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Evidence in gas pricing arbitration

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1. Introduction

Counsel and tribunals in gas pricing disputes are confronted with the tension inherent in long-term gas supply agreements ('GSAs') between the need for predictability, which mandates high thresholds for seeking and establishing the need for a price revision, and the concurrent need for flexibility, which requires that GSAs may be adapted to take into account changes in energy markets that have all too often gone through phases of turmoil. This tension is compounded by the limited availability of data regarding market prices and the presumption that, the parties being sophisticated and prudent operators, they are deemed to be aware of the prevailing market conditions.

This chapter examines the specificity of evidence in gas pricing arbitration and in particular how it may depart from principles commonly applied in other commercial disputes.

Indeed, although the burden and standard of proof are determined pursuant to applicable law, their regime may vary as a result of the specific language of the GSA at issue, and are in addition impacted by presumptions inherent to the industry.

The scarcity of data available in gas pricing disputes also impacts the selection by the parties of available evidence in support of their respective positions.

Finally, the focus of gas price reviews on a determined temporal scope set usually by the reference period raises issues as to the admissibility of evidence from outside this determined scope. This touches on the admissibility of evidence post-dating the end of the reference period, the evidence from the negotiation phase, and also arbitral decisions rendered in previous matters.

2. Burden and standard of proof in gas pricing arbitration

The determination of the party bearing the burden of proof, as well as the standard of proof, in gas pricing disputes, follows from the applicable law, as in any commercial dispute. However, certain specificities arise in gas pricing arbitrations, in which the requesting party has to meet a burden articulated in two steps, one at the request stage and the other at the adjustment stage.

Furthermore, both the burden and standard of proof are affected by certain presumptions specific to gas pricing disputes.

2.1 Burden of proof

The prevailing principle in international arbitration is the principle *actori incumbit probatio*, that is, the party making an allegation must prove it.¹

In the context of a gas price review arbitration, the burden of proof rests on the party seeking a revision,² as in any dispute. However, this matter is rendered somewhat more complex in gas pricing disputes since the requesting party must in fact meet two separate burdens. As a first step, it must prove in its price revision request that the contractual requirements for a price revision are met. As a second step, it must prove, in the negotiations or, should those fail, in the subsequent arbitration, that a revision of the contract price is warranted.

Unlike the burden of proof of a party's claim for an adjustment of the price formula, the burden of proof at the stage of a price revision request is often more formalistic and may be more or less stringent depending on the GSA. However, this stage is not simply procedural. Normally, the requesting party must show that a so-called trigger event has occurred and explain the consequences that this has on the pricing terms in force. The burden of proof in this phase is usually lower than in the adjustment phase, requiring a *prima facie* demonstration of the merits of the price review requested. This step can nonetheless be crucial in gas pricing arbitrations as the issue of whether a price review request has been served in accordance with the GSA and adequately substantiated may have an impact on the admissibility of the requesting party's substantive claims in the arbitration. Irrespective of the applicable law, this principle derives from the GSA, which usually provides that the party requesting a revision must substantiate its request.

The language for this requirement varies from one contract to another. The threshold is generally limited to providing the reasons for the revision (eg, by stating that the requesting party should "inform the other party in writing, stating the reasons therefore and proof of these reasons" or "notify the other party in writing of a price revision request, substantiating the grounds for its request").

Other GSAs even provide that the trigger letter should be accompanied by supporting evidence. This was the case in ICC Case No 9812, in which the contract specified that: "[e]ach party shall provide all necessary information to substantiate its own claim. No Party shall be required to disclose any business

1 J Waincymer, *Procedure and Evidence in International Arbitration* (Wolters Kluwer, The Netherlands, 2012) 763; N Blackaby, M Hunter, C Partasides and A Redfern, *Redfern and Hunter on International Arbitration* (OUP, United Kingdom, 2015) para 6.84.

2 See Final Award in Case 9812, August 1999, "An application of Article 6.10(a)(1) implies that the burden of proof is on the party requesting a price review" (2009) 202 *ICC International Court of Arbitration Bulletin* 81.

secrets nor [sic] to provide such information as the other party may need to substantiate its claim.”³

Some GSAs merely require that the requesting party notify the other party of its price revision request. Yet, even then, the GSAs often require that the requesting party substantiate its position in the ensuing negotiation period. Such substantiation may include a description of the changes invoked, with reference to economic analyses or data showing the need for a revision.

