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Contract Adjustment in Arbitration – Should the Approach Be Adjusted?[1]

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Abstract

For decades, the general attitude has been moving towards accepting contract adjustment in arbitration. More and more, the question is when and how a contract may be adjusted and not whether the arbitrators may have such a power. The article will firstly discuss hardship as a basis for contract adjustment and provide general discussion on arbitrators' position in cases of hardship. Once the scene is set the paper will focus on how the issue is approached in the area of long-term gas sale and purchase agreements and especially the price review clauses. Based on their example, it is concluded that arbitral tribunals should evaluate not only conditions of hardship but also the will of the parties to continue the contract and, in absence of any other guidance, request proposals for adjustment from the parties.

Keywords

Contract Adjustment; Hardship Clause; Price-Review Clause; Gas Sale and Purchase Agreements.

1 Introduction

Contract adjustment[2] is a process best described in opposition to contract interpretation. When interpreting a contract, the decision-maker follows the original will of the parties with focus on clarification of dispute points or even gap-filling regarding the "missed" spots in the contract. Although

1 The article was supported by Charles University, project GA UK No. 342 222.

2 Synonymous term "contract adaptation" is also used in the literature but, for the sake of consistency, this article will only use "contact adjustment".

the interpretation process may be complicated by conflicting views as to whether the parties' intentions should be found within the contract or beyond and cases which require employment of objective standards (e.g., reasonable person's perspective)[3], interpretation does not aim to actively change what was agreed.

To the contrary, in case of contract adjustment, the aim is to change the initial agreement and replace it with a new, adjusted set of rights and obligations. While parties may at any point decide to renegotiate and ultimately change agreed terms, whether any third party, be it a judge or arbitrator, has a power to impose such change upon them naturally sparks a controversy. To summarize, the general concern is that the intervention disrupts parties' right to contract at will as well as their confidence in the sanctity of the contract, *pacta sunt servanda*.[4] Furthermore, any entity other than the parties is necessarily worse positioned and less equipped to make the business decision on the new contractual terms which may negatively affect the result and, most importantly, the practical viability of the adjusted terms.[5]

Regardless of these concerns, the issue gradually became less controversial as more and more national laws[6] incorporated contract adjustment as an option in changing circumstances, building on the doctrine of good faith and the overriding goal to protect economic balance in the contract more than the original wording. The general argument is that in specific circumstances contract adjustment will keep the deal alive when alternatives would be non-performance. While the debate is still ongoing, it is now less focused on whether contract

3 ROSENGREN, J. Contract Interpretation in International Arbitration. *Journal of International Arbitration*. 2013, Vol. 30, no. 1, p. 2.

4 HILLMAN, R. A. Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law. *Duke Law Journal*. 1987, Vol. 36, no. 1, p. 2.

5 HORN, N. Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law. In: HORN, N. (ed.). *Adaptation and Renegotiation of Contracts in International Trade and Finance*. Alphen aan den Rijn: Wolters Kluwer Law International, 1985, pp. 23–24.

6 To name a few, German law (Article 313 of German Civil Code), Dutch law (Article 6:258 of Dutch Civil Code) or Swiss law (Article 119 of Swiss Civil Code) allow for adjustment of contract by a third party (court) under certain conditions. For detailed analysis see FONTAINE, M. Chapter 1: The Evolution of the Rules on Hardship. In: BORTOLOTTI, F., UFOT, D. (eds.). *Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World*. Den Haag: Kluwer Law International, 2019, pp. 11–40.

adjustment is possible and more on when and how it should be applied. The purpose of this article is to add to this latter debate.

To set the scene, it is necessary to first define hardship[7] as a base on which we may then build any further argument on contract adjustment. Subsequently, the article will comment on a few aspects in position of arbitral tribunals where contract adjustment is requested in arbitration. After the general topics are set, the article will focus on forms of contract adjustment in a specific context of long-term gas sale and purchase agreements ("GSPA") with a goal to identify some aspects of the adjustment process in that field which may be advisable on more general level.

