

Practical Guide to Asian LNG Price Review: Part 2

March 16, 2020

Part 2

There are currently substantial commercial incentives for Asian buyers to seek price adjustments under their long-term liquefied natural gas (LNG) contracts. In Part 1 of this series we outlined the elements of an effective price review clause. But where price review cannot be resolved by agreement, an effective arbitration mechanism is required.

We comment below from the perspective of Asian price review on the three fundamental elements needed for an effective arbitration clause.

1. Seat

There is a common misconception that the choice of seat of arbitration merely determines where hearings are to take place. In fact, it determines the procedural law of the arbitration and which national court has supervisory jurisdiction—factors that have fundamental implications. For example, they impact:

- The extent to which national courts will intervene in the arbitration, either to support or (potentially) undermine it.
- The availability of interim remedies.
- Rights to challenge an arbitral award.
- Recognition and enforcement of an award, both at the seat and elsewhere.

It is therefore vital that a seat is chosen which has laws and national courts that are reliable, neutral and “pro-arbitration.”

For Asian arbitrations, Singapore is now a common choice, and it certainly fulfils these criteria.

2. Institutional Rules

It is usually strongly desirable to incorporate by reference established institutional arbitration rules into an arbitration clause. The choice of seat need not determine which rules are chosen, and it is important to consider the differences between rules before a decision is made.

Contact Information

If you have any questions concerning this alert, please contact:

Justin Williams

Partner

williamsj@akingump.com

London

+44 20.7012.9660

Michael Joyce

Partner

Michael.Joyce@akingump.com

Singapore

+65 6579.9020

Conor Mc Stravick

Counsel

Conor.McStravick@akingump.com

London

+44 20.7012.9822

Cost: One area in which different rules have markedly different approaches is in determining arbitrators' and institutional fees. The Singapore International Arbitration Centre (SIAC), International Chamber of Commerce (ICC) and certain other rules adopt an "ad valorem" approach, which determines fees on a scale by reference to the amount in dispute. In contrast, the Japan Commercial Arbitration Association (JCAA) and London Court of International Arbitration (LCIA) rules apply hourly rates, subject to a maximum cap. Since large sums are typically at issue in price review arbitrations, it may be that the hourly rate approach would produce significantly lower costs.

Time: Choice of rules may also impact the duration of arbitrations. For example, experience suggests that rules providing for fewer procedural steps and with swifter institutional administration may enable an award to be obtained more rapidly.

Confidentiality: LNG price review arbitrations involve the disclosure of highly sensitive information. The price which is subject to review will itself be highly confidential. In addition, for example, the review methodology may require that prices under comparable contracts or in end-user markets are considered. However, different arbitral rules have markedly different confidentiality requirements—some surprisingly light. For example, the United Nations Commission on International Trade Law (UNCITRAL) Rules are largely silent on confidentiality and only implicitly indicate that the award itself should not be made public.

The terms of institutional rules can usually be revised in the arbitration clause. For example, if the confidentiality regime in the chosen rules is not thought to be adequate, it can be expressly supplemented or replaced.

A comparison of key international arbitration rules can be found [here](#).

3. Arbitrators and Language

The clause should specify the number of arbitrators. One will usually be cheaper and quicker, but the amounts at issue in price review arbitrations are typically thought to justify the additional reliability of three arbitrators.

To reduce the time and cost of translation, the clause should specify the language of the arbitration.

akingump.com