Once the request has been admitted, either voluntarily by the receiving party or through arbitration, the requesting party must establish that the price revision it is seeking is justified, for instance because the contract price has become out of sync with the parties’ original bargain. In this phase, the requesting party has the burden of proving that, during the contractual reference period, the economic circumstances changed significantly compared to those that prevailed at the time the parties last agreed on the pricing terms of their GSA, and that these changes are not reflected in the pricing provisions in force so that an adjustment is required.

The exact scope of the requesting party’s burden of proof with respect to the adjustment phase is usually defined by the price revision clause. In particular, the clause will determine:

- the reference period to be taken into account (usually the period of time between the last price revision and the request for a new price review);
- the reference market, which may be defined in geographic terms (eg, the market of the buyer or a wider market), sectorial terms (eg, the electricity, industrial or retail markets) or a combination of both;
- the specific circumstances that must be examined, if they are specified at all (eg, gas prices and their structure, the price of alternative energies);
- the magnitude of the required change in economic circumstances (eg, whether the change must be “substantial”, “material” “unforeseeable”, “outside the parties’ control”);
- the impact of the change on existing pricing terms; and
- whether new or alternative pricing terms reflecting the changes may be introduced.

Although the burden of proof on whether a price revision is warranted cannot shift, the more the requesting party substantiates its request, the more the party resisting the price revision will have to present contrary evidence to counter it.⁴ Similarly, the party resisting the price revision may present its own case in response to the claimant’s claim (eg, by proposing a different

3 *Ibid*, 79.

4 J Waincymer, *Procedure and Evidence in International Arbitration* (Wolters Kluwer, The Netherlands, 2012) 763.

interpretation of the reference market or alternative benchmarks to be taken into account to track the prices of natural gas, LNG or alternative fuels in such markets). In such cases, the respondent will bear the burden of proving this positive case.

2.2 Standard of proof

Tribunals often determine the degree of evidence required in accordance with the nature of the proposition to be proved. As a general rule, “the more startling the proposition that a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring that proposition to be fully established”.⁵

The standard of proof applied by tribunals in gas pricing disputes is also contingent on the availability of the evidence. More often than not, proving the need for a price revision requires reliance on pricing data, which is either not publicly available or incomplete or confidential. It has been suggested, that, in such cases, the standard of proof should be adapted accordingly, that is, that the tribunal should accept that a party has met its burden of proof if it has adduced sufficient evidence in light of what is available to it.⁶

2.3 Presumptions in gas pricing disputes

Certain presumptions arise in the context of evidence in gas pricing disputes, not by virtue of legal requirements, but as a result of specific pricing terms or industry practice.

A key presumption is that the parties are prudent and sophisticated operators. This presumption is logical in light of the technical and legal skills required to be able to even enter into a GSA.

This presumption is sometimes formalised in GSAs. For instance, in ICC Cases Nos 13504 and 9812, the contract provided that the parties’ conduct should be assessed under the standard of a “prudent and efficient gas company”.⁷ Other contractual terminologies include “reasonable and prudent operator”, “efficient and prudent operator” or “skilled and efficient operator”. Some GSAs even provide a definition of the standard, often by making it clear that the parties are deemed to perform their obligations in good faith, exercising a degree of skill, prudence and foresight to be expected from an operator engaged in the same type of undertaking.

Under this presumption, the tribunal will consider both parties to be professionals, familiar with the natural gas market and industry.

5 N Blackaby, M Hunter, C Partasides and A Redfern, *Redfern and Hunter on International Arbitration* (OUP, United Kingdom, 2015) paras 6.86–6.87.

6 See P Pinsolle, “Confidentiality in Gas Price Reviews” in M Levy, *Gas Price Arbitrations* (Globe Law and Business, London, 2014) 57–59.

7 Final Award in Case 13504, January 2007, (2009) 202 *ICC International Court of Arbitration Bulletin* 105–06; Final Award in Case 9812, August 1999, (2009) 202 *ICC International Court of Arbitration Bulletin* 79.