2 Contract Adjustment as a Resolution of Hardship Situations

When negotiating a contract, parties naturally depend not only on their knowledge of the present situation but also their expectations of future events including the gains from the contract itself. The final agreement should then reflect the balance among these aspects acceptable and beneficent for both parties. In UNIDROIT[8] Principles, this state of balance is referred to as "contractual equilibrium"[9] and hardship represents its disruption significant enough to justify, assuming that all conditions are met, contract adjustment.[10] In some national laws the description is even more direct, and hardship occurs whenever performance of the contract becomes excessively/exceedingly onerous[11] without reference to the original "contract equilibrium". In any case, the change has to be beyond mere fluctuation of the market.

7 In order to narrow the topic, situations of hardship will be considered in relation to (international) trade and in the context of arbitration.

8 The International Institute for the Unification of Private Law.

9 For details, see DAWWAS, A. Alteration of the Contractual Equilibrium Under the UNIDROIT Principles. *Pace International Law Review Online Companion*. 2010, Vol. 2, no. 5, pp. 1–28.

10 BRUNNER, C. *Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2009, p. 391.

11 For example, hardship rule adopted into French law in 2016 (Article 1195 of the French Civil Code) makes no reference to contract equilibrium. It only requires that the change of circumstances renders performance "excessively onerous".

Simultaneously to the change in costs, there also have to be justifiable reasons why the burden should not be just silently shouldered by the affected party. Under Article 6.2.2 of the UNIDROIT Principles, the cost increase becomes hardship if the source thereof can be found outside of the contract, in events that the affected party (i) became aware of it after conclusion of a contract, (ii) could not reasonably expect it, and (iii) did not control or assume it.[12] To differentiate hardship and *force majeure* situations, it should be noted that hardship does not require impossibility of performance.[13] In cases of hardship, the affected party may perform the contract at its will but the performance is no longer advantageous because of the increased costs.

When hardship occurs, the affected party (or, even better, both parties) may approach the issue from several perspectives:

- (non-)performance – the affected party either performs the contract or breaches it, in any case bearing the negative consequences in the form of increased costs or damages; in some jurisdictions hardship may be claimed as a simple excuse from performance and thus defence against damages claims;[14]
- renegotiation – both parties agree to adjust contractual terms more or less in line with the changing circumstances;
- termination – because the hardship renders the contract economically non-viable, the affected party may have an option to unilaterally terminate the contract (or the parties agree on termination); or
- adjustment – a crossbreed between the above, where a contract is not terminated but the performance is granted under new conditions which are not a result of renegotiation but of an arbitral award.

12 Full text reads: *"There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party."*

13 BRUNNER, C. *Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2009, p. 76.

14 Such an approach is most notably seen in Article 79 of the United Nations Convention on Contracts for the International Sale of Goods, which does not support contract adjustment but works only as an exemption from negative consequences in case of non-performance.

Both the contract itself and the underlying contractual law may include or exclude some of these solutions. Although some authors argue that contract adjustment as a potential remedy available in arbitration is neither necessary nor desirable under the current standards and practice,[15] as will be discussed further below, I am of the opinion that contract adjustment may be beneficial but only if additional requirements are met.

2.1 Challenges of Contract Adjustment

While the contracting parties are automatically considered both capable and empowered to renegotiate their contract, in case of a third-party decision, any such assumption becomes moot and gives rise to several challenges. In the context of arbitration these may be divided between issues regarding (i) procedural authority of the arbitration tribunal and (ii) substantive legitimacy of the adjustment.[16]

2.1.1 Power of an Arbitral Tribunal to Decide on Contract Adjustment

What a tribunal can or cannot decide is in essence determined by the arbitral agreement of the parties and the applicable procedural law, *lex arbitri*. When providing scope of arbitrators' powers, arbitration agreements do not go into much detail and refer simply to the power to decide on a "dispute".[17] In some jurisdictions, *lex arbitri* is traditionally interpreted narrowly in this context, meaning that the term dispute is understood as a "legal dispute", which may be understood narrowly as a dispute over legal aspects only.[18] In such a case, assuming that the factual circumstances constitute a hardship situation, two conflicts over the potential adjustment may arise. Either

15 SCHWENZER, I., MUÑOZ E. Duty to renegotiate and contract adaptation in case of hardship. *Uniform Law Review*. 2019, Vol. 24, no. 1, p. 149.

