadly discretionary because parties have an option, once the trigger is satisfied, to request a meeting. Discretionary triggers are the most common form of trigger and arbitral proceedings frequently centre on whether their threshold conditions have been met.¹⁰⁷ Determining whether a trigger condition is satisfied is more complicated in practice than it may appear.

It is less common for a trigger to operate automatically.¹⁰⁸ In *Sonatrach*, the parties had arranged to meet every four years.¹⁰⁹ Other agreements initiate a price review when the contract price deviates from a set standard. In *Esso Petroleum*, the price was reviewable if it deviated from the contractual comparator more than a certain percentage.¹¹⁰ *Sonatrach* is an example of a periodic review contract, and *Esso*

103 See for example: Loreface, above n 20, at 163; Holland and Ashley, above n 18, at 34.

104 Holland and Ashley, above n 18, at 37.

105 Loreface, above n 20, at 164.

106 See for example *Atlantic LNG*, above n 19, which is also quoted in Levy and Gupta, above n 22, at 176.

107 At 176.

108 At 175.

109 "The parties agree to meet regularly to proceed with the revision of the Contractual Sales Price [...]. They shall so meet for the first time in the first quarter of the year 1980 and thereafter every four (4) years." Contract between Sonatrach and Distrigas Corporation, above n 47, at cl 20.

110 Notice of a price review could be given if the party giving notice "is reasonably satisfied in good faith that the Energy Charge...is [at review] eighty five per cent or less than the Comparator", the comparator being the market price of natural gas: *Esso Petroleum & Production UK Limited v Electricity Supply Board* [2004] EWHC 723 (Comm) at [6]–[7].

Petroleum a mechanical review. Sometimes a substantial change causing hardship to one party is necessary.¹¹¹ Last, it is comparatively rare for parties to include a right to initiate a limited number of reviews at any time during the contract period ("wild card reviews").¹¹²

2 Scope of price review process

The precise scope of a price review is a secondary issue of jurisdiction, defining the full extent of parties' powers to renegotiate price within the contractual framework. They define whether the review permits rewriting of the price formula, limited review to reflect only changes in the market and whether review extends to language of the reopener clause itself.¹¹³

Examples of contractual guidance on the scope range from a wide "revision of the Contract Price provisions",¹¹⁴ to mere "revision of the price",¹¹⁵ or a more clear "adjustment of the prices... or in the price revision mechanisms".¹¹⁶ The first example entitles parties to appraise all aspects of the review process in the initial stage. The second is limited to a consideration of the price. Though a slightly different kind of price review dealing with economic hardship, the third example is better than the first because it specifically permits review of the provisions, including by third party experts. These examples show third party interveners must have close regard to the variances of the case at hand.¹¹⁷

A third party intervener's authority is directly defined by the review's scope. A wide power, for example to rewrite the price formula entirely rather than changing multipliers or price floors, can be more factually complex. This suggests the potential for commercially sensible results and error are both increased.¹¹⁸ The risk-rewards considerations expand equally but the purpose of a price review is to maintain the original bargain, not rewrite it entirely. As such, a risk-averse party

111 "If...there has been any substantial change in the economic circumstances relating to this Agreement and...either party feels that such change is causing it to suffer substantial economic hardship" then parties initiate a review to see what changes are "justified in the circumstances in fairness to the parties to offset or alleviate the said hardship": *Superior Overseas Development Corporation and Philips Petroleum (UK) Co Ltd v British Gas Corporation* [1982] 1 Lloyd's Rep 262 (CA), cited in Holland and Ashley, above n 18, at 34 [*Superior Overseas*].

112 Blackett, above n 10, at 8.

113 Holland and Ashley, above n 18, at 38–39.

114 *Atlantic LNG*, above n 19, at [4].

115 Contract between Sonatrach and Distrigas Corporation, above n 47, at cl 20.

116 *Superior Overseas*, above n 111. Note that this contract only operates in case of hardship. It was also the only example seen which referred a gas price dispute to expert determination.

117 Holland and Ashley, above n 18, at 39.

118 At 39.

may see wider powers as having greater risk of coming to an uncommercial result. Whether that should be possible depends on parties' appetites for risk, but the ability of arbitrators to rewrite agreements in this way excites academic controversy.¹¹⁹

3 Factors affecting the price review

Once the scope of review and existence of a trigger event is confirmed, parties turn to which factors guide them. Parties may be required to have regard to a large range of economic indicia. These can include levels and trends of gas prices sold in competitive contracts, characteristics of the product such as quality, quantity and reliability, or competing forms of energy such as oil or renewables.¹²⁰ These criteria are things parties initially considered would relevantly affect the market value of gas at the time of dispute and must be considered. Examples reviewed seem to treat these lists of factors as 'mandatory relevant considerations' rather than a closed list.

Some clauses frame factors generally, referring to "economic circumstances then prevailing" on the market,¹²¹ or changes that are "justified in the circumstances in fairness... to offset or alleviate the said hardship [caused by the trigger]."¹²² Some commentators propose an even wider framing of "relevant significant changes... which affect the value" of gas.¹²³ A broader formulation permits more autonomy at the time of dispute, but may raise issues in arbitration since the contract will offer less guidance. Buyers typically expect a price level that is competitive downstream assuming sound application of business principles.¹²⁴ This reflects the upstream nature of many gas price reviews, because in a retail or downstream context such a guarantee is less needed—household consumers do not negotiate price.

Arbitrators and experts must be careful to consider relevant factors only in relation to the proper time. A factor which has been considered in full in a previous price review, or will be subject of later price reviews, cannot be considered unless parties have agreed otherwise. This avoids double-counting of the same market events.

119 See generally Blackett, above n 10, at 10.

120 *Atlantic LNG*, above n 19, in this case cited in Holland and Ashley, above n 18, at 33.

121 Contract between Sonatrach and Distrigas Corporation, above n 47, at cl 20.

122 *Superior Overseas*, above n 111, at 34.

123 Holland and Ashley, above n 18, at 34.

124 See discussion of level of margin afforded by contracts at Lorefice, above n 20, at 171–172.

4 Process by which reviews occur

Procedural requirements of the reopener clause are the final feature. Most examples reviewed for this paper require some kind of notice to begin negotiations.¹²⁵ One did not, but because it required periodic meetings instead a notice requirement would be superfluous.¹²⁶ Following notice, a period is normally stipulated for discussion and followed by some kind of third party invention if agreement is not reached. Arbitration was most common in examples reviewed. Sometimes the specific arbitral agreements are included in a separate standard arbitration clause so as to reduce text complexity. Overall, process requirements seem to lack detail—notice and a method of final resolution are often all that is included.

B Semantic Emphasis Undermines the Contract

Commercially sophisticated parties are drafting reopener clauses widely in order to account for their uncertainty about the future.¹²⁷ Assuming instead that the semantics of the contract reflect a restrictive approach by parties, as 'objective' contractual interpretation does, undermines the purpose of reopeners as a contractual means to ensure future co-ordination and overstates the depth of agreement at the initial point of contracting. Parties are leaving open the possibility of re-agreement at the time of review. A permissive approach to contractual interpretation at arbitration takes seriously both what parties intended initially and that parties have not fulfilled this intention at the time of review.

1 Obligations defined by agreement

Contracts indisputably create obligations through party autonomy. Their moral valence and normative force is derived from the intention to be bound, and so the enforcement of contracts is frequently justified as holding people to their promises.¹²⁸ Contractual meaning, and therefore the nature of the obligations parties assume, is more contested.¹²⁹ The nature of language is central to this debate.

125 *Superior Overseas*, above n 111; *Atlantic LNG*, above n 19; *Esso Petroleum & Production UK Limited v Electricity Supply Board*, above n 110; and the typical clause as suggested by Holland and Ashley, above n 18, at 34.

126 Contract between Sonatrach and Distrigas Corporation, above n 47.

127 Loreface, above n 20, at 163–164.

128 Keith, above n 1, at 5

129 See for example an argument for a stronger objective approach in George Leggatt "Making Sense of Contracts: The Rational Choice Theory" (2015) 131 LQR 454.

However, a key directive of contractual interpretation is that text cannot be taken out of context without doing violence to its meaning.¹³⁰

Both civil and common law generally seek to give effect to the common intention of the parties.¹³¹ This often begins with the semantics of the text for evidentiary reasons.¹³² For example, in England contracts are read to mean what a reasonable person, knowing what the parties knew, would interpret it to mean in light of its context and commercial purpose.¹³³ But:¹³⁴

[I]f a detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

Therefore, while the text of an agreement matters it is not the final word.

There is a difference between the aim of interpretation and the tools and methods open to fulfil it. Evidence available for contractual interpretation will depend on the governing law selected by parties in their choice-of-law clause. In English law, for example, focus is on plain meaning of the text; previous negotiation of the parties and declarations of subjective intent are not admissible (unless seeking rectification of the contract).¹³⁵ However, to interpret what parties to a contract meant is to explain, expand upon and translate their words.¹³⁶ Words do not have a single meaning, even in the dictionary,¹³⁷ and so interpretation must be approached

130 Johan Steyn "The Intractable Problem of the Interpretation of Legal Texts" (John Lehane Memorial Lecture 2002, University of Sydney, 25 September 2002), (2003) 25 Sydney Law Review 5 at 6–8.

131 See for example Christopher Staughton "How do the courts interpret commercial contracts?" [1999] CLJ 303 at 304–306; *The Principles of European Contract Law* (Commission on European Contract Law, 2002) at art 5.101(1); *UNIDROIT Principles* (International Institute for the Unification of Private Law, 2010) at art 4.1.

132 See generally James Kessler "Objectivity and Subjectivity in Interpretation" in Anne Wagner and Sophie Cacciaguidi-Fahy (eds) *Obscurity and Clarity in the Law: Prospects and Challenges* (Ashgate, Aldershot (UK), 2008) at 32–33.

133 See generally *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL); see also *Chartbrook v Persimmon Homes Limited* [2009] UKHL 38; compare similarly *Vector Gas v Bay of Plenty Energy* [2010] NZSC 5 at [19]–[26].

134 *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 (HL) at 201, per Lord Diplock.

135 Joshua Thomson, Leigh Warnick and Kenneth Martin *Commercial Contract Clauses: Principles and Interpretation* (Thomson Reuters, Sydney, 2012) at [1710]; *Vector Gas v Bay of Plenty Energy*, above n 133, at [19] per Tipping J.

136 Keith, above n 1, at 3.

137 Oliver Wendell Holmes "The Theory of Legal Interpretation" (1899) 12 Harvard L Rev 417, quoted in Keith, above n 1, at 3.

systematically but sensitively. Contractual interpretation is considered to be an objective process (despite its noticeable scope for coming to different results).¹³⁸

2 Reopeners contain contestable agreements

Focussing on the technical meaning of a price reopener clause is to put too much emphasis on parties' drafting decisions at the time of contracting. Acting without knowledge of the future, parties agreed to the possibility of price renegotiations. Taking a narrow interpretive approach on matters of law, to frustrate this agreement, undermines the reopener's commercial function of ensuring future co-ordination by frustrating renegotiations.

Limiting the applicability of a commercial common-sense approach to interpretation and preferring narrow interpretations makes most sense if reopener clauses have a plain meaning. The following clause is not plain:¹³⁹

If at any time either Party considers 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, if after a price review, at the time of that price review] and the Contract Price [...] does not reflect the value of Natural Gas in the Buyer's end-user market...

This clause is readable, certainly, but not clear in its application.¹⁴⁰ To parse its meaning, and apply it, one must appreciate the nature of "control", what sort of diligence is "due" on the facts, the extent to which "substantial" qualifies the content of "change", and what sort of expectations are "reasonable" in the circumstances.¹⁴¹ The best place to look is the context of the agreement.¹⁴²

For this contractual clause to bind 'as it reads' (in essence 'objectively') it ought to be first shown that parties had turned their mind to a general agreement about these

138 Thomson, Warnick and Martin, above n 135, at [1170].

139 *Atlantic LNG*, above n 19.

140 For more on the difference between readability and clarity of application see generally Alexandre Flückiger "The Ambiguous Principle of The Clarity of Law" in Wagner and Cacciaguidi-Fahy, above n 132; but see a warning in *Investors Compensation Scheme Ltd v West Bromwich Building Society*, above n 133, per Lord Lloyd's dissent: "Purposive interpretation of a contract is a useful tool where the purpose can be identified with reasonable certainty. But creative interpretation is another thing altogether. The one must not be allowed to shade into the other."