This may have practical consequences in terms of the conduct and evidence expected from the parties. For instance, in ICC Case No 13504, the tribunal considered that this standard could influence the appreciation of whether a change in economic circumstances was outside the parties' control.⁸ This principle also guided the tribunal's analysis of the method and evidence proposed by the claimant to calculate the value of natural gas in the relevant market.⁹

A second presumption, which derives from the first one, is that the parties, as prudent operators, were fully aware of all the prevailing economic circumstances when they agreed on the terms of the GSA or renewed their consent to the pricing provisions.

The practical consequence of this presumption, in terms of evidentiary standards, is that any contemporaneous publicly available evidence could be presumed to have been known to, and taken into account by, both parties. Consequently, a party seeking to argue that it was not aware of a certain event, which was discoverable from the public domain will have to meet a very high burden of proof.

A third presumption, which derives from the first two, is that, when entering into a GSA or renewing their agreement on its pricing provisions, the parties will not only have made the necessary inquiries regarding the prevailing economic circumstances, but also made reasonable projections as to how these circumstances would subsequently evolve.

In light of the volatility of the oil market and the changes that have affected the gas markets over the last two decades, this presumption is obviously not conclusive. However, certain provisions, like hardship clauses or the law applicable to some GSAs,¹⁰ enable a party to seek a price revision should an unforeseeable change in circumstances arise, outside the parties' control. In such situations, if the data available the last time the price was agreed would have enabled the parties to reasonably anticipate the change invoked by the requesting party, tribunals may reject the price revision request.

Naturally, all these presumptions are rebuttable, which in turn implies that the burden of disproving them would lie on the party seeking to do so.

8 Final Award in Case 13504, January 2007, (2009) 202 *ICC International Court of Arbitration Bulletin* 108 (at para 110).

9 *Ibid.*, pp114–115 (at para 138). In particular, the tribunal considered whether the claimants had acted as a “prudent and efficient gas company” in order to determine whether the prices presented by the claimants as obtainable in its home market were indeed market-reflective or the consequence of events within its control, ie significant discounts off market price to its customers, as purported by the respondent. In so doing, the tribunal noted that “Claimants have been most reluctant to disclose information relating to the relations between Claimants and their traditional customers”.

10 See M Polkinghorne, “Changes of Circumstances as a Price Modifier” in M Levy, *Gas Price Arbitrations* (Globe Law and Business, London, 2014) 63.

3. Types of evidence used in gas pricing disputes

A specific trait of gas pricing arbitrations is that they typically do not arise from a breach of the GSA, but from a dispute over whether a specific set of circumstances justifying a price revision has occurred and whether a price revision is warranted under those circumstances. In other words, the economic circumstances can play a much greater role than the factual aspects of the parties' relationship. As a result, although parties to a gas pricing arbitration will rely on documentary evidence, experts and fact witnesses, as in other international disputes, the relative focus and importance of such evidence is rather particular in these types of disputes.

3.1 Documentary evidence

The key issue in relation to documentary evidence in gas pricing disputes is the availability of reliable data concerning the value of natural gas, or competing fuels, in a specific market. This data, although necessary to determine whether a change in economic circumstances requiring a price revision has occurred, remains scarce.¹¹

Whether introducing this evidence through an expert or directly,¹² parties often use combinations of different sources of publicly available data (statements by energy regulators, statistics, market reports, reports from other gas companies to their shareholders, etc) to get as close as possible to the reality of the value of gas in the market. Some practitioners have compiled impressive lists of available public sources that can be used to that effect.¹³ However, the calculation methods may be unknown or inconsistent from one source to the next. The use of public data is often challenged in arbitrations on this basis. The most relevant data are sometimes the prices of gas under individual contracts, which remain confidential.

Public statements by gas companies that they are requesting price revisions under their GSAs can also constitute possible indicators of change in the market even though the provisions of the underlying contracts, and, in particular, the conditions for price revisions remain confidential.¹⁴ Publicised results of gas pricing arbitrations provide similar indicators. Multiple statements by buyers that they have succeeded in securing a price revision may assist other buyers in

11 There is undeniably a trend towards more transparency in the natural gas market. The availability of market-based hub prices provides useful indications concerning the value of gas. The time may come when gas market hub prices will be applied as the relevant benchmark. Be that as it may, for the time being, the market is not changing uniformly. Although Northwest European hubs are increasingly mature and market-reflective, the same cannot be said for the rest of the European market and, to a larger extent, the Southeast Asian market.