16 BERGER, K. P., Adaptation of Long-Term Contracts by International Arbitrators in the Face of Severe Economic Disruptions: Three Salient Problems. *Journal of International Arbitration*. 2020, Vol. 37, no. 5, p. 590.

17 Template arbitration clauses of major arbitration institution such as ICC, London Court of International Arbitration or Vienna International Arbitral Centre use "all disputes" or "any disputes".

18 BEISTEINER, L. Chapter I: The Arbitration Agreement and Arbitrability, The (Perceived) Power of the Arbitrator to Revise a Contract – The Austrian Perspective. In: KLAUSEGGER, C. et al. (eds.). *Austrian Yearbook on International Arbitration 2014*. Wien: C. H. Beck, 2014, p. 84.

the affected party requests adjustment of a contract which the counterparty disputes altogether or each party has its own idea as to how the contract should be adjusted. In the first scenario, the tribunal would have to address whether the situation amounts to hardship[19] which may be qualified as a "legal dispute" but ultimately, as is the case with the second scenario, the core of the decision actually lies in deciding on the adjustment itself. This is arguably more of a question of expertise or business than law, which are both questions outside of the context of "legal dispute".[20]

The challenge posed by traditional limitation of arbitrators to solving "legal disputes" only is challenged by the same sources that have introduced it – arbitration agreement and applicable law. Firstly, while parties have agreed that arbitrators shall decide their dispute, the same agreement may also allow adjustment of a contract. While such reference may be found in the arbitration clause, relevant language may also be found elsewhere. In its latest update to template hardship clause, ICC has provided language for adjustment of a contract by arbitrators or court as a part of its hardship clause.[21] This approach seems to be wise, after all, adjustment of a contract should be reserved for hardship situations and if the parties decide to confer that power upon the tribunal, it is advisable to do so without raising any doubt as to when it should be used.

If a parties' agreement on the issue is not available, it is still possible to argue in favour of the arbitrators' power to adapt the contract, this time relying on the principle of synchronized competences.[22] Under this principle, if a matter is arbitrable, and parties choose arbitration in lieu of state courts,

19 LORFING, P. A. Chapter 2: Adaptation of Contracts by Arbitrators. In: BORTOLOTTI, F., UFOT, D. (eds.). *Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World*. Den Haag: Kluwer Law International, 2019, p. 54.

20 Along these lines, the Austrian Supreme Court held in a decision of 1985 that *"the adaptation of a long-term contract to changed circumstances"* on the basis of a respective contractual clause would not be arbitration (i.e., *Schiedsrichtertätigkeit)*, but rather expert determination (i.e., *Schiedsgutachten)*. – See Judgment of the Supreme Court of Austria (Oberster Gerichts- und Kassationshof), Austria, of 27. 2. 1985, Case 1 Ob 504/85.

21 See ICC template hardship clause at ICC Force Majeure and Hardship Clauses. *ICC* [online]. [cit. 12. 6. 2022]. Available at: https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf

22 BERGER, K. P. Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense. *Arbitration International*. 2001, Vol. 17, no. 1, p. 10.

powers of the arbitrators to resolve the dispute should be, in their scope, aligned with the power of the courts. Otherwise, arbitration would fail as an alternative to court litigation. Hence, the principle of synchronized competences provides the next step towards a solution – it is now a matter of looking whether state courts, in the seat of arbitration, would have the power to adjust the contract.

Similarly to placing the language within contractual hardship clause, in case of court's power, it is usually a matter of substantive and not procedural law. In particular, it has to be determined whether the law governing the contract recognizes hardship as a concept and what solutions it offers in cases it occurs. In cases of conflict between the chosen substantive law of the contract and *lex arbitri*, typically the substantive law allows for hardship and adjustment of contracts while the arbitration is seated in a different state that does not recognize either, it should still be argued in favour of adjustment. That is because even in that scenario, state judges would have to apply the relevant substantive law including the concept of hardship. To argue that they could not do so because of "gaps" in their procedure would deny parties their choice of law, and while adjustment of contracts may be seen as controversial and debatable topic, it hardly seems an appropriate fit for the public policy exception.