141 As one example, the complexities of adverbial qualifications are addressed in relation to the adverb "knowingly" in the context of "knowingly" transporting films containing the depiction of minors engaging in sexually explicit activities in *United States v X Citement Video* 513 US 64 (1994) at 68–70.

142 Part II.

ambiguities. It is unlikely this occurred in great detail;¹⁴³ parties are likely to subjectively appreciate the contractual power as being available in the event of more-than-minimal market changes. Insisting on anything more, with interpretation based on conflicting data, contributes to negotiation deadlock.

Without a properly common understanding of the clause, an interpretation which favours the commercial function of reopeners is preferred.¹⁴⁴ An enabling approach is likely to be more consistent with actual agreement subjectively reached and shared than strict technical construction. A more review-friendly interpretation of reopener clauses may be seen as "ignor[ing] the realities of business" by adducing uncertainty to apparently simple terms,¹⁴⁵ but it also gives effect to a more realistic understanding of parties' common intention. Nor does it frustrate the commercial purpose of reopener clauses by using a narrow focus on, for example, whether a putative trigger event is within control of the parties to restrict the availability of otherwise meritorious review.

3 Observations about language and legal clarity

An appreciation of the inherent uncertainty and subjectivity in language animates this perspective. The quest for legal certainty is an important one and it is appropriate that readability is recognised as a central principle of legal drafting.¹⁴⁶ However, complexity of the law and of the world within which the law operates exposes demonstrates that legal certainty, in other words the clear legal application targeted by advocates of the literal approach, is an ideal that cannot be achieved at the same time.¹⁴⁷

Attempting to strike a workable balance between clarity of application and the readability of agreements is the best that can be hoped for. Whether rewriting reopener clauses is a worthwhile endeavour in pursuit of this, over merely taking a permissive approach, remains to be seen.

C Towards Permissive Contractual Interpretation

A lack of information about the future encourages commercially sophisticated parties to draft reopener clauses in ways which are difficult to apply to emerging

143 Kessler, above n 132, at 35; see also Leggatt, above n 129, at 460–465.

144 At 34.

145 Dan Holborow "Contract Interpretation" [2004] NZLJ 272 at 273, cited in Keith, above n 1, at 18.

146 Flückiger, above n 140, at 10.

147 At 23; see also Steyn, above n 130, at 8.

market fluctuations and the future prospects of gas price arbitrations. It is not surprising that parties struggle to settle conflicting interests independently. Nor is it surprising that disagreements about the contractual meaning are a central feature of these disputes.¹⁴⁸

The standard presumption underpinning contractual interpretation is that parties turned their mind to the future and drafted their clauses appropriately. On that basis arbitrators are justified in taking a semantic approach. If parties did not want the arbitrator to have wide powers at review, then they ought not to have agreed to these wide powers (and vice versa). The argument is compelling because it appears to show that parties have pre-agreed to any award the arbitral panel makes, and therefore the price reached by the panel must be sound in terms of its adherence to this normative force of contractual law.¹⁴⁹

Similarly, a typical commercial claim stems from a breach of contractual obligation. The tribunal seeks to establish legal rights, whether they have been met and, in the event they have not, the extent of compensation or damages appropriate to remedy the breach. The process is inherently backwards-looking, concerned only with events as they are at the time a claim is filed. Adjudication is infrequently concerned with the future relationship between the contractual parties, and especially so events that might predate an award.¹⁵⁰

Price reviews are inherently different. Like a normal claim, inquiries into the satisfaction of any trigger conditions and similar are retrospective. Any adjustment will depend on market factors prevailing at that time.¹⁵¹ The evidence considered will frequently be about the state of affairs at that time or what the contract meant at the time of contracting, years prior. Yet the reopener clause's purpose is to prospectively set the contract price.¹⁵² It is a tool to improve co-operation, necessarily looking forward to the future terms of the contractual relationship.¹⁵³

Commercially-sophisticated parties are agreeing to imprecise reopener provisions for a plethora of reasons, but primarily because they do not wish to be bound overly tightly by matters that could not be foreseen at the time of contracting.¹⁵⁴ Unpredictability of the future means that reopener clauses must be prospective and

148 Levy and Gupta, above n 22, at 175–177.

149 Leggatt, above n 129, at 466–467.

150 Levy and Gupta, above n 22, at 179.

151 At 177.

152 At 179.

153 Loreface, above n 20, at 167–169.

154 At 163–164.

general in nature; it is not possible to fully account for all matters in the contract. While parties to long-term gas supply agreements are unwilling to engage in frequent and unjustified price reviews to ensure maximum price stability, it is hard to determine in advance the kind and extent of changes that will arise and, importantly, which party price fluctuations will favour in a fifteen-year period or more. An imperfect information context puts security and continuity of the parties' relationship in sharp relief and gives it added importance.

A strong emphasis on initial intention entailed by semantic emphasis effectively ignores, and thus steps outside, the bounds of what parties intend at the time of renegotiation. It undermines their nature. If arbitration puts significant emphasis on the terms of a contract because that reflects party agreement, arbitrators ought to take a permissive interpretation of the contractual terms unless parties explicitly direct otherwise.

Refocussing dispute resolution processes on helping parties to seek independent agreement more effectively respects original agreement of the parties. It also reflects the special characteristics of the dispute, including its no fault nature as discussed in Part IV. Where parties still cannot agree constraining the award to a range where parties share the 'loss', for example by "high-low" arbitration,¹⁵⁵ also better reflects party wishes at the time of the specific dispute. The prospects of these and other procedural changes is discussed in Parts VI–VII.

IV Aiming at the Actual Dispute

The most pressing conflicts in gas price reopeners stem from the parties' relationship and what they know about the dispute.¹⁵⁶ These issues manifest in the often 'faultless' nature of these disputes, the centrality of the contractual language, and the pressure to sometimes look ahead in disputes about gas price formulae. These issues are neither the only issues nor arise in every case.¹⁵⁷

Relationship conflicts and asymmetric information suggest a more co-operative approach is likely to be better than a strictly adjudicative process which results in winners and losers. Standard arbitration is not suitable for gas price reopeners as it

155 A party 'loses' to the extent an award is worse than their final negotiating position. Constraining the scope of an award to being between parties' last negotiating position 'splits the loss' by ensuring that each party takes a share of that difference

156 The author records his gratitude to Birte Bruce for her instruction in negotiation and dispute resolution techniques while studying at the University of Copenhagen.

157 Levy and Gupta, above 22, at 181.

encourages the imputation of fault based on clauses that provide little normative guidance.

A *Dispute Resolution as Conflict Management*

Dispute resolution is the effective management of conflict. Each conflict present has the potential to determine how to best solve a dispute. Successful dispute resolution requires understanding precisely what is at stake for parties through an analysis of the hierarchy of objectives for each party. Knowing the other party's interests can lead to integrative potential—solutions that are multi-sum and leave both parties better off than if they strike a competitive bargain or to simply go to arbitration.¹⁵⁸ Having ascertained relative bargaining positions and interests, non-adjudicative dispute resolution is mostly the art of managing conflicts until an agreement is reached.

Conflicts can arise in terms of data, structure, values, interests, and the relationship between parties.¹⁵⁹ Conflicts stemming from structure, values or personalities depend on the specific context of a specific dispute and resist comprehensive definition and management in advance. Conversely, relevant data is 'objective' and outside the scope of negotiation. This means data conflicts are managed by the sharing of data and the understandings formed by them. Only interests are capable of true resolution. Accordingly, dispute resolution should concern itself primarily with the resolution of interests.

1 Value conflicts

Conflicts of value reflect the differences between the distinct ways each party views the world around them. They echo a number of environmental or social factors such as religious belief, cultural context, firm culture and political preferences.¹⁶⁰ Involvement of parties from a greater range of human experiences and cultures leads to a higher potential for value conflict. Domestic arbitrations occurring in 'downstream' energy markets are more likely to involve a common values basis.

Internationally, the difference in value priorities between states or their agents and multinational corporations is the one most likely to arise in an energy arbitration. States are nominally obliged to act in the best interests of their population in addition to any commercial imperative, affecting gas price reopeners as discussed

158 Gifford, above n 25, at 34–35.

159 At ch 2–5.

160 See for example Michelle Maiese "Moral or Value Conflicts" (July 2003) Beyond Intractability <<http://www.beyondintractability.org>>.

in Part II. Multinational corporations are obliged only to reflect the interests of their shareholders.

Though parties must be aware of the risk of a public-private clash, the overarching values dynamic is a commercial one. Once parties are meeting their costs the core commercial interest of profit depends on the relationship between parties at least as much on the price secured. As such, the commercial dynamic is intrinsically relational. It is unlikely that parties can negotiate any conflicts of value rather than work around them. The short timeframe of dispute resolution, and the depth of conviction with which values are usually held, means that these conflicts can only be accepted within the context of a contractual relationship.¹⁶¹

2 Structure conflicts

Structural conflicts arise from unbalanced institutional factors and the potential of those power imbalances to drive or limit negotiations. As Part II outlined, the perceived risk of structural conflicts in gas price negotiations is a key reason neutral processes like arbitration are preferred over national litigation.¹⁶² Parties need to be mindful of comparative power dynamics between them, including any ability of parties to punish each other for non-cooperative behaviour (for example, by not renewing a production license).

In gas price arbitrations, parties are often commercially sophisticated with a wealth of commercial and legal expertise.¹⁶³ While some difference is inevitable, systemic disadvantage is harder to predict. Structural conflicts are difficult to manage because, like values, they predate the dispute; careful awareness may be the best that a party can aspire to.

3 Data conflicts

Data conflicts arise when what parties know about a dispute is materially different ('hard' conflict) or where they interpret their knowledge in different ways ('soft' conflict).¹⁶⁴ Since knowledge is 'objective' it cannot be negotiated, as such, and must be shared to ensure that common understanding of the dispute arises. A difference in what parties know and what they can share with third parties drives some of the key difficulties in gas price arbitrations. The commercial pressure to

161 It is possible to leverage these differences in the negotiation process by choosing a specific framing of an argument, or another similar device.

162 Blackaby and Partasides, above n 11, at [1.99]–[1.100].

163 Loreface, above n 20, at 163.

164 For a discussion of information disclosure, see Gifford above n 25, at 98–99 and 118–120.

keep pricing confidential is a major reason that arbitration is preferred by parties to energy disputes.¹⁶⁵

Data conflicts also arise in the context of a reliance on economic experts—and the difficulty of deploying legal and factual expertise at the same time. Because expert evidence drastically affects the merits of each case in this way, sometimes requiring forecasting, questions of evidence frequently occupy tribunals' time and effort.¹⁶⁶ Consequently, expertise around the valuation of gas is an important part of gas price reviews.¹⁶⁷ It is not infrequent to appoint multiple experts on the same points, to be sure that parties' interests are well represented.¹⁶⁸

4 Relationship conflicts

Relationship conflicts concern clashes of disposition between parties to the dispute, which often do not strictly relate to the substance of the dispute.¹⁶⁹ Much more than simply ascertaining whether the opposing negotiator is credible, managing relationship conflicts requires making a judgment on how discourse and negotiation procedure should be framed to have maximal persuasive effect.¹⁷⁰

Although contracts within which price negotiations occur typically last 15 years or more, the specific price renegotiations are short-term in nature. Personnel handling each side of a gas supply arrangement may not be the same from review to review, meaning that opportunities to manage relational conflicts are more limited. It might be more fruitful to attend to macro considerations such as the culture and policies of the other party, and thus to relationship conflicts at an institutional level. Taking an institutional, long-term view means there is little scope for management of relationship conflicts. Parties must simply be alive to the possibility these conflicts will occur and otherwise handle relationship differences as they arise.

5 Interest conflicts

Interests are what is actually at stake in a given dispute. Each party will have a hierarchy of objectives which they seek to achieve and the goal of negotiators is to

165 Levy and Gupta, above n 22, at 178.

166 Rosen and Cazier-Darmois, above n 13, at 261; Levy and Gupta, above n 22, at 171.

167 Levy and Gupta, above n 22, at 171; Loreface, above n 20, at 169–172.

168 Rosen and Cazier-Darmois, above n 13, at 265.

169 A lack of trust is a key example of a relationship conflict: see generally Kevin Celuch, John H Bantham and C J Kasouf "The role of trust in buyer-seller conflict management" (2011) 64 *Journal of Business Research* 1082 at 1084 and 1086.

170 Gifford, above n 25, at 89–94.

secure as many of these interests as they can.¹⁷¹ The ability to trade-off between interests, to compromise, is why interests are the only part of any dispute that are truly negotiable.