12 Parties often involve consultancy firms as expert witnesses to provide in-depth analysis of the value of natural gas in a given market based on independently gathered data. Expert evidence is discussed further in section 3.2 below.

13 J Bowman and J Mattamouros, "Resources on Resources: Publications and Databases Available to Help Advocates in International Oil & Gas Disputes" in JM Gaitis (ed), *The Leading Practitioners' Guide to International Oil & Gas Arbitration* (Juris, 2015) 937 et seq.

14 M Polkinghorne and S-M Volkmer, "Price Re-Openers in Long-Term Gas Supply Agreements" in M Gaitis (ed), *The Leading Practitioners' Guide to International Oil & Gas Arbitration* (Juris, 2015) 550.

convincing tribunals that their own claim is justified. Similarly, statements providing information as to changes in formula indexation often serve as an argument in subsequent gas pricing disputes to request a switch from oil to hub indexation.¹⁵ However, any evidence of this nature must be approached carefully in view of the diversity across GSA provisions regarding price reviews and the basis on which the price may be adjusted.

Another issue often addressed by arbitral tribunals in gas pricing disputes is the asymmetry in access to evidence. Buyers often enjoy access to the data provided from their marketing department in relation to obtainable prices in the market (records of realised and lost sales). Sellers, unless they have downstream capacities or subsidiaries operating in the relevant market, are less able to provide their own price analysis. Nevertheless, if they have multiple customers in the market, they have knowledge of the prices charged to each of them. From both the buyer's and the seller's perspective, this data is often confidential and may not be presented to the tribunal in the form of direct documentary evidence (subject to a document production order, as discussed below).

The same question arises in relation to the parties' profits. The respective profits made by either or both parties may be relevant depending on the price revision provision. Such 'in any case' clauses provide that either the buyer or both parties should be able to market the gas at a reasonable profit. Likewise, the setting of a floor in the pricing provision may be indicative of the parties' intention to ensure that the seller makes sufficient margins or recoups its costs. Some contracts also provide that the outcome of the price revision must be 'fair' or 'fair and equitable', which may require the requesting party to show that its proposed revision enables both parties to earn a reasonable profit from the contract. Because they involve transactions with third parties, such profit figures are also often confidential.¹⁶

The document production phase, when not prohibited under the GSA,¹⁷ may provide an avenue for establishing more even access to evidence by obliging the parties to produce or make available for inspection data that would otherwise not have been available on record. The sensitivity of such data often results in acrimonious disputes between the parties over document production, requiring the tribunal to intervene in order to ensure that the said data's confidentiality is preserved.¹⁸

15 See eg the press release by RWE on 1 July 2013 informing the press that an arbitral tribunal had ordered a significant price reduction and introduced a new gas market indexation, which was widely invoked in subsequent arbitration proceedings.

16 However, certain consultancy or audit firms may review and provide an anonymised account of such confidential data. Such expert evidence is discussed further in section 3.2 below.

17 Some gas supply agreements specifically limit the possibility of parties to request any kind of documents from each other, or provide that the parties should not be required to produce confidential information. However, these clauses, which often relate to the request or negotiation stages, are not necessarily implemented by arbitral tribunals in the course of the arbitration.

18 P Pinsolle, "Confidentiality in Gas Price Reviews" in M Levy, *Gas Price Arbitrations* (Globe Law and Business, London, 2014) 57.

Documentary evidence may also feature in gas pricing arbitrations in relation to the interpretation of the GSA or the assessment of the parties' conduct. Documents pertaining to the negotiation of the terms of the GSA (minutes of meetings, presentations, correspondence) may shed light on the intention of the parties in relation to the meaning of certain provisions, if they are admissible under the applicable law. Likewise, records of the positions taken by the parties in previous price review negotiations may also assist the tribunal in assessing the parties' intentions as to the meaning of certain terms of the GSA.

3.2 Experts

Most commercial disputes involve the submission of expert evidence. This evidence is often limited to discrete technical issues or, more generally, the quantum of the claims and counter-claims.