To conclude, powers of the tribunal to decide on adjustment of a contract may be found with the most ease if the parties include relevant procedural language in the hardship clause. In its absence, the matter requires an analysis of the applicable substantive law which may allow for adjustment by the court judges and thus, under the principle of synchronized competence, also by the arbitrators. There are thus three potential and often combined sources of arbitrators' power to adjust the contract: arbitration agreement, *lex arbitri* and applicable substantive law. And although this trio may provide for some clashes of its own, the result should support adjustment process as an option in arbitration.[23]

23 BERGER, K. P. Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense. *Arbitration International*. 2001, Vol. 17, no. 1, p. 7–8.

2.1.2 Substantive Issues Regarding Contract Adjustment

First of all, it was noted that also when declaring hardship, the arbitrators should proceed with caution and adopt a restrictive approach – hardship should be reserved for extreme and exceptional circumstances.[24] As noted by an English court, hardship is not something that *"happens in a flash or is here today and gone tomorrow"* but rather circumstances resulting in serious and grave distortion of parties' expectations.[25]

If hardship indeed occurs and arbitrators are deciding on how to adjust the contract, their biggest challenge is that, as any third party actor, they suffer from lack of relevant knowledge, including know-how in the field itself (demands, other sources of goods, price models, etc.) or knowledge related to the parties only (business projections, related contracts, etc.). The arbitrators also lack any real responsibility for the decision, meaning that the burden of a wrong decision will be borne by the parties and not by the decision-makers themselves. Furthermore, there is also lack of certainty regarding the future performance – if the "new" contract is breached, should that trigger a new dispute or enforcement procedure? These are all concerns that should put the tribunal on notice to carefully weight and consider any adjustment measure, and especially to involve both parties as much as possible to alleviate their own shortcomings.

The hardship clauses may provide only very general guidance, stating that arbitrators should adjust the contract in order to find an *"equitable solution"*[26]. If the hardship provision, whether based on the contract or the applicable law, lacks any kind of guidance for the arbitrators, the decision will be based on general principles of good faith and fairness.[27] In addition, some guidance

24 BERGER, K. P. Adaptation of Long-Term Contracts by International Arbitrators in the Face of Severe Economic Disruptions: Three Salient Problems. *Journal of International Arbitration*. 2020, Vol. 37, no. 5, p. 595.

25 Judgment of the Court of Appeal (Civil Division), England, of 28. 7. 1981, *Superior Overseas Development Corporation and Phillips Petroleum (U.K.) Co. Ltd vs. British Gas Corporation*, Case 81/0316 1981 P No. 938 1981 B No. 1271.

26 LORFING, P. A. Chapter 2: Adaptation of Contracts by Arbitrators. In: BORTOLOTTI, F., UFOT, D. (eds.). *Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World*. Den Haag: Kluwer Law International, 2019, p. 51.

27 BERGER, K. P. Adaptation of Long-Term Contracts by International Arbitrators in the Face of Severe Economic Disruptions: Three Salient Problems. *Journal of International Arbitration*. 2020, Vol. 37, no. 5, p. 596.

may still be sought within the dispute itself. Commentators have noted that even though hardship clauses (or even more generally arbitration clauses) usually require parties to firstly try to negotiate in good faith, even once the claim is filed, arbitrators still may invite the parties to negotiate, invite experts or employ any other methodology to narrow down intentions of the parties[28] and come up with a suitable decision[29].

3 Dealing With a Change of Circumstances in the Context of the GSPAs

In order to examine contract adjustment as a practical solution in case of changing circumstances, this paper will now focus more closely on a specific contractual field of GSPAs. As apparent from the title, under a GSPA the seller undertakes to continuously sell and deliver certain quantities of natural gas for a certain price to the buyer.[30] GSPAs are usually entered into for an extensive period of time, which may extent to several decades, typically between 20 to 30 years, although shorter contracts (10 to 15 years) are becoming more common.[31] Any contract which extends over such a substantial period of time is naturally more susceptible to risk of unforeseeable change in circumstances.[32] As a way of allocation of this risk, the GSPAs have developed several typical features, such as:

- Allocation of volume risk by a "take-or-pay" provision – supply of gas requires considerable investment from the seller who needs to build, maintain and operate required infrastructure, GSPAs thus need to include sufficient assurances that the infrastructure will not be in vain. Traditionally, the volume risk is assumed by the buyers

28 LORFING, P. A. Chapter 2: Adaptation of Contracts by Arbitrators. In: BORTOLOTTI, F., UFOT, D. (eds.). *Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World*. Den Haag: Kluwer Law International, 2019, p. 65.