The overarching interest of parties to a gas price renegotiation is commercial. Buyers seek to buy low and sellers seek to sell high. As gas sale agreements are long-term, parties' base interest of profit maximisation is shaped by the need to maintain the business relationship underpinning the trade. This relationship is a significant contributor to making a profit overall. Some parties will opt to periodically take less-than-optimal prices to smooth this relationship and, for example, avoid the costs of arbitration for that reason.

A wider commercial view suggests the most economic outcome is preferred, considering risks and costs as well as price.¹⁷² Importantly, this is not the same as the outcome which most obviously vindicates legal rights. Effective dispute diagnosis must consider this possibility.¹⁷³ De-emphasis of legal rights emphasises the parties' autonomy to reach what they subjectively believe is the best agreement for their business needs.

Knowledge of the legal interests and responsibilities is thoroughly necessary to conduct effective dispute resolution on behalf of a client.¹⁷⁴ However, taking an overly analytical approach to legal elements of gas price disputes may be hindering settlement rather than advancing client interests. The difference is one of slavish focus as against mindful awareness. As Parts II–III generally outlined, the commercial emphasis may suggest parties' interests lie in the avoidance of a binding settlement by arbitration, if possible.

B Arbitration Practice Exacerbates Key Conflicts

Choice of which strategies, tactics and dispute resolution methods a party will pursue depends on the nature of the dispute.¹⁷⁵ In long-term business relationships it is often wise to pursue a more co-operative or problem-solving strategy that focuses on achieving bargains that suit both parties.¹⁷⁶ In contrast, competitive

171 At 47–51.

172 At 51; see also Levy and Gupta, above n 22, at 174–175.

173 Eileen Carroll and Karl Mackie *International Mediation: The Art of Business Diplomacy* (2nd ed, Kluwer Law International, Alphen aan Den Rijn (NL), 2006) at 24–25; Gifford, above n 25, at 1.

174 Gifford, above n 25, at 3–7.

175 At 46 [Table 2-1].

176 At 13–18.

approaches are generally harmful in those situations. If opponents display competitive strategies it will be damaging to be over-accommodating.

An absence of true party fault is a key issue in gas price conflicts.¹⁷⁷ The legal problem is frequently one of interpretation, made worse by disputes about the facts, and parties have simply failed to reach a consensus agreeable to them. This is common business behaviour and would not attract issue outside of a long-term contractual arrangement; and in the absence of agreement, the old price remains in effect. A more creative approach to procedure that reflects the no-faults basis will reduce costs through improving the possibility of collaboration or settlement. Instead, parties are required to grapple with a lengthy and technical process designed to avoid the wrongful imputation of fault. The object of arbitration is at odds with the dispute.

1 Contractual language central to disputes but with consistent problems

There is a data conflict inherent in contractual interpretation. The problems arising from contractual interpretation are a soft conflict because they relate to how the parties understand the same information (the contract). As addressed in Part III, each aspect of a price reopener clause has their own interpretative problems which can accentuate the problems an arbitral panel must deal with, and seem to continually arise even in respect of the same contracts over their lifetimes.¹⁷⁸ The material available to resolve this conflict is determined by parties' choice of applicable laws of contractual construction.¹⁷⁹

Drafting options range from fully discretionary to fully automatic.¹⁸⁰ It is most common for imprecise terms to be used in line with the *Atlantic LNG* example.¹⁸¹ The absence of an industry standard means that the words of the contract, and more importantly their meaning, are the crux of many disputes. Whether the clause is satisfied is ultimately a matter of contractual interpretation as well as fact. The data conflict results from vagueness in the contractual terms.

For example, in the trigger defining the exact boundaries of party control, the meaning of "due diligence", what constitutes a "substantial" change in economic conditions, and what sort of changes ought to have been "reasonably" anticipated

177 Levy and Gupta, above n 22, at 174.

178 At 175.

179 Parties may effectively choose which law of contractual interpretation applies in the contract provided that *lex arbitri* permits this, otherwise *lex arbitri* applies: see Part III and Holland and Ashley, above n 18, at 40.

180 Part III(A).

181 *Atlantic LNG*, above n 19.

by the parties are too difficult to be answerable on the face of each clause. These terms seem to require an additional understanding between parties about their content. Yet arbitrations often turn on such interpretations. The same issues arise in determining factors considered in the quantum of award, such as which market value is the "value" of gas or whether a situation amounts to "hardship".

These questions are a blend of fact and law, with legal argument often closely following expert advice.¹⁸² Expert submissions in gas price arbitration are uncharacteristically lengthy; for parties that seek to minimise costs, this could be seen as inappropriate. There is no obvious fix that would resolve each issue as it arises (though Part VI makes some observations about drafting). It is possible that conflicts about contracts are perpetrated by a tendency amongst some parties to treat widely disparate clauses as saying effectively the same thing.¹⁸³ While it is true reopener clauses serve the same purpose, they are operationalised differently.

2 Parties may not be at fault for dispute

Fault is often central to a contractual claim. Either a party acted wrongly and is directly at fault, or is held liable for some occurrence for which the law determines a response is required (legal fault). This is why contracts (and other areas of law for that matter) are often discussed in terms of vindicating rights and assigning liability.¹⁸⁴

In contrast, fault is usually less relevant in gas price disputes.¹⁸⁵ In analysing this point it is helpful to remember how we may feel if price renegotiations were initial discussions independent of a pre-existing relationship. It seems odd to describe a failure to agree on a price for the sale of goods as a true "fault" against the parties, because there is no obligation to sell in an ordinary case. The situation facing price revisions is, of course, distinct due to the relational nature of a long-term gas supply agreement.¹⁸⁶ Parties might reasonably expect that each other makes a genuine good faith effort to agree. Nonetheless, absent some actionable defect in procedure, mere fact of disagreement cannot import truly adversarial processes.

182 Holland and Ashley, above n 18, at 38; Levy and Gupta, above n 22, at 177.

183 At 176–177, Levy and Gupta seem to suggest that similar but distinct clauses are being used as standard price review clauses. This may be contributing to a "black hole" of contractual interpretation as discussed generally in Stephen J Choi, Mitu Gulati and Robert E Scott "The Black Hole Problem in Commercial Boilerplate" (Law and Economics Research Paper 16-38, New York University, 2016). The confidentiality of awards means it is hard to judge.

184 For example John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016) at 22–30.

185 Levy and Gupta, above n 22, at 174.

186 At 174.

The possibility for faultless dispute is clearly demonstrated in the famous *Atlantic LNG* case.¹⁸⁷ Gas Natural purchased liquid natural gas from Atlantic on terms which, among other things, linked the contract price to gas prices in Spain. After a depreciation in Spanish gas prices, that Gas Natural sold the gas supplied to them in the United States (where prices were rising) was both consistent with the contract and enabled them to receive a better return than selling within Spain as had been originally intended. Atlantic's decision to seek price review reflects a desire to share in these additional profits.¹⁸⁸

Looking to that contract, a price review was only available when (i) the wider economic situation in Spain, outside of the parties' control, had changed (ii) in a manner that was not reasonable to expect, and (iii) the contract price no longer reflected the economic value of the gas supplied. To suggest that either party is at fault for failing to agree about how to address market consequences of Spanish market liberalisation and Gas Natural's decisions to sell its gas in the United States is arguably taking too harsh a position. While other disputes do involve fault, it is evident that not all will. Something more congenial than adversarial ought to be preferred.

C Towards Settlement of Disputes

Arbitration is swift and simple in theory. Commercially rational parties are select a technically competent third party to rule on the law and facts as they apply to the case. In practice, parties array a vast and expensive collection of experts and lawyers in front of a tribunal, also composed of lawyers, and argue competitively to preserve their position. Being lawyers, participants in the process sometimes prefer technical or procedural argumentation rather than argument on the merits of the price review case.¹⁸⁹ Rather than working in an integrative manner, the process is often treated as zero-sum. The result is a lengthy and frustrating process that departs from the intended nature of arbitration.¹⁹⁰

These procedural tendencies, and the frequently technical nature of disputes, lead to rising costs and time due to effective replacement of the litigation process by arbitral processes.¹⁹¹ This "judicialisation" of arbitration probably arises as parties

187 *Atlantic LNG*, above n 19.

188 This desire is understandable given a non-binding understanding between the parties that the gas was for distribution in Spain. See further discussion of the award at n 17.

189 Power, above n 20, at 12.

190 At 12.

191 Carroll and Mackie, above n 173, at 10.

default to the most enforceable method of dispute resolution.¹⁹² A full hearing where parties no longer control the process may not be needed. Suggestions of over-formalism and litigiousness in arbitral situations demonstrate a degree of fragility in arbitration's commercial value.¹⁹³

That commercially sophisticated participants cannot resolve their disputes independently suggests that divisions and positional negotiation are rife. However, the role of divergent interests inhibiting amicable resolution still cannot impute fault to either party. Properly construed, the renegotiation of a gas price formula aims to facilitate the continuation of a mutually beneficial commercial relationship on similarly beneficial terms.¹⁹⁴ Gas price arbitrations ought to reflect this.

Rather than 'picking winners', it might be that the arbitrator's role could be refined to something more in line with 'relationship counselling'. At any rate, an arbitrator is tasked with something different from the ordinary case. Although always constrained to some degree by the terms of the contract, putting the continuance of the commercial relationship first and seeking integrative results is likely to be in the interests of both parties.

V *Alternatives to Arbitration*

Although there are possibly as many alternative dispute resolution processes as parties can dream up, there is no easy alternative to arbitral-type processes. Through a comparison with the major competing dispute resolution processes, arbitration's appeal is made clear. This Part analyses the nature of mediation, negotiation and expert determination. It concludes that because expert determination and mediation are not easily enforceable in foreign courts, these processes are not suitable solutions to the issues outlined by this paper.

A *Negotiation and Mediation*

Negotiation is a process in which "two or more participants attempt to reach a joint decision on matters of common concern where they are in actual or potential disagreement or conflict."¹⁹⁵ Mediation is a framework for managed engagement and negotiation between disputing parties, aimed at facilitating that joint

192 Blackaby and Partasides, above n 11, at [1.118]–[1.122].

193 Carroll and Mackie, above n 173, at 13.

194 Blackett, above n 10, at 9.

195 Gifford, above n 25, at 3.

decision.¹⁹⁶ Professional mediation is often confidential and without prejudice.¹⁹⁷ Mediators act for both parties at once to impartially assist by directing parties' energy towards effective negotiation practices.¹⁹⁸ Classical mediation traditionally takes a facilitative rather than evaluative role.

Mediation is distinguished from arbitration because parties are still fully responsible for reaching their own agreement.¹⁹⁹ Like arbitration, mediation can be contractually provided for as a dispute resolution technique. In such cases the contract will govern the process to the extent that it prescribes one; however, absence of a contractual provision does not prevent later adoption.²⁰⁰

Negotiation and mediation are often a cost-effective first step to resolving disputes about international energy contracts. Because negotiation and mediation are party-centric and party-controlled, the dispute resolution process is more flexible than other pre-negotiated dispute settlement processes. The outcome is fully within the control of the parties, maximising party autonomy. It is easier to streamline the process to fit commercial needs.²⁰¹ This keeps transaction costs lower than many alternatives, frequently takes less time, and allows all parties to move on from disputes quicker.²⁰² So mediation (or conciliation) might enable greater pre-arbitral success, but is unlikely to be a panacea on its own.

Third party intervention is required to resolve gas price arbitrations. Simply advising parties to keep negotiating is naïve, because commercially sophisticated parties have demonstrated consistently that the interests at stake in price reviews are too divergent to easily manage. Even where they do converge, the right granted is a mere contractual right. Some kind of final award must be available for when those disputes break down as they will continue to do. Even though negotiation, mediation or conciliation may not be adequately enforceable, combined with arbitration their advantages may be harnessed through an award by consent.²⁰³

196 Carroll and Mackie, above n 173, at 21.

197 *Guide to Mediation* (online looseleaf ed, Arbitrators' and Mediators' Institute of New Zealand, 2004) at 5–6.

198 Carroll and Mackie, above n 173, at 28. This can raise ethical difficulties when parties are mismatched but see generally Ellen Waldman and Lola Akin Ojelabi "Mediators and Substantive Justice: A View from Rawls' Original Position" (2016) 30(3) *Ohio State Journal on Dispute Resolution* 391.

199 Mark Baril and Donald Dickey "Med-Arb: The Best of Both Worlds or Just A Limited ADR Option?" (2009) *Mediate* <www.mediate.com>, at 2.