By contrast, the role of experts in gas pricing disputes is central to the case as a whole. This results from the importance of economic analysis and industry practice in the operation of long-term GSAs. As noted above, the difficulty of procuring or presenting direct documentary evidence in arbitration renders the role of expert evidence crucial.

In the context of the arbitration itself, the term 'experts' may cover many different aspects. It is common for the parties to rely on one expert from one consultancy firm to cater for all aspects of the case. An alternative that has developed in recent years has been to resort to several different types of expert covering different aspects of the dispute. For instance, the expert teams may comprise:

- economists specialising in the valuation of natural gas or LNG, dealing with the analysis of the market and possible changes affecting it, as well as the proposed price adjustment;
- economists specialising in competition issues, given the increasing weight given to competition law issues in long-term GSAs, and especially in LNG contracts;
- former executives from the industry who have become independent consultants and may testify to the dynamics of a given market, industry practice, or their own experience in relation to price reviews based on similar provisions;
- accounting or audit firms in charge of providing analysis of the parties' internal accounting data, especially in cases where the parties' ability to

19 Some cases involve even more specialised experts. For instance, a party may require the services of experts in charge of quantifying changes in the price of gas on the economy of an entire country. This is achieved by building a mathematical model reproducing all sectors of a country's economy with all their variables so as to measure the quantitative effect of modifying one of these variables, the price of natural gas. The size of this model and the quantity of data required obviously limits the number of experts available to perform such valuations.

make profits is disputed, or presenting in an audited form information that would otherwise not be produced because of its confidential nature; or

- consultancy firms offering quantitative analysis of market data on gas prices, including by providing in an anonymised form data gathered independently in the market pertaining to confidential transactions.¹⁹

Submitting evidence from several experts whose scope of expertise may largely overlap inevitably requires a higher degree of coordination between them, and with the parties and their counsel. On balance, the risks of overlap and minor contradictions between experts in different fields may however be less problematic for a party than the risk of the tribunal perceiving its only expert as lacking credibility in a specific area of importance to the dispute.

It is legitimate for a party to use an expert's knowledge to its full extent. For instance, parties may be tempted to ask their expert to opine on the interpretation of a price review clause. This is usually not inappropriate: industry experts may provide useful insight on the meaning of technical terms, such as 'market value of gas', 'obtainable prices', or 'gas-to-gas competition'. However, experts should in most cases not be asked to opine on the operation of the clause, notably in relation to whether a price revision is warranted in light of its terms.

3.3 Fact witnesses

Given the prevalence of the economic background in adjudicating price review disputes, the factual background of the parties' relationship is usually of limited relevance. Evidence from fact witnesses may nonetheless prove necessary in some situations.

First, witnesses may shed light on the negotiating history of the contract and provide insight as to what the parties meant by certain terms and the articulation of certain clauses, as well as the contractual bargain struck by the parties at the outset. Whether this approach is admissible ultimately depends on whether, and the extent to which, the applicable law admits such evidence for interpretation purposes. In the context of a commercial arbitration, arbitrators may apply the issue of admissibility with some flexibility, using the applicable law rather as guidance as to the weight to be given to such evidence.

Secondly, individuals who took part in the negotiations following the price revision request may testify to the conduct of these negotiations. This is of course subject to the negotiation period not being covered by a confidentiality arrangement.²⁰ In particular, a witness may speak to the basis of the price revision request and its initial scope (in case the scope varied in the arbitration),

20 As to the admissibility of evidence from the price review negotiation phase, please see section 4.2 below.

or whether the parties were in agreement as to the relevance of certain data or markets to the revision of the price.

Thirdly, the buyer may present witnesses to testify to the real-life conditions in the market, notably on the relationship with customers in various market segments. For instance, a witness from the buyer's marketing department may describe discussions and negotiations with its customers to show that the existing contract price no longer enables the buyer to market the gas economically. In response, the seller may seek the testimony of local private gas marketers or, if it has downstream capacity, members of the marketing department of one of its subsidiaries.

Fourthly, the seller may ask some of its employees in charge of managing its portfolio in a given market to provide evidence on the relationship the seller has with other market players. The seller may seek to prove that the other buyers in the market have been satisfied with negotiated solutions, be it through a price reduction or additional volume flexibility through temporary reductions of their take-or-pay obligations. If the buyer requesting the price revision has refused similar proposals, this may help depict its attempt to seek relief through arbitration as rigid and unreasonable.