29 Ibid., p. 62.

30 IYNEDJIAN, M. Gas Sale and Purchase Agreements under Swiss Law. *ASA Bulletin*. 2012, Vol. 30, no. 4, p. 746.

31 COHEN, G. Long-Term Gas Contracting: Terms, definitions, pricing – Theory and practice. *Institute of Energy for SE Europe (IENE)* [online]. 2019 [cit. 12. 6. 2022]. Available at: https://www.iene.eu/articlefiles/Long-Term%20Gas.pdf

32 ROZEHNALOVÁ, N. Vyšší moc, hardship aneb smluvní doložky v mezinárodní praxi. *Časopis pro právní vědu a praxi*. 2015, Vol. 23, no. 1, p. 57.

in a form of a "take-or-pay" clause which requires the buyer to either take minimum amount of gas (annually), or pay for it; the relevant percentage may be rather high (from 75 to 95% of the full quantity)[33];

- Allocation of price risk – GSPAs determine price for gas by a complex price formulas that may (i) use indexation to other competing energy sources (such as oil, coal or electricity)[34] or (ii) refer to alternative price of gas that may be obtained by the buyer elsewhere; both measures are meant to keep the price on a competitive level.[35]

Both the allocation of volume and price risks are meant as automatic adjustments of the parties' obligations under the GSPAs over time. However, at times the original mechanisms may not work well enough to maintain balance between the parties. Given the initial investment, need for stable supply of gas to third parties, and limited alternative options in terms of other potential contractors, adjustment of a GSPA beyond the original terms seems to be worth due consideration. The GSPAs deal with the issue primarily by including price review clauses, with general hardship clauses acting in support thereof. Both will be examined in the following sub-chapters.

3.1 Contract Adjustment Under the Price Review Clauses in GSPAs

Focusing first on the issues of price, it was noted that the automatic "adjustment" by way of changes of variables in the calculation formula may not be enough to support the economic balance of a particular GSPA. Therefore, in addition to the indexation itself, the GSPAs often include also provisions which allow for revision of the calculation mechanism itself, so called "price review clauses" or "price re-opener clauses".[36]

33 POLKINGHORNE, M. A. Take-or-Pay Conditions in Gas Supply Agreements. *White & Case LLP* [online]. 2016 [cit. 12. 6. 2022]. Available at: https://www.whitecase.com/sites/whitecase/files/files/download/publications/paris-energy-series-no7_2016.pdf

34 FERRARIO, P. *The Adaptation of Long-Term Gas Sale Agreements by Arbitrators*. Alphen aan den Rijn: Kluwer Law International, 2017, p. 73.

35 IYNEDJIAN, M. Gas Sale and Purchase Agreements under Swiss Law. *ASA Bulletin*. 2012, Vol. 30, no. 4, p. 747.

36 FERRARIO, P. *The Adaptation of Long-Term Gas Sale Agreements by Arbitrators*. Alphen aan den Rijn: Kluwer Law International, 2017, p. 74.

The price review clauses typically feature specification of a triggering event, which may be either a simple passage of time (i.e., allowing for periodical review every few years) or more specific change in the market.[37] If the triggering event occurs, parties are due to renegotiate the price formula, and in case of a conflict enter into a dispute resolution procedure, typically arbitration.

The obvious difference from a general hardship clause is that by targeting a specific provision of the GSPA (i.e., the price clause), the price review clauses enable parties to provide clear set of directions and limitations for themselves as well as the arbitrators.[38] These may include general references to good faith and fairness, maximum number of reviews or other time limitations,[39] requirement to include experts to deal with the technical side of the calculation,[40] requirement to consideration of prices of other energy commodities[41] and others. The wording may also generally specify the final effect of the adjustment, for example demanding that the adjusted price clause must allow the buyer to be able to economically market the gas, or that the adjustment should result in the seller gaining profit or parties share the loss.[42] These are in line with the general idea that the contract should remain balanced.[43]

The price review clauses differ from hardship not only by its limited scope but because they do not necessarily require the triggering event