200 *Guide to Mediation*, above n 197, at 2.

201 Carroll and Mackie, above n 173, at 10.

202 At 6.

203 If parties settle before an award is finally made that result can be registered as if it were an award: see generally Blackaby and Partasides, above n 11, at [9.39].

B Expert Determination

Expert determination is a process where issues are referred to a technical expert for binding determination, in accordance with a process which otherwise does not amount to arbitration.²⁰⁴ Like arbitration, the basis for expert determinations is contractual and is controlled by parties in that sense.²⁰⁵ The main difference is that the rules for expert determinations are more flexible and inquisitive than arbitrations;²⁰⁶ the *quid pro quo*, despite widespread recognition, is that the law in most jurisdictions treats them differently.²⁰⁷

The right given by a "final and binding" expert determination is really a contractual right enforceable on a similar basis to the rest of the contract; seeking help from a court is required for enforcement and each court will apply its own national laws.²⁰⁸ This introduces the perceived bias issue that led to arbitration being adopted in the first instance in international commerce. If an analogue to the New York Convention encouraging cross-jurisdictional recognition and enforcement of determinations became part of international law, prospects of expert determination as a solution would be significantly better.

Arbitral panels are normally vested authority under a contract's arbitration clause to adjudicate matters of law and fact relevant to the dispute.²⁰⁹ Expert determination is limited to a technical question of fact, such as valuation.²¹⁰ Contractual interpretation is outside the bounds of most expert determinations. Therefore, using expert determinations would reflect an understanding of gas price disputes as being primarily debates about fact rather than law. There are examples of reopener clauses

204 Tómas Kennedy-Grant "Expert Determination and the Enforceability of ADR Generally" (paper presented to Arbitrators' and Mediators' Institute of New Zealand Conference, Christchurch, August 2010) at [10].

205 John Kendall, Clive Freedman and James Farrell *Expert Determination* (4th ed, Sweet & Maxwell, London, 2004) at 6 and 106–109.

206 At 292–204.

207 At 309.

208 In New York, determinations are binding in the absence of "fraud, bad faith or palpable mistake": *Liberty Fabrics v Corporate Properties Associates*, cited in Steven H Reisberg "What is Expert Determination? The Secret Alternative to Arbitration" *The New York Law Journal* (online ed, New York, 13 December 2013) at 1. But see Australia where mistakes will only vitiate a determination if it also shows an excess of or failure to fulfil the contractual mandate: Kennedy-Grant, above n 204, at [43]–[45]. For a general explanation of various jurisdictions see Kendall, Freedman and Farrell, above n 205, at ch 14.

209 Reisberg, above n 208, at 1.

210 An expert's remit usually extends to a specific factual dispute, not law. There are new rules governing the use of experts in proceedings under ICC auspices: Sarah West and Zelandar Gray "ICC Launches New 2015 Expert Rules" *Global Arbitration News* (Baker McKenzie, 8 June 2015); for more information see generally Patricio Grané Labat "Making good use of the new ICC Expert Rules" (paper presented to ICC Conference on International Arbitration, Miami, November 2015).

which provide for expert determinations about price formulae to alleviate economic hardships caused by changes in the market.²¹¹ However, the residual need for contractual interpretation in deciding most gas price review arbitrations means that both legal and commercial skill is required. Were the scope of issues narrower in gas price reviews, perhaps more legally automatic, then expert determination would be a more frequently useful dispute resolution tool.²¹²

Needing legal support suggests that expert determination is less suitable for non-automatic triggers (which require qualitative interpretation) as those contracts are more likely to then involve interpretative error. It could be necessary to allow an expert to seek their own legal advice if expert determination is chosen. Concerns that this would amount to summary arbitration are based on the lack of procedural safeguards.²¹³ This is especially true because, being narrower in scope, the process for expert determination is not seen by some as requiring curial procedure.²¹⁴

Another complaint is that widening of matters an expert can consider to include legal advice effectively undermines the decision made by parties that the matter does not turn on law. In other words, if the parties decide the relevant issues are factual the decision-maker should be confined to considering those.

C Arbitration is Required

Party autonomy is central to the normative authority of the contract to bind each party. Neither party should be bound to pay a revised price that has an overall effect of undermining the original bargain struck without a new consent to such a change; so each revised price must be sensitive to what the parties are saying at the time of dispute. Negotiation or mediation are the best way of respecting that need because only parties can come to a solution. However, as acknowledged, the rise of arbitration suggests that these disputes are so fractious that commercially-sophisticated parties cannot come to independent agreement. Neutral intervention is needed, but that does not mean that standard arbitration is automatically the best response in every case.

The core reason arbitration is preferred in international energy disputes is that their awards are much more easily enforceable in any jurisdiction signatory to the New

211 *Superior Overseas*, above n 111.

212 Levy and Gupta, above n 22, at 177.

213 Power, above n 20, at 13.

214 "Arbitration requires procedural protections appropriate to an adversarial proceeding...The expert, subject to any limitations imposed by the parties in the contract, has inquisitorial powers and can exercise that discretion to gather information from any source that in the expert's judgment is required to resolve the matter." Reisberg, above n 208, at 2.

York Convention. As such, enforcement of any outcome does not depend as heavily on the willingness of any potential 'losing' party to self-enforce.²¹⁵ This introduces an element of certainty and stability to arbitral awards that negotiation and mediation can lack, but may not be enough to account for their advanced speed and flexibility.

Whether arbitration is to be preferred over the alternatives will depend, above all, on business requirements of the client. Choosing to negotiate first will not require the surrendering of a contractual right to seek arbitration. Because expert determination and mediation are not easily enforceable in foreign courts, they are not capable of being suitable solutions to the issues gas price reviews involve.

VI Drafting Future Reopener Clauses

The wide spectrum of issues behind each clause means there may be little value in offering a standard or ideal drafting of a provision. Arbitrators must focus on the words of the contract upon which they are arbitrating, but it is possible to give contractual language too much weight or content. Serious prospects of legal argument remain which may inhibit agreement, which other drafting decisions may avoid. But legal drafting, like chess, “requires participants, each time they need to make a decision, to consider many relevant factors. Thus, in both activities every move has many implications.”²¹⁶ That is, a fix may cause more problems.

Although some commentators talk about 'typical' clauses permitting price review, there are no standard clauses.²¹⁷ There are various reasons for this.²¹⁸ The simplest is the mere evolution over time in drafting preferences. Otherwise different parties have different commercial practices and, for example, tolerate risks differently. Given the international element of energy agreements, cultural preferences also inevitably colour the choice of contractual language and negotiation.²¹⁹ Even within a domestic negotiation between similar parties, language of a reopener clause may simply reflect that one party had more leverage at the time of agreement. Treating price review provisions as if they have a standard meaning is inappropriate.

215 Gifford, above n 25, at 225–231.

216 Though Stark writes in reference to statutory drafting, the sentiment is apposite: Jack Stark "The Proper Degree of Generality for Statutes" (2004) 25(1) Stat LR 77 at 77.

217 Loreface, above n 20, at 163; Holland and Ashley, above n 18, at 34.

218 At 36.

219 See generally Gifford, above n 25, at 2010–214.

Holland and Ashley suggest the following example as a plausibly typical price review clause:²²⁰

If a circumstance beyond the control of either party results in a significant change in the energy market of the Buyer compared to such energy market on [date], then either party may give notice for a price review.

If the parties fail to agree a revised price formula within 90 days after giving notice for a price review, the price formula shall be reviewed by arbitration. In any such arbitration the arbitrators shall review the price formula and shall decide whether it needs to be revised to reflect, as at the review date, the relevant significant change(s) in the energy market of the Buyer which affect the value of [the gas] in the end user market of the Buyer as such value can directly or indirectly be obtained by a prudent and efficient buyer.

Any revised price formula determined by the arbitrators shall enable the Buyer to market economically [the product] delivered under this Agreement in the energy market of the Buyer in competition with other competing sources of energy in the end user market of the Buyer, assuming always the Buyer acts as a prudent and efficient energy company.

The triggering event is: any circumstance; that is beyond the control of the parties; which results in a significant change in the energy market; compared to the date of agreement or the last price review. If the trigger is satisfied, negotiation and possible arbitration is limited to a review of the price formula and whether the formula needs to be revised to reflect the change in the market. Relevant factors are anything which affects the market value of the gas, and whether the price formula so revised will be adequate to allow the buyer to market economically and in competition with other sources of energy such that they can make a profit. There is an assumption the buyer shall act prudently and efficiently. The process is that, following valid notice, parties must negotiate within 90 days a new agreement and if that fails, arbitration will occur as agreed by the parties. Presumably, there is expected to be a separate arbitral provision in the contract which outlines this process.

This clause is simply framed and relatively concise. Each sentence is clear in its meaning without complicated clauses and sub-clauses. The addition of material in parentheses is limited to significant relevant issues and designed to avoid confusion through the introduction of complicated descriptions. This clause fixes issues in historical clauses by expressly requiring arbitrators to consider the link between market changes and any changes in the price of gas, and whether the price formula

220 Holland and Ashley, above n 18, at 34.

actually needs revision.²²¹ The complicated technical details of the arbitral process are left out of the clause as (presumably) they would be included in the arbitration clause of this agreement.

A Use of Automatic or Wild-Card Triggers Preferred

The clause is not perfect. Proposed drafting continues to generate jurisdictional ambiguities around the use of a discretionary trigger:²²² parties must be satisfied there is a substantial change in the market value of gas before notice can be given. There is no definite indication as to how much and what kind of a gloss is provided by the word "substantial".²²³ It contains references to circumstances within the control of either party and significance of the change, which as questions of law probably do not have certain answers. Parties might reasonably differ on facts before the tribunal as to whether this condition is satisfied; and litigating the point will raise costs that parties will prefer to avoid.

It is in parties' interests to agree to wild-card, mechanical or periodic triggers.²²⁴ Doing so means that the question of whether the price review is within the arbitral tribunal's jurisdiction is resolved either by recourse to the nature of the market or the simple request of one party. Interpretive issues that arise can be thus side-stepped. Reducing the number of legal issues before a tribunal is a way to manage soft data conflicts about the contract and can reduce the barriers to a swift result.

Adopting more precise triggers and the like also raises the prospects of expert determination should the issue of enforceability be resolved. As discussed above, currently even if expert determinations could be enforced in multiple jurisdictions, a lack of legal expertise means that expert determination currently cannot be flexible to respond to the issues raised by reopener clauses.

B Temporal Issues

There is another issue around the temporal requirements of the clause. Must the significant market change cause a variation in the value of gas prior to notice of a price review being given? This question arises because discussion of the change is different in the first and second parts of the clause, making it arguable that different treatment is intended by parties.

221 At 37–38.

222 Defined and discussed at Part III(A)(1).

223 *United States v X Ciment* Video, above n 141, at 68–70.

224 See generally Part III(A)(1).

If so, significant market changes that have not yet changed the value of gas could be used to begin a price review process allowing for dilatory price reviews to be initiated. The issue is compounded by the question of whether the "review date" refers to the date of arbitration or the date of the notice. Taking the former meaning could stave off these dilatory claims (or claims based on transient market fluctuations) but the latter is typical of these clauses in practice.²²⁵ If the latter, it will be difficult for arbitrators to ignore events between the date notice is given and the hearing or award when trying to strike a commercially acceptable reward. This can only be made more difficult if a contract asks adjudicators to turn their mind to enduring market factors, as some do.²²⁶

Though it seems there is a likely answer based on commercial practice the argument can still be litigated, raising costs for parties. Asking the arbitral panel to make an adjustment based on market situation at the time of the hearing may avoid this, if that date is set as the benchmark against which to measure later changes in future reviews.

C Towards Automatic Drafting

Contractual drafting should aim, above all, for simplicity and flexibility. Where there is ambiguity in the language that reflects a semi-deliberate choice to not decide an issue, working by agreement at the time of dispute is preferable to treating the contract as an authoritative advance expression of party preferences. For this reason, this clause is a good one because it limits the scope of potential disputes without undue reliance. It does what it should by reducing the scope of legal disputes about the clause. However, it can be improved by changing the scope of the arbitral panel's review to include matters after notice is given that arise before the award is delivered, and by use of automatic triggers.