4. Admissibility of evidence

Because the admissibility of evidence in gas pricing arbitration is often confined to a specific period or contract, the issue arises whether evidence from beyond that scope is admissible. Typically, gas price review arbitrations may give rise to such considerations regarding the temporal scope of evidence, and whether or not evidence from the negotiation phase or previous arbitrations can be introduced.

4.1 Temporal scope of evidence

A common feature of gas price review arbitrations is to determine whether a change occurred in the market that would justify a revision of the contract price. To establish this, the claimant must usually identify such a change during the reference period. The starting date of the reference period is usually the effective date of the last price revision, or the date on which the GSA was entered into. The end date of the reference period is typically the effective date of the new price revision. This latter date should in principle also determine the cut-off date for data submitted by the parties concerning the alleged change in the market, since data after this date may no longer be relevant to establish a change during the reference period.

This does not mean, however, that such later evidence would automatically be rejected.²¹ Arbitral tribunals have often been reluctant to consider the

21 See P Pinsolle, "Confidentiality in Gas Price Reviews" in M Levy, *Gas Price Arbitrations* (Globe Law and Business, London, 2014) 60–61.

effective date as a complete limitation on the admissibility of evidence. The assessment of evidence post-dating the price revision request must be evaluated on a case-by-case basis. For instance, data which was published only after the end of the reference period may be relevant to determine changes that occurred during the reference period. It may also be arguable that the GSA allows the tribunal to consider the outcome of the revision, for example, by providing that the result of the revision must be fair and equitable. More practically, the tribunal may simply want to conduct a 'sense check' as to whether its proposed price revision is sensible when viewed against price data post-dating the effective date. Such considerations can provide a basis for the admission of evidence post-dating the reference period.

A claimant may also seek to adduce evidence relating to the reference period if that was published or became available only in the course of the negotiations or arbitration. This is not uncommon especially where a party is required by the contract to make a price revision request by a certain date. In such a case, when the date of the request coincides with the end of the reference period, it will not have had access to all of the information for the reference period relevant to its claim.

Although the admissibility of such additional evidence is usually uncontroversial, since it still concerns data for the reference period, it may raise concerns if the new information requires the claimant to amend its claims or make new claims. The respondent may object to the admissibility of such new claims on the ground that the scope of the dispute is restricted by the terms of the initial request.

Moreover, the admissibility of such new evidence will likely depend on the stage of advancement of the proceedings. In particular, before admitting such evidence, the tribunal will consider whether the other party will have sufficient time to review and provide its comments on the data submitted. In case of a belated submission that prejudices the process, the tribunal will in all likelihood not admit the evidence or, if it does, it might discount the weight to be given to such evidence in reaching its decision.

4.2 Evidence from the price review negotiation phase

The admissibility of evidence from the negotiation phase raises particular issues.

Whether these documents, and the negotiation process in general, are inherently privileged is a hotly debated issue. The answer varies significantly depending on the legal system of reference and the circumstances of the discussions (eg, whether lawyers, external or in-house, were involved).

Over the course of negotiations, parties often adopt positions that are less developed and – at least in principle – more constructive than during the arbitration where the issues in dispute are more crystallised. For instance, the seller may acknowledge the existence of a change, albeit transient, in the market and propose concessions such as a downward adjustment to the take-or-

pay requirements or a slight reduction of the price through a reduction of the base price in the formula (PO). The buyer may make similar concessions.

In the absence of appropriate confidentiality provisions, it is likely that evidence of such concessions in the negotiation process will surface in the subsequent arbitration. Accordingly, if a party wishes to avoid this, it is often preferable to enter the negotiation with a non-disclosure agreement in place.²²

Another issue that may arise in connection with evidence from the negotiation phase is that a party may dispute the admissibility of a claim in the arbitration because the requirement that the parties negotiate in good faith has not been met. In this scenario, the parties may have to waive any confidentiality that may apply, to produce materials from the negotiations, in order to prove whether or not the negotiation was pursued in good faith.