37 KHANNA, K. Gas Price Review Disputes: Key Insights for a Successful Resolution. *Global Arbitration Review* [online]. 10. 11. 2020 [cit. 12. 6. 2022]. Available at: https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/4th-edition/article/gas-price-review-disputes-key-insights-successful-resolution

38 LOREFICE, M. Gas Price Review Arbitrations. *Global Arbitration Review* [online]. 10. 11. 2020 [cit. 12. 6. 2022]. Available at: https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/4th-edition/article/gas-price-review-arbitrations

39 FERRARIO, P. *The Adaptation of Long-Term Gas Sale Agreements by Arbitrators*. Alphen aan den Rijn: Kluwer Law International, 2017, p. 81.

40 SARZANA, S. The rise of price revision arbitrations. *ICLG* [online]. 31. 10. 2012 [cit. 12. 6. 2022]. Available at: https://iclg.com/cdr/arbitration-and-adr/european-energy-disputes:-the-rise-of-price-revision-arbitrations

41 FERRARIO, P. *The Adaptation of Long-Term Gas Sale Agreements by Arbitrators*. Alphen aan den Rijn: Kluwer Law International, 2017, p. 81.

42 Ibid., p. 81.

43 BERGER, K. P. Adaptation of Long-Term Contracts by International Arbitrators in the Face of Severe Economic Disruptions: Three Salient Problems. *Journal of International Arbitration*. 2020, Vol. 37, no. 5, p. 598.

to be unforeseeable for the affected party. To the contrary, by including a price review clause, parties are planning a procedure for when the triggering event occurs, thus foreseeing it without assuming the risk thereof.[44] From this point of view, price review clauses are not only "better targeted hardship clauses" but also more easily accessible provisions for the affected party.

Of course, the requirement of foreseeability may be added and some authors list it as a general rule,[45] nevertheless such an approach conflicts with the idea of providing specified conditions for the adjustment under the price review clause. Simply speaking, if the review may be triggered only by events unforeseeable to the parties, they may hardly prepare specific and effective guidelines as to how the situations should be solved and parties may as well only include a hardship clause to have a general escape for unforeseeable events. I would thus argue for leaving the foreseeability requirement out of the price review clause.

Apart from hardship, which may also be answered by termination of the contract (see above), if the price review clause is successfully invoked and the negotiations fail, the conflict should be automatically resolved by contract adjustment, otherwise the inclusion of the price review clause in the GSPA loses any effect beyond an invitation to negotiate.

That being said, negotiations still may play a major role in the dispute resolution. In ICC Case no. 10351,[46] the tribunal was deciding on adjustment of a price review clause in a GSPA concerning liquified natural gas following the parties' disagreement in the initial negotiations. The tribunal responded by issuing a partial award, ordering the parties to negotiate again for a set period of time. The arbitration was then to be resolved either in accordance with a newly reached agreement of the parties or by the tribunal itself based upon suggestions provided by the parties.

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44 LOREFICE, M. Gas Price Review Arbitrations. *Global Arbitration Review* [online]. 10. 11. 2020 [cit. 12. 6. 2022]. Available at: https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/4th-edition/article/gas-price-review-arbitrations

45 FERRARIO, P. *The Adaptation of Long-Term Gas Sale Agreements by Arbitrators*. Alphen aan den Rijn: Kluwer Law International, 2017, p. 80.

46 For excerpt in English see Partial 10351. *ICC Dispute Resolution Bulletin*. 2009, Vol. 20, no. 2, pp. 76–86.

3.2 Contract Adjustment Under Hardship Clauses in GSPAs

Hardship clauses may be found in GSPAs,[47] although they are less common,[48] and if the GSPA includes a separate price review clause, hardship provision is more or less a supplementary basis for contract adjustment covering the contract as a whole.[49] In this sense, hardship is a practical third alternative to subject-specific price review clauses and high-standard *force majeure* clauses.

In contrast to more specific price review clauses, hardship clauses in GSPAs, as in other contractual fields, often lack any such criteria and require only "fair and equitable" or "reasonable" result. Nevertheless, in case law related to GSPAs, there are several interesting examples of how a hardship clause may provide more specificity.