Even if these suggested amendments are not adopted, as argued in previous Parts putting great weight on the specific language of reopener clauses may not be appropriate. Parties are assumed to act in an economically rational way when choosing the words of their bargains.²²⁷ This means that parties must be assumed to be deliberately choosing discretionary triggers for a commercial reason. One possible reason is to restrict the possibility of price reviews in the name of price certainty.²²⁸ Whilst that may be true, if a price review is aimed at ensuring the

225 Loreface, above n 20, at 167.

226 At 168.

227 See for example Leggatt, above n 129, at 475.

228 M Clarke, T Cummins and F Worthington "The price isn't right – gas pricing disputes" (2015) 1 IELR 13 at 14–15, cited in Finizio, above n 49, at 184.

maintenance of the original bargain actually agreed to then that purpose suggests narrow construction of price reopener clauses to reduce the prospects of review also subverts the contractual relationship.

Parties have not predicted the future and should not be assumed as having attempted to do so. Suggesting otherwise is a form of post-hoc reasoning that mostly succeeds only with the benefit of hindsight. Instead a permissive approach to the construction of reopener clauses is necessary. Wide construction avoids a situation where a party is denied review because the panel is not convinced, for example, that a change in price is "substantial" within the meaning of the contract. Thus, a wider approach better protects the decision to allow for price reviews and preserves party autonomy.

A permissive approach to contractual interpretation such as this paper suggests can go too far in making price reviews available contrary to the bargain struck. However, since many reviews fix the price to market conditions prevailing at the time of review,²²⁹ without considering the future, the author considers risks of a wrong price being set to be comparatively low compared to the risk of improperly limiting consideration of the full range of issues a review may present.

VII Reframing Arbitration

Since arbitration is the best dispute resolution mechanism available in an international commercial context, despite its discussed flaws, it is incumbent on parties to decide terms upon which the arbitral process is directed. The possibility of drafting better contracts is available for new gas supply agreements, but currently existing relationships are more limited by the inertia having a so-far workable agreement will likely entail.²³⁰ Effects of inertia in the face of adverse rulings have been observed in relation to the use of *pari passu* clauses in sovereign debt bonds.²³¹ There is a similarly low likelihood of suggestions in Part VI being adopted.

Unfortunately, not every contractual framework will be able to adopt the changes this paper proposes for arbitral procedure without some variation to the contract. Doing so is the first step of reframing arbitration to fit the unusual circumstances of gas price reopener clauses. The second step is to actually implement those variations. It will most likely be easiest to adopt streamlined procedures or the use

229 Loreface, above n 20, at 167–169; Levy and Gupta, above n 22, at 179–180.

230 That is, it will be harder to renegotiate an already existing agreement than it will be to write a new one with new parties.

231 Choi, Gulati and Scott, above n 183.

of limited-awards arbitration,²³² since those are relatively simple questions of procedure that do not import practical complications.

The most effective solution, however, is to adopt a form of arbitration called conciliation-arbitration, where in the standard arbitral process an arbitrator acts as conciliator for the purpose of pushing parties towards settlement. Conciliation-arbitration is different from standard mediation-arbitration because it is integrated—the point is that the arbitrator takes on both roles and under the auspices of arbitral rules so as to reduce cost outlays whilst retaining the advantages of mediation. It is more than the same neutral across two procedures; it is one process.

The first issue with conciliation-arbitration is that not every arbitral regime permits the arbitrator to hear evidence in confidence or to give advice on the relative merits of a case, both of which are central to the conciliator's role. This paper considers the rules of six arbitral regimes in subpart C, including the International Chamber of Commerce (ICC) Arbitration Rules 2012 and the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 2010.²³³ A second issue is that of a potential role conflict between arbitrator and conciliator. The risk is that if an arbitrator has heard confidential information at the conciliation stage, they may not be able to bring an impartial mind to the arbitration stage.

However, these issues are based on a misconstruction of the nature of a standard arbitrator's role and by implication also what conciliation in an arbitral context entails. An arbitrator is not a judge and there should be no obstacles to parties adopting different rules of procedure if that is what they prefer. Conflict with the overarching rules of arbitration can only be avoided if the regime permits parties to contract out of them. The solutions are in the hands of parties alone and they bear sole responsibility for the decision to take them, or not.

A Defining Potential Reforms

Parties may elect to adopt different procedures within already-existing arbitral agreements to come to more suitable results. As streamlined procedures and

232 Baseball and high-low arbitration are both examples raised in Power, above n 20.

233 They are the: (1) International Chamber of Commerce Arbitration Rules 2012 [ICC Rules 2012]; (2) ICDR Rules 2009, above n 30; (3) London Court of International Arbitration Arbitration Rules 2014 [LCIA Rules 2014]; (4) Stockholm Chamber of Commerce Arbitration Rules 2010 [SCC Rules 2010]; (5) UNCITRAL Rules 2013, above n 30; and (6) CPR Rules 2014, above n 30.

limited-award arbitrations are not novel, this paper does not discuss them in detail. Parties could adopt any or all reforms noted here if they wished to.

1 Streamlined procedures

The rules of procedure at arbitration are controlled by parties to the arbitration.²³⁴ If parties are concerned that an observed increase in complexity is leading to unacceptably high costs then they may take steps to reduce complexity of the arbitral procedure—for example by restricting the use of expert evidence or introducing hearings on the papers.²³⁵ Shorter procedures will in most cases have little or no effect on the outcome of arbitration, especially if the processes are as unnecessarily complex as is suggested. Several commentators have suggested changes to the rules of procedure to lower the costs of arbitration.²³⁶

2 Limited-award arbitrations

As identified in Parts III–IV, one of the key problems with standard arbitration is the risk the last negotiating positions of parties will not be respected by the panel.²³⁷ An award which puts one party in a much worse position does not reflect the no-fault nature of the dispute. Limited-award arbitrations are arbitral procedures which operate in special ways to constrain the possibility of the arbitrator coming to a party outside the parties' contemplated range.²³⁸ Given some concerns exist about summary arbitrations and other expedited arbitral procedure, limited-award procedures like baseball and high-low arbitrations may be good ways to ensure putative consequences do not exceed acceptable boundaries.

Baseball arbitration is where each party proposes their own award to the arbitrator, and the arbitrator selects between them.²³⁹ There is also a blind variant called a "night baseball arbitration", where the arbitrator is unaware of the proposed awards and, after making an award, the mathematically-closest award is binding. If there is a perceived risk of partiality by the arbitrator the blind variant may be preferable.

234 Blackaby and Partasides, above n 11, at [1.06]–[1.08].

235 Power, above n 20, at 15; for more possibilities see generally ICC Commission *Controlling Time and Costs in Arbitration* (International Chamber of Commerce, November 2013).

236 Power, above n 20; ICC Commission, above n 235; Gordon Kaiser "The Challenges Going Forward" in Rowley, Bishop and Kaiser, above n 13, at 271–272.

237 Power, above n 20, at 15.

238 At 15. Limited-award arbitrations are also known as last-offer arbitrations.

239 Margaret L Moses *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, Cambridge, 2008) at 15.

In high-low arbitrations, a range is agreed to by the parties and if the arbitrator's award exceeds that range it is automatically adjusted to be within that range.²⁴⁰

Both approaches give parties certainty of the parameters of the final award and preserve party control over the renegotiation process. They are a form of splitting the difference and may be, if nothing else, faster.²⁴¹ Limited-award arbitrations present a good alternative to conciliation-arbitration if its difficulties prove too much for parties because they reduce the scope for an arbitrator to rule in error. Procedural difficulties are not resolved though and would need to be adopted independently.

3 Conciliation-arbitration

Unlike mediators, a conciliator is evaluative and facilitates agreement by proposing a settlement that in their opinion reflects the merits of the case.²⁴² As such, conciliation-arbitration is an arbitral process where the arbitrator encourages early settlement by proposing non-binding awards following a more informal process, including confidential meetings with each party individually to understand their respective positions.²⁴³ If parties do not adopt the proposed settlement, then the arbitrator engages a more adversarial, traditional arbitral process which results in an award. Like arbitration, conciliation-arbitration can be contractually provided for as a dispute resolution technique.

Practitioners will appreciate that conciliation-arbitration raises a risk of ethics conflicts because parties will not have the opportunity to challenge what is said in confidence by the other party. This risks procedural justice because parties may not be able to know the basis of the argument against them in full and the arbitrator will, realistically, be unable to expunge this information when giving an award. However, this paper has adopted the language of conciliation-arbitration, as distinct from mediation-arbitration, to specifically underline the similarities between the role of conciliator and arbitrator. In the author's view, a proper construal of the arbitrator role lessens the apparent risk of bias to an acceptable level.

In the interests of being explicit, this paper treats conciliation-arbitration as conducted within the arbitral process, which is to say under the rules of an arbitral

240 Power, above n 20, at 15.

241 Whether they are also fairer to the parties depends on the context, as a simple split down the middle may not reflect the merits of the dispute.

242 Moses, above n 239, at 14; compare Gifford above n 25, at 218–225.

243 Conciliation-arbitration could be compared to early neutral evaluation or, with an opt-out as proposed below, med-arb-opt-out: Baril and Dickey, above n 199, at appendix A.

regime. It is intended to occur early in the process in some kind of meeting, after an identification of initial differences. It is much more like expedited arbitration with *ex parte* communication than a separated process.

Nothing necessarily prevents parties from adopting an independent mediation or conciliation process prior to engaging arbitration,²⁴⁴ and doing so does not raise ethical risks mentioned above. However, a separate process will cost more due to process duplication.

B In Favour of Conciliation-Arbitration

Respect for party autonomy, securing a final and enforceable award, and avoiding third party issues such as bias are the three core criteria for a process that will help solve gas price arbitration's issues. Only the conflict between the arbitrator and conciliator roles presents any meaningful impediment to adoption of conciliation-arbitration and is discussed in the next subpart of this paper.

Party autonomy is central to the normative authority of the contract—thus, also to arbitration. Arbitration is criticised for mimicking the formalism and adversarial nature of litigation,²⁴⁵ while conciliation-arbitration reflects a more autonomous dynamic. If parties can agree prior to an arbitral award, its outcome is by definition within the scope of party agreement since there is no result forced on either party. This conforms to the expectation that party agency be recognised.

Extrinsic information like the market price is one of the most useful ways to set an 'objective' and accurate gas price formula. Sometimes parties may peg their proposals to their own costs or potential for re-sale, but this information is sensitive too. Parties are typically reluctant to share this information with each other.²⁴⁶ One of the advantages of conciliation is that the conciliator can propose a settlement with a reasonable knowledge of both parties' positions, even of matters that the parties keep from each other. This is an avoidance of data conflicts that may get in the way of settlement in a normal negotiation.

If process is well-managed by conciliators, the environment can also be collegial and co-operative; there is a real potential to maintain ongoing relationships between

244 Note however that UNCITRAL Model Law on International Commercial Conciliation (2002), art 12, includes a bar on a conciliator later acting as an arbitrator, unless parties otherwise agree. This does not apply to situations where an arbitrator acts as conciliator: Pieter Sanders *The Work of UNCITRAL on Arbitration and Conciliation* (2ed, Kluwer Law International, The Hague, 2004) at 227–229.

245 Carroll and Mackie, above n 173, at 13.

246 See generally Levy and Gupta, above n 22, at 178–179.

disputing parties.²⁴⁷ And, with ownership of the result taken by parties, any losses are distributed by agreement; there is no risk of losses being imposed on one side unfairly. This is an improvement over standard arbitration.

At its heart, conciliation-arbitration is still a form of arbitration governed by rules of arbitral tribunals and the contract between the parties. All rules reviewed in the writing of this paper provide that, if parties ask for it and a tribunal accepts, settlement reached prior to rendering of an award may be issued as a consent award.²⁴⁸ This means that if a conciliation does successfully lead to agreement it can be given force as an award enforceable under the New York Convention, preserving the main virtue of arbitration in gas price arbitrations.

Conciliation-arbitration is an improvement over standard arbitration because, in aiming for settlement, it steps around problems of narrow contractual interpretation favoured by arbitrators. This is more sensitive to the imprecise nature of gas price reopener clauses and their underlying relational nature. It is also likely to result in lower costs for most claims because there is a higher chance of coming to a pre-award settlement if the parties are given neutral suggestions about how to reach agreement.

C Conciliation-Arbitrations and the Law

Arbitral improvements can only be applied if rules of the tribunal chosen by the parties permit it. Rules governing general arbitral procedure, arbitrators' duties and procedural justice and the status of awards "by consent" are most relevant to the adoption of conciliation-arbitration. Any potential rules limitations are also discussed here.

All arbitral regimes reviewed allow arbitration panels to arbitrate (in some close variation of) "whatever manner... deem[ed] appropriate".²⁴⁹ These powers are typically subject to any specific agreement between parties about conduct of proceedings.²⁵⁰ The near universality of the regimes' approaches demonstrates wide discretion to parties and arbitrators, reflecting the private commercial nature of arbitration.

247 Carroll and Mackie, above n 173, at 34–35.

248 Not every rule set uses the term "award by consent" but nothing turns on that.

249 See for example UNCITRAL Rules 2013, above n 30, at art 17.1.

250 ICC Rules 2012, above n 233, at art 22.2; SCC Rules 2010, above n 233, at art 19.

Arbitral rules take the vital issue of arbitrator independence and impartiality seriously.²⁵¹ A variance in stringency means that only some rule sets will permit conciliation-arbitration processes. Each regime prescribes actual independence and impartiality.²⁵² The London Court of International Arbitration (LCIA) Arbitration Rules 1998 go furthest, stipulating no arbitrator can "advise... on the merits or the outcome of the dispute."²⁵³ This would prevent an arbitrator from suggesting a settlement since that is likely to amount to advice on the relative merits of the dispute. Using conciliation-arbitration under these rules may permit a bias challenge. For the others, the implications of a requirement to avoid partiality are discussed below.

Effects of a ban on *ex parte* arbitrator-party communication are also adverse. The International Centre for Dispute Resolution (ICDR) International Arbitration Rules 2009 prevent most types of *ex parte* communication, as do the International Institute for Conflict Prevention and Resolution (CPR) International Rules 2007.²⁵⁴ These rules would prevent an arbitrator communicating in conditions of confidence, which typically encourages success in conciliation. UNCITRAL and LCIA rules require communications with the arbitrator to be sent to all parties which is effectively the same in operation.²⁵⁵ UNCITRAL, ICDR and CPR requirements can be contracted out of by parties if they prefer.²⁵⁶ While the adoption of conciliation where an arbitrator might push for a settlement remains open that process would be little more than informal, even summary arbitration in the absence of access to confidential information. Accordingly, contracting out of these rules would be advisable if seeking to implement conciliation-arbitration.

Case-management or pre-hearing conferences will be the best procedural vehicles for beginning conciliation-arbitration because they are early in the process and arbitrators have powers to direct the process as the parties wish. Parties may choose to exchange written statements of claim and similar, but the decision to pursue conciliation-arbitration will normally be made at these conferences. The decision may be made later but costs savings will be less the more ordinary arbitral process

251 Rosen and Cazier-Darmois, above n 13, at 262.

252 ICC Rules 2012, above n 233, at art 11; ICDR Rules 2009, above n 30, art 7; SCC Rules 2010, above n 233, at art 14; UNCITRAL Rules 2013, above n 30, at art 12; and CPR Rules 2014, above n 30, at r 7.1.

253 LCIA Rules 2014, above n 233, at art 5.3.

254 ICDR Rules 2009, above n 30, art 7.2, CPR Rules 2014, above n 30, at r 7.4; See also International Bar Association Rules of Ethics for International Arbitrators 1987, art 5.3 which warns against "unilateral" communication with parties.

255 UNCITRAL Rules 2013, above n 30, at art 17.4; LCIA Rules 2014, above n 233, at art 13.3.

256 UNCITRAL Rules 2013, above n 30, at art 1.1; ICDR Rules 2009, above n 30, at 1.1; and CPR Rules 2014, above n 30, at r 1.1.

is followed. None of the rules reviewed prevent a pre-hearing or case management conference, but some regimes are more supportive of conciliation-arbitration than others. LCIA, the Stockholm Chamber of Commerce (SCC) Arbitration Rules 2010 and UNCITRAL do not reference this step in arbitral process.²⁵⁷ ICDR permits a preparatory conference on procedural concerns.²⁵⁸ The ICC and CPR rules both permit case management conferences which can address the possibility of settlement.²⁵⁹

Arbitrators must be able to advise parties as to the merits of their claims and communicate to each party in confidence about their case for conciliation-arbitration to be possible. LCIA rules effectively prevent conciliation-arbitration from being adopted, meaning contracts engaging that system will have to come to another solution. Alternatively, parties need to be able to provide substitute rules in their contracts contrary to discussed rules of the arbitral intuitions. UNCITRAL, ICDR and CPR rules could be suitable if rules around communication with the arbitrator were relaxed by party consent. In the author's view, the scheme of the ICC Rules is most conducive to conciliation-arbitration as defined in this paper. The SCC rules are a suitable alternative arbitral regime.

D Limited Risk of Arbitrator Bias

Success of conciliation will often depend on how open parties can be with the conciliator. Party openness is typically directly supported by mandated observance of confidentiality.²⁶⁰ But to rely on information a party has not commented on is to risk a breach of due process requirements: parties will not have the opportunity to challenge what is said in confidence.²⁶¹ This risks procedural injustice because parties may not be able to know the basis of the argument against them in full.

1 An ethical dilemma

As parties will have the opportunity to present and question evidence at the arbitral stage, material evidence that does not arise openly in the negotiations between parties at the conciliatory stage must be raised at the arbitral stage for the tribunal to rely on it in their binding decision. This requirement does not change.

257 See generally Robert Smit and others *Comparison of International Arbitration Rules* (4ed, Juris, New York, 2014) at 107.

258 ICDR Rules 2009, above n 30, at art 16.2.

259 ICC Rules 2012, above n 233, at art 24; CPR Rules 2014, above n 30, at r 9.3(e).

260 Power, above n 20, at 14.

261 Baril and Dickey, above n 199, at 5.

Instead, the concern is that information raised in confidence will affect interpretation and weight given to evidence heard at the arbitral stage—in other words, that a conciliator-arbitrator could not fulfil their legal obligation to ensure due process.²⁶² Due process is central to *lex arbitri*, and always requires that parties must be able to present their case; often this extends to contradiction of the case presented by the other party.²⁶³ This requirement animates the LCIA ban on giving of advice, and bans on *ex parte* communication with the arbitrator.

As above, a conciliation-turned-arbitrator cannot disclose confidential information. Confidentiality is one of the core requirements of an appropriate process due to the sensitivity of the gas price formula.²⁶⁴ Parties will not accept disclosure to their competitors or they would have already begun to do so in order to avoid some of the information conflicts inherent in gas price renegotiations. Indeed, one of the purposes of conciliation-arbitration procedure is to avoid this data conflict by enabling disclosure to an independent third party bound by rules of ethics. As disclosure is not an option the arbitrator must vacate their mind of confidential party information or avoid it influencing their decision. But it is quite naive to suggest vacation or elimination of information is properly possible.

Criticising conciliation-arbitration for this tension appeals to a view of arbitrators as strictly judicial in nature, with high expectations of independence for those who wield legal authority. It is a viewpoint strongly held by many academics.²⁶⁵ Honesty requires a concession that conciliation-arbitration does not meet these standards of judicial independence. However, these standards are more appropriate for a judicial role in a domestic legal system which is defined by, among other things, responsibility for all kinds of cases (notably, criminal cases) and where parties typically cannot choose the judge. As this range of examples makes clear, viewing arbitration as equivalent to domestic judicial activity is naïve in its own way.

This tension is significant. Being risk-averse, parties could decline to share full information at the conciliatory stage of a conciliation-arbitration proceeding. Such reticence leading to conciliator ignorance would demonstrate parties' lack of faith

262 At 5.

263 Hans van Houtte "Conduct of Arbitral Proceedings" in Petar Šarčević (ed) *Essays on International Commercial Arbitration* (Graham & Trotman, London, 1989) at 126–127.

264 See again Levy and Gupta, above n 22, at 178–179 and Power, above n 20, at 14.

265 See for example Andreas Lowenfeld "The party-appointed arbitrator: further reflections" in Lawrence W Newman and Richard D Hill (eds) *The Leading Arbitrators' Guide to International Arbitration* (2ed, Juris, New York, 2008) at 44; compare discussion of a duty to act judicially in Blackaby and Partasides, above n 11, at [5.70]–[5.78] and discussion of the right to equal treatment by arbitrators in Matti Kurkela *Due Process in International Commercial Arbitration* (Oceana Publications, New York, 2005) at 186–187.

in the dispute resolution process and undermines the efficacy of the conciliator's role.²⁶⁶ This concern is based on the expectation that arbitrators shall adjudge impartially and independently.

2 Adjudication as independent and fair judgment

Independence and impartiality are core to arbitrators' roles. Though these terms overlap they are not actually synonymous;²⁶⁷ some jurisdictions have different treatments.²⁶⁸ Partiality is to favour one party for whatever reason, whereas dependence results from a relationship between the arbitrator and parties to the dispute.²⁶⁹ Partiality can exist without dependence; a major problem with dependence is its apparent threat of partiality.²⁷⁰ The distinction, rather than being pedantry, goes to the heart of what it means to judge. The charge against conciliation-arbitration is that by following this process the arbitrator will have become partial to party by virtue of being involved at an 'earlier' stage predating adjudication.²⁷¹ This cuts across rules against partiality.

That argument erroneously sees impartiality as a static quality which must be in place for the duration of an adjudication. This disregards that partiality, over time, erodes necessarily as part of any decision-making process; the act of coming to a decision on the merits is to form a view in favour of one side. The same is true of "neutrality", best understood as non-alignment for the duration of a conflict.²⁷² It is actually a "dereliction of duty" for an arbitrator or judge to be impartial at the time of ruling, in this sense, because that is effectively a failure to fulfil their function.²⁷³ The temporal aspect of partiality and neutrality is made explicit. Provided an arbitrator is neutral and impartial *at the beginning of arbitration*, which is also the beginning of the conciliatory process, then the rule against partiality is preserved.

This changes how challenges to independence and impartiality are properly understood. Challenges alleging dependence are claims that the judge is reliant on

266 Carroll and Mackie, above n 173, at 20–21.

267 Luttrell, above n 2, at 19.

268 At 19–21, Luttrell outlines the differences as at 2009. His discussion of the ICC Rules appears to be out of date as of the adoption of new rules in 2012. Additionally, the ICSID regime only requires capacity to exercise independent judgment—but this is not discussed in this paper because it is not concerned with investment disputes as that regime exclusively is.

269 International Bar Association Rules of Ethics for International Arbitrators 1987, art 3.1.

270 See for example where membership of a political organisation was said to create a threat of apparent bias in *Re Pinochet* [1999] UKHL 1.

271 Note that because conciliation-arbitration is effectively proposed expedited procedures at the arbitration stage, this objection is not strictly apposite.

272 Luttrell, above n 2, at 24.

273 Robert Jennings in *Re Judge Broms*, quoted in Luttrell, above n 2, at 22.

one party by virtue of some relationship.²⁷⁴ Challenges alleging partiality can be one of two things. The first is a claim of predetermination, that the judge has either an outcome or party preference that is not related to the legal or factual merits of the case. Predetermination remains grounds for removal of an arbitrator.²⁷⁵

The second claim is really that the administration of procedure is so poor as to deprive one party of a chance to present their case. This has little (or nothing) to do with the arbitrator's partiality. It is much more about fairness of procedure and could be levelled at a decision to not permit cross-examination or another round of hearings as equally as at a decision to allow private communications between the judge and counsel for parties.²⁷⁶ That is to say it is about where to draw a line, not a question of absolutes. Complaints about procedure are distinct from criticising the arbitrator. Appreciating that the rule against partiality is really about avoiding predetermination and unfair processes should mean the apparent threat of an expedited procedure is reduced somewhat. However, national courts can intervene at the enforcement stage should arbitrators strike the wrong balance.²⁷⁷

As such, conciliation-arbitration could still be vulnerable to those who wish to tactically call into question their arbitrator's integrity.²⁷⁸ Counsel and professionals are subject to their own ethical duties, among which there is an obligation to fearlessly represent the interests of their clients. If counsel use dirty tactics to hinder dispute resolution that is a matter for consideration in discussion with their client. It is not for this paper to take responsibility for any tragedy of the commons that might result. Instead, it is trying to point to another way of doing things.

A higher standard to show arbitrator bias is implicitly suggested once the nature of adjudication is considered; provided equal formal treatment is afforded, claims that due process is being breached in fact should not succeed.

274 At 19; see an example of a prohibited relationship in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35.

275 Blackaby and Partasides, above n 11, at [4.138]–[4.142].

276 Claims of the second type might be evidence of partiality but that is a factual inquiry.

277 Denial of an opportunity to be heard will vacate an award if it results in serious procedural unfairness, suggesting courts defer to some degree to arbitrators on procedural grounds: Born, above n 31, at 1095–1096. If this is a risk, it underscores the importance of selecting quality arbitrators.