In ICC Case no. 15610, the arbitrators evaluated a hardship clause applicable in case of reasonably unforeseen circumstances resulting into a "severe and unforeseeable" hardship which had to last for at least six months. Furthermore, the affected party had to provide a written notice of the situation specifying *"(i) the date and nature of the event or events which caused the change alleged by it; (ii) an evaluation of the hardship that has been suffered; and (iii) the proposal made by that Party to remedy that hardship."*[50]

By these simple requirements, the parties provided some initial materials for themselves as well as the tribunal in a manner comparable with the price-review process.

4 Conclusion

As the list of jurisdictions with substantive rules on hardship and contract adjustment grows, arbitration should follow this trend. Contract adjustment

47 FERRARIO, P. *The Adaptation of Long-Term Gas Sale Agreements by Arbitrators*. Alphen aan den Rijn: Kluwer Law International, 2017, p. 74.

48 ZIADÉ, R., PLUMP, A. Changed Circumstances and Oil and Gas Contracts. *BCDR International Arbitration Review*. 2020, Vol. 7, no. 1, pp. 195, 218.

49 KAUFMAN, E. E., SVINKOVSKAYA, S. Chapter 5: Gas and Liquefied Natural Gas Disputes in Latin America: Issues of Force Majeure, Hardship, and Price Reopeners. In: ALVAREZ, G. M., PICHÉ, M. R., SPERANDIO, F. V. (eds.). *International Arbitration in Latin America: Energy and Natural Resources Disputes*. Alphen aan den Rijn: Wolters Kluwer Law International, 2021, p. 130.

50 See Final Award in Case 15610. *ICC Bulletin e-Chapter, Extracts from ICC Arbitration in Oil and Gas Disputes.* 2014, Vol. 25, no. 1.

should then be provided in the spirit of good faith and fair "meeting halfway" at times when full "meeting of minds" is out of the question even though parties may not wish to terminate the relationship altogether. In cases where the party affected by hardship wishes to renegotiate the contract and the not-affected party wishes to carry on without changes, contract adjustment may resolve the issue in a true manner of a compromise. Given the fact that in hardship neither is to blame for the dispute itself, it seems fair that neither party will be fully successful nor fully burdened by the changed circumstances. For this reason, contract adjustment should be available.

Nevertheless, contract adjustment is still a remedy to a dispute and as such has no chance at successfully resolving the conflict (and not immediately trigger another), if the parties no longer share at least the most basic will to continue the contractual relationship. Hence, expression of such will should be required. While it would be unreasonable to expect an explicit declaration of intent after the arbitration commences, the will of the parties may be derived from their conduct in the proceedings and even during the (failed) negotiations leading up to it. This may cover cases where the parties continue to perform the contract partially or where the dispute is more concerned about the scope and content of the adjustment and not the idea thereof, as is the case with price review clauses in GSPAs. Also, if the claimant includes termination of the contract due to hardship as an alternative prayer for relief (next to the argument for its adjustment) and the claim is refused by the counterparty, that may serve as a guidance for what is actually desired by the parties. Respect to the will of the parties also means that contract adjustment should not be considered unless proposed by at least one of the parties.

Following the GSPAs practice, especially with respect to price review clauses, the arbitral tribunals should consider not only whether hardship occurred but also observe additional requirements in order to support arbitral award leading to contract adjustment.

If there is no guidance in the contract or applicable law, arbitral tribunal should actively seek it. Most importantly, because contract adjustment is meant to re-set the business relationship, the decision-making should incorporate aspects of negotiations in a sense that both parties should be given an opportunity to present their idea about how the contract should

look like after the arbitration is concluded.[51] In practice, the parties should be given a timely notice that the tribunal has decided to adjust the contract and, following such a notice, an opportunity to submit proposals for the adjustment. This notice may be even formalized as a partial arbitral award on the matter.

By providing a chance to participate in the formulation of the adjustment, the tribunal supports procedural equality of the parties and makes success of their future relations more probable. After all, contract adjustment has the unfortunate attribute of creating a renewed platform on which the parties may one day arbitrate anew. The tribunal should not only make every effort to examine its procedural powers and issue an enforceable award but also to consider its practicability for the parties bound by the adjusted rights and obligations.

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