278 See generally Luttrell, above n 2, particularly at 278–279; see also Blackaby and Partasides, above n 11, at ch 4(E). If a higher standard for challenges is adopted, as Luttrell argues for, then the threat is reduced.

3 Arbitration is not truly judicial

Though arbitration is the most curial of alternative dispute resolution, it is discernibly not equivalent to the public function fulfilled by national courts. Arbitrators' functions and authority are private and contractual only, qualitatively distinct from state authority.²⁷⁹ Arbitrators are "para-judicial"—not judicial.²⁸⁰

That parties choose their arbitrators in ways not allowed by many jurisdictions clearly demonstrates this distinction. Parties are often allowed to select one arbitrator each (and agree on a third), and it is hard to imagine on what grounds that person would be selected other than that the party trusts their chosen arbitrator to act 'properly'. This is why arbitral regimes often prohibit parties from challenging the arbitrator they personally appointed for matters known about prior to appointment.²⁸¹

Additionally, parties frequently select arbitrators for their experience and legal and commercial nous.²⁸² In contrast, selecting judges on the basis of non-legal expertise is considered to be a breach of judicial independence.²⁸³ It cannot then be expected that arbitrators be absolutely neutral or judicial as they are necessarily expected to bring their personal characteristics to the role.²⁸⁴

Any comparison between arbitration and litigation in national courts that is designed to import rules of independence and impartiality of judges to arbitrators is therefore unsustainable. This disconnect is necessitated by the private and contractual nature of arbitration, and particularly the fact that parties choose their arbitrators. As the presumption that parties are competent and understand their agreements is a part of *lex mercatoria*,²⁸⁵ it should be assumed they also understand

279 William Park *Arbitration of International Business Disputes* (2nd ed, Oxford University Press, Oxford, 2012) at 83–86.

280 Luttrell, above n 2, at 264.

281 LCIA Rules 2014, above n 233, at art 10.3; SCC Rules 2010, above n 233, at art 15.1; UNCITRAL Rules 2013, above n 30, at art 12.2; and CPR Rules 2014, above n 30, at r 7.5.

282 "[I]n our experience, the best arbitrators often approach these disputes from a less legalistic, and more commercial, perspective than would usually be the case in commercial arbitration." Levy and Gupta, above n 22, at 175; see also Lowenfeld, above n 270, at 45–46.

283 For example, see discussion of effects of adopting a commercial list on judicial independence in New Zealand in William Steel "Judicial specialisation in a generalist jurisdiction: is commercial specialisation within the High Court justified?" (2015) 46(2) VUWLR 332 at 341–344 and 352–355. Although some of the issues raised regarding judicial independence do not arise for arbitrators because they are not a cohesive institution, this only further demonstrates the inappropriateness of comparing judges and arbitrators.

284 Luttrell, above n 2, at 264–265. See generally that domestic judges apply the law and not their own expertise: *Arnold v Britton* [2015] UKSC 36 at [35]–[37]; Kendall, Freedman and Farrell, above n 210, at 282.

285 Luttrell, above n 2, at 267.

the at best para-judicial nature of arbitration and its incompatibility with true judicial norms of impartiality and due process.

Rather than elevating impartiality, it must be looked at in an entirely practical way.²⁸⁶ Calls to 'see justice being done' should not be used as a de facto smokescreen for continuing the judicialisation of arbitration because, as just outlined, the theoretical comparison justifying this is defunct.²⁸⁷ Accordingly, there is or should be no theoretical barrier to adopting conciliation-arbitration processes.

4 Towards reconciliation

The relevant question facing parties is whether gains in efficiency and cost savings by seeking informal conciliatory processes are outweighed by any risk that confidential information will sway an arbitrator's mind. This is not a question which compels an answer either way in theory, except to say that contracts are as usual a question for the parties.

Parties should not be concerned by conciliation in the arbitral process. Confidential information will be in the minds of arbitrators when they give an award. However, for what it is worth, this information is not likely to be material to the legal merits of a binding decision but rather the commercial prospects of a settlement being reached. If this is accurate, any knowledge leak will have limited effects on arbitral awards.

Regardless, parties anticipate that arbitrators will bring their personal characteristics to the role, including those regular biases that all people have. In that light, it seems that the risk of contaminated awards will be nominal if arbitrators facilitating agreement act with humility, conscientiousness and discretion while doing so.²⁸⁸ As parties deliberately do not seek a truly curial process, complaints to the contrary seem somewhat exaggerated.

An 'opt-out' process, before the end of the conciliatory stage, will minimise any residual risk of a tainted award.²⁸⁹ An opt-out is analogous to a challenge already

286 At 265, quoting El-Kosheri and Youssef: "The world with which arbitrators have to deal is inevitably imperfect. It is therefore important at all stages [...] to set philosophical and idealistic conceptions of independence against the realities".

287 Luttrell, above n 2, at 260. Compare Lowenfeld, above n 265, at 44: "Anything that cannot be done out loud and in the open should not be done at all."

288 See generally Waldman and Ojelabi, above n 198, at 425.

289 John T Blankenship "Developing your ADR Attitude: Med-Arb, a Template for Adaptive ADR" (2006) Blankenship & Blankenship Attorneys at Law <blankenshiplawoffice.com>, at 8–9 and 28–29.

permitted under arbitral rules.²⁹⁰ In the same way that conciliation process is intended to be flexible, opt-out powers should be simple to invoke if a party is concerned the arbitrator could be biased against them.

Although there is a prospect opt-out powers would be abused, an integrated conciliation-arbitration process encodes a series of default assumptions into the process. First, that conciliation-arbitration is the preferred process over ones which are separate (con-then-arb) or complex (arb-con-arb). Cost savings are more likely to eventuate if complex or distinct procedures are saved for cases where an actual concern about partiality has arisen. Second, that failure to use the opt-out power implies satisfaction with the independence of the arbitrators—claims to the contrary will be harder to prove. An opt-out gives parties the opportunity of expedited process which could lower costs and lead to an early settlement, without locking them into the consequences should it go awry.

Overall, allowing arbitrators to take on the role conciliation-arbitration envisions presents limited conceptual issues. Concerns that confidential information gathered as a conciliator will taint awards with procedural injustice are exaggerated. In practice conciliators and arbitrators are never strictly neutral nor intended to be. The rules against dependence, predetermination and unfair processes are preserved by conciliation-arbitration processes; that arbitrators, while conciliators, form a view on the merits is nothing more than their role in action conducted under different rules of procedure. Any lingering risk is avoided by permitting parties to opt out of the conciliation-arbitration process if they have concerns. As parties control the arbitral process and do not seek a strictly curial process, provided they consent, there seem to be few serious reasons why arbitrators cannot push for informal settlement in a conciliation-arbitration process.

VIII Conclusions

The purpose of a price reopener clause is to allow parties to renegotiate the price paid for gas in the long-term sale of gas. Reopener clauses exist because parties foresee that market conditions will change in the future enough that a reaffirmation of the contractual relationship is necessary, at least in terms of price. As such they exist to increase co-operation amongst the parties over time and make possible transactions which would otherwise be too uncertain to commit to. If parties cannot co-operate independently their dispute is reviewed by an arbitral panel, and because

290 Blackaby and Partasides, above n 11, at [4.89]–[4.91].

arbitral awards are enforceable in many jurisdictions arbitration is likely to remain the preferred forum for these disputes.

Disputes about gas prices arise frequently. This is an inevitable part of a capital-intensive industry undergoing substantial structural changes. Parties have aggressively defended their interests when these price reopeners are triggered because of the inherent commercial conflict of interest immediately presented. Positional approaches result in an unsurprising proliferation of arbitration to ensure, among other things, that parties get their proverbial day in court. Standard interpretive presumptions that parties meant precisely the words of the contract do not reflect the distinct nature of gas price reopeners and only encourage the adversarial trend parties complain of. Instead, a permissive approach to contractual interpretation reflects party uncertainty at the time of initial agreement and does not penalise parties who are not at fault simply because they cannot agree on a new price. Interpretive flexibility is preferred accordingly.

This paper argued that it is in parties' interests to attempt to settle gas price disputes and proposed a novel arbitral process, conciliation-arbitration, for that purpose. An approach where the arbitrator uses a more informal, inquisitive process to encourage early settlement is less likely to fuel tensions because it manages the tension between a lack of textual guidance from the contract and a fundamental need to respect party autonomy. This tension can be minimised by less discretionary drafting of price reopener clauses, which might permit a narrowing of the legal issues before a tribunal. Until these drafting practices are more widely adopted other solutions will be necessary. Conciliation-arbitration is such a solution, being a process intimately grounded in the commercial and legal context of cross-border commercial disputes, and specifically in the need for a process which parties can agree to and have confidence in.

Conciliation-arbitration is seen as a risk because it merges the role of conciliator and arbitrator into one person, causing practitioners and parties to suspect that information gathered in confidence by a conciliator would spoil impartial deliberation as an arbitrator. But the reality is that arbitration is private and contractual. It has always been so. Arbitration has no claim to public law norms unless parties demand them, and parties implicitly yet still deliberately by their actions demonstrate they desire the opposite: arbitrators partial to the commercial nature of the transaction, if not to the parties themselves. A perception of potential bias is based on a romanticised notion of the arbitrator as a member of an international judiciary and is not sustainable. It also reflects a misunderstanding of the adjudicative function to decide the merits of a case, which must necessarily

involve becoming partial as a process of decision goes on. The risk conciliation-arbitration poses exists, but is nominal and within the scope of legitimate party agreement.

Though an improvement over the status quo, this risk still creates obstacles to conciliation-arbitration. Arbitrations conducted under LCIA rules cannot make use of conciliation-arbitration because their rules prohibit giving of advice about dispute merits—a central feature of the conciliatory role. Contracts using UNCITRAL, CPR and ICDR rules can use conciliation-arbitration only if parties explicitly do not apply certain contrary rules about *ex parte* communication. However, SCC and especially ICC arbitrations will have the option of conciliation-arbitration should parties wish to. Although the author believes conciliation-arbitration to be ethically justified and procedurally sound, difference in treatment by the various leading arbitration rules and expert comment reflects a great difference in professional opinions on the issue. In the author's view, private justice should be bound by private rules; so whether a nominal risk of arbitrator partiality is worthwhile is a judgment only the parties can make.

Gas price arbitrations are not a passing issue. Rather, the Japanese Fair Trade Commission has begun to investigate destination restrictions for violation of competition law.²⁹¹ It is a fresh look at a "crisis of fundamentals",²⁹² where Asia-Pacific gas supply agreements are still linked to oil products and the price of liquid natural gas in Asia is three times higher than in North America.²⁹³ Limiting destination restrictions in the Japanese market on the grounds of competition as the European Commission did will likely have flow on effects to the whole of the Asian gas market.²⁹⁴ If so, it will be "déjà vu all over again" for gas price arbitrations and the issues they present.²⁹⁵

Perhaps this time could be different.

291 Stacpzynski, Inajima and Murtaugh, above n 14; Act on Prohibition of Private Monopolization and Maintenance of Fair Trade 1947 (JP), chs 2 and 3(2).

292 Stern, above n 78, at 46–48.

293 At 46; see also Henning Gloystein "US exports fill Asia's LNG demand gap as market tightens" *Hellenic Shipping News* (online ed, 21 January 2017).

294 Korea, Taiwan, China and India price their LNG imports based on the Japanese Crude Cocktail: Stern, above n 78, at 46.

295 Lawrence Peter 'Yogi' Berra, quoted in Holland and Ashley, above 18, at 35.

Bibliography

A Example Clauses

Ben Holland and Phillip Ashley "Natural Gas Price Reviews: Past, Present and Future" (2012) 30(1) *Journal of Energy & Natural Resources Law* 29 at 34 [the proposed typical clause].

Contract between Sonatrach and Distrigas Corporation regarding sale and purchase of LNG 88-37-NG (13 April 1976), available at <www.fossil.energy.gov>.

Esso Petroleum & Production UK Limited v Electricity Supply Board [2004] EWHC 723 (Comm).

Gas Natural Aproveisionamientos SDG SA v Atlantic LNG Company of Trinidad and Tobago DC New York 08 Civ 1109 (SD NY 2008), 22 September 2008.

Superior Overseas Development Corporation and Philips Petroleum (UK) Co Ltd v British Gas Corporation [1982] 1 *Lloyds Rep* 262 (CA).

B Cases

1 New Zealand

Saxmere Company Ltd v Wool Board Disestablishment Company Ltd [2010] 1 NZLR 35.

Vector Gas v Bay of Plenty Energy [2010] NZSC 5.

2 United Kingdom

Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191 (HL).

Arnold v Britton [2015] UKSC 36.

Chartbrook v Persimmon Homes Limited [2009] UKHL 38.

Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 (HL).

Re Pinochet [1999] UKHL 1.

3 United States

Gas Natural Aproveisionamientos SDG SA v Atlantic LNG Company of Trinidad and Tobago DC New York 08 Civ 1109 (SD NY 2008), 22 September 2008.

United States v X Ciment Video 513 US 64 (1994).

C Legislation

1 New Zealand

Energy Efficiency and Conservation Act 2000.

2 Japan

Act on Prohibition of Private Monopolization and Maintenance of Fair Trade 1947.

D International Materials

1 Treaties

Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 38 (opened for signature 10 June 1958, entered into force 7 June 1959).

Treaty on the Functioning of the European Union 2702 UNTS 6 (concluded 13 December 2007, entered into force 1 December 2009).

2 Arbitral Awards

Atlantic LNG Company of Trinidad and Tobago v Gas Natural Aprovevisionamientos SDG SA (Award) UNCITRAL 17 January 2008.

3 Arbitration and Conciliation Rules

American Arbitration Association/International Centre for Dispute Resolution International Arbitration Rules 2009.

International Chamber of Commerce Arbitration Rules 2012.

International Institute for Conflict Prevention and Resolution Rules for Administered Arbitration of International Disputes 2014.

London Court of International Arbitration Arbitration Rules 2014.

Stockholm Chamber of Commerce Arbitration Rules 2010.

United Nations Commission on International Trade Laws Arbitration Rules 2010.

UNCITRAL Model Law on International Commercial Conciliation (2002).

4 Other International Materials

International Bar Association Rules of Ethics for International Arbitrators 1987.

The Principles of European Contract Law (Commission on European Contract Law, 2002).

UNIDROIT Principles (International Institute for the Unification of Private Law, 2010).

E Journal Articles

Nicholas Apergis and James E Payne "Natural gas consumption and economic growth: A panel investigation of 67 countries" (2010) 87 *Applied Energy* 2759.

Jelle Bijma and others "Climate change and the oceans – What does the future hold?" (2013) 74 *Marine Pollution Bulletin* 495.

Kevin Celuch, John H Bantham and C J Kasouf "The role of trust in buyer-seller conflict management" (2011) 64 *Journal of Business Research* 1082.

Stephen J Choi, Mitu Gulati and Robert E Scott "The Black Hole Problem in Commercial Boilerplate" (Law and Economics Research Paper 16-38, New York University, 2016).

Steven Chu and Arun Majumdar "Opportunities and challenges for a sustainable energy future" (2012) 488 *Nature* 294.

Itay Fischhendler and Daniel Nathan "In the name of energy security: the struggle over the exportation of Israeli natural gas" (2014) 70 *Energy Policy* 152.

Peter J Glecker and others "Industrial-era global ocean heat uptake doubles in recent decades" (2016) 6 *Nature Climate Change* 394.

Antonio A Golpe, Monica Carmona and Emilio Congregado "Persistence in natural gas consumption in the US: An unobserved component model" (2012) 46 *Energy Policy* 594.

Øistein Harsem, Arne Eide and Knut Heen "Factors influencing future oil and gas prospects in the Arctic" (2011) 39 *Energy Policy* 8037.

Ali Hasanbeigi and others "Retrospective and prospective decomposition analysis of Chinese manufacturing energy use and policy implications" (2013) 63 *Energy Policy* 562.

Ben Holland and Phillip Ashley "Natural Gas Price Reviews: Past, Present and Future" (2012) 30(1) *Journal of Energy & Natural Resources Law* 29.

George Leggatt "Making Sense of Contracts: The Rational Choice Theory" (2015) 131 *LQR* 454.

Anthony McMichael, Hugh Montgomery and Anthony Costello "Health risk, present and future, from global climate change" (2012) 344 *BMJ* 1359.

Mathias Reymond "European key issues concerning natural gas: Dependence and vulnerability" (2007) 35 *Energy Policy* 4169.

Jack Stark "The Proper Degree of Generality for Statutes" (2004) 25(1) Stat LR 77.

Christopher Staughton "How do the courts interpret commercial contracts?" [1999] CLJ 303.

William Steel "Judicial specialisation in a generalist jurisdiction: is commercial specialisation within the High Court justified?" (2015) 46(2) VUWLR 332.

Jonathan Stern "International gas pricing in Europe and Asia: A crisis of fundamentals" (2014) 64 Energy Policy 43.

Johan Steyn "The Intractable Problem of the Interpretation of Legal Texts" (John Lehane Memorial Lecture 2002, University of Sydney, 25 September 2002), (2003) 25 Sydney Law Review 5.

Shah M Tarzi and Nathan Schackow "Oil and Political Freedom in Third World Petro States: Do Oil Prices and Dependence on Petroleum Exports Foster Authoritarianism?" (2012) 29(2) Journal of Third World Studies 231.

Eleonora Wåktare "Territorial restrictions and profit sharing mechanisms in the gas sector: the Algerian case" *EC Competition Policy Newsletter* (Luxembourg, 2007-3).

Ellen Waldman and Lola Akin Ojelabi "Mediators and Substantive Justice: A View from Rawls' Original Position" (2016) 30(3) Ohio State Journal on Dispute Resolution 391.

F Texts and Chapters in Texts

Guide to Mediation (online looseleaf ed, Arbitrators' and Mediators' Institute of New Zealand, 2004).

Nigel Blackaby and Constantine Partasides *Redfern and Hunter on International Arbitration* (6th ed, Oxford University Press, Oxford, 2015).

Gary B Born *International Arbitration: Cases and Materials* (Kluwer Law International, Alphen aan den Rijn (NL), 2011).

John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016).

Eileen Carroll and Karl Mackie *International Mediation: The Art of Business Diplomacy* (2nd ed, Kluwer Law International, Alphen aan Den Rijn (NL), 2006).

Alexandre Flückiger "The Ambiguous Principle of The Clarity of Law" in Anne Wagner and Sophie Cacciaguidi-Fahy (eds) *Obscurity and Clarity in the Law: Prospects and Challenges* (Ashgate, Aldershot (UK), 2008).

Donald Gifford *Legal Negotiation: Theory and Practice* (2nd ed, Thomson/West, St Paul (MN), 2007).

John Kendall, Clive Freedman and James Farrell *Expert Determination* (4th ed, Sweet & Maxwell, London, 2004).

James Kessler "Objectivity and Subjectivity in Interpretation" in Anne Wagner and Sophie Cacciaguidi-Fahy (eds) *Obscurity and Clarity in the Law: Prospects and Challenges* (Ashgate, Aldershot (UK), 2008).

Matti Kurkela *Due Process in International Commercial Arbitration* (Oceana Publications, New York, 2005).

Sam Luttrell *Bias Challenges in International Commercial Arbitration: The Need for a 'Real Danger' Test* (Kluwer Law International, Alphen aan de Rijn (NL), 2009).

Andreas Lowenfeld "The party-appointed arbitrator: further reflections" in Lawrence W Newman and Richard D Hill (eds) *The Leading Arbitrators' Guide to International Arbitration* (2ed, Juris, New York, 2008).

Margaret L Moses *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, Cambridge, 2008).

William Park *Arbitration of International Business Disputes* (2nd ed, Oxford University Press, Oxford, 2012).

Alan Redfern and Martin Hunter *Law and Practice of International Commercial Arbitration* (4th ed, Sweet & Maxwell, London, 2004).

J William Rowley, Doak Bishop and Gordon Kaiser (eds) *The Guide to Energy Arbitrations* (Law Business Research, London, 2015).

Pieter Sanders *The Work of UNCITRAL on Arbitration and Conciliation* (2ed, Kluwer Law International, The Hague, 2004).

Robert Smit and others *Comparison of International Arbitration Rules* (4ed, Juris, New York, 2014).

Joshua Thomson, Leigh Warnick and Kenneth Martin *Commercial Contract Clauses: Principles and Interpretation* (Thomson Reuters, Sydney, 2012).

Hans van Houtte "Conduct of Arbitral Proceedings" in Petar Šarčević (ed) *Essays on International Commercial Arbitration* (Graham & Trotman, London, 1989).

G Theses

Hassan Yousaf "Emission Trading Scheme: Risks & Strategies for the Norwegian Petroleum Industry" (MSc Thesis, University of Nordland, 2012).

H Reports and Papers

Directorate-General for Competition *DG Competition Report on Energy Sector Inquiry* (European Commission, SEC(2006) 1724, 10 January 2007).

ICC Commission *Controlling Time and Costs in Arbitration* (International Chamber of Commerce, November 2013).

KJ Keith *Interpreting Treaties, Statutes and Contracts* (Centre for Public Law, Occasional Paper 19, May 2009).

Tómas Kennedy-Grant "Expert Determination and the Enforceability of ADR Generally" (paper presented to Arbitrators' and Mediators' Institute of New Zealand Conference, Christchurch, August 2010).

Patricio Grané Labat "Making good use of the new ICC Expert Rules" (paper presented to ICC Conference on International Arbitration, Miami, November 2015).

MIT Energy Initiative *The Future of Natural Gas: An Interdisciplinary MIT Study* (Massachusetts Institute of Technology, June 2011).

Howard Rogers *Asian LNG Demand: Key Drivers and Outlook* (Oxford Institute of Energy Studies, NG 106, April 2016).

Jonathan Stern *Continental European Long-Term Gas Contracts: is a transition away from oil product-linked pricing inevitable and imminent?* (Oxford Institute for Energy Studies, NG 34, September 2009).

Jonathan Stern and Howard Rogers *The Transition to Hub-Based Pricing in Continental Europe: A Response to Sergei Komlev of Gazprom Export* (Oxford Institute for Energy Studies, February 2013).

I Media Sources

1 Industry and Legal Commentary

Phillip Ashley "Energy disputes heat up as oil and commodities prices crash" (05 September 2016) CMS <www.cms.law>.

Mark Baril and Donald Dickey "Med-Arb: The Best of Both Worlds or Just A Limited ADR Option?" (2009) Mediate <www.mediate.com>.

Robert Blackett "Pricing Arbitrations: It's a Gas, Gas, Gas" *The Arbitrator* (Andrews Kurth, United Kingdom, 2014).

John T Blankenship "Developing your ADR Attitude: Med-Arb, a Template for Adaptive ADR" (2006) Blankenship & Blankenship Attorneys at Law <blankenshiplawoffice.com>.

Michelle Maiese "Moral or Value Conflicts" (July 2003) *Beyond Intractability* <<http://www.beyondintractability.org>>.

Richard Power "Gas price reopeners – is there a better way?" *International Arbitration 1/3LY* (issue 7, Clyde & Co, United Kingdom, 16 June 2016).

Steven H Reisberg "What is Expert Determination? The Secret Alternative to Arbitration" *The New York Law Journal* (online ed, New York, 13 December 2013).

Sarah West and Zelander Gray "ICC Launches New 2015 Expert Rules" *Global Arbitration News* (Baker McKenzie, 8 June 2015).

Jeremy Wilson and William Lowery "'Trigger Happy': Considering the Requirements of Your Price Review Clause" (19 February 2015) *Inside Energy and Environment* <www.insideenergyandenvironment.com>.

2 News Articles

Jude Clemente "Why Japan's Liquefied Natural Gas Demand Will Increase" *Forbes* (online ed, 25 September 2016).

Henning Gloystein "US exports fill Asia's LNG demand gap as market tightens" *Hellenic Shipping News* (online ed, 21 January 2017).

Elena Mazneva "Gazprom Mulls \$6 Billion Asset Sales, Dividend Freeze" *Bloomberg* (online ed, 23 January 2017).

Stephen Stapczynski, Tsuyoshi Inajima and Dan Murtaugh "More than \$600 Billion Is at Stake as Japan Probes LNG Deals" *Bloomberg* (online ed, 21 July 2016).

Huileng Tan "Natural gas crashes as Japan demand wanes, Australia supply takes off" *CNBC* (online ed, 2 March 2016).

3 Other Media Sources

"Crude Oil Brent" (28 January 2017) *NASDAQ* <www.nasdaq.com>.

European Commission "Commission confirms that territorial restriction clauses in the gas sector restrict competition" (press release IP/04/1310, 26 October 2004).

J Miscellaneous

Correlli Barnett *The Sword-bearers: Studies in Supreme Command in the First World War* (1st ed, Eyre & Spottiswoode, London, 1963).