Even where evidence from the negotiations is admitted, for instance where there is a waiver of confidentiality, or where the negotiations are not protected by confidentiality or privilege, the question still arises regarding the weight to be given to evidence adduced from the negotiations. The negotiation positions taken by the parties in a spirit of cooperation should in principle not preclude them from advancing different arguments in the subsequent arbitration.²³ Nonetheless, tribunals may draw negative inferences from a party's significant shift in position between the negotiation and the arbitration.

4.3 Previous arbitral decisions

Arbitral awards rendered in gas price reviews have proliferated over the last decade or so, but almost all of them remain confidential. This raises the issue of the admissibility and effects of previous arbitral decisions in gas pricing disputes.

(a) *Previous decisions between the same parties*

In long-term contracts, it is not unusual that the parties go through several price revisions that result in arbitration proceedings and arbitral awards. The admissibility of these awards is not controversial insofar as their production does not raise confidentiality concerns.

The problem rather rests with the impact these previous decisions have on the subsequent tribunal's ability to decide the case and their preclusive effects on the parties as a *res judicata*. Since issues of preclusion are generally considered to be procedural rather than substantive in nature, the law of the seat will tend to govern the effect of the previous award,²⁴ although this will depend on the applicable substantive law and the law of the seat.

22 *Ibid*, at pp48–50.

23 See N Radjai and J Landbrecht, "Arbitration and price review negotiations: previous arguments no longer relevant?" (ILO, 17 August 2015).

24 See International Law Association, "Interim Report: 'Res Judicata and Arbitration'" (2004) 26. See also C Seragliani, "Le droit applicable à l'autorité de la chose jugée dans l'arbitrage" (2016) 1 *Revue de L'Arbitrage* 51.

In most civil law systems like France, Belgium, Switzerland, Germany or Sweden, *res judicata* only applies to the actual dispositive findings of the tribunal, not the reasoning behind these findings.²⁵ In common law systems, *res judicata* may prompt preclusive pleas such as cause of action estoppel, issue estoppel and abuse of process, which may apply to any issue decided by the first tribunal which is necessary for deciding the claim in question.²⁶ There may thus be differing approaches to this question depending on the applicable law.

The uncertainty of the effect of an earlier award on a later tribunal is compounded by the fact that price reviews, even under the same contract, arise in different time periods and in different market circumstances. Given the typical length of intervals between price revisions in long-term contracts, successive arbitration proceedings are rarely initiated in the same context. For instance, the factual and economic background of an award rendered in relation to a dispute pertaining to the increase in oil prices in 2009 is very remote from that of a dispute relating to the decoupling between oil prices and hub prices in 2011–12.²⁷ Can the interpretation of key contractual provisions be separated from the context in which they were agreed? And if so, will the conclusions derived by one tribunal from such an interpretation remain valid by the time the next tribunal has to decide on different claims based on the same provisions? In other words, the requesting party cannot necessarily consider that its burden of proof is satisfied because certain issues have been addressed by a previous arbitral award in a different context.

This is not to say that the second tribunal should disregard the first award altogether. Whichever law is applicable, the operative part of the award should bind the next tribunal. Furthermore, the findings of the first tribunal may be taken as a starting point by the subsequent tribunal. However, given the fast-paced evolution of international gas markets in the last two decades, then subject to the applicable law, subsequent arbitral tribunals should remain at liberty to depart from findings of fact and law, especially if they are no longer adapted to the economic context.

In any event, regardless of the position a tribunal reaches on the *res judicata*

25 B Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions* (Kluwer, The Hague, 2006) para 534. See also K Hobér, *International Commercial Arbitration in Sweden* (OUP, United Kingdom, 2011) para 7.117; L Radicati di Brozolo, “*Res Judicata* and international arbitral awards” (2011) 38 *ASA Special Series*.

26 B Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions*, (Kluwer, The Hague, 2006) paras 523–29. See also *Arnold v National Westminster Bank plc* [1991] 2 AC 93 at 105E.

27 For instance, one of the very few public awards, rendered in ICC Case No 9812, was rendered in 1999 (see Final Award in Case 9812, August 1999, (2009) 202 *ICC International Court of Arbitration Bulletin*). The term ‘value of gas’ in the contract was interpreted by the tribunal as meaning the price which “makes an end-user indifferent with respect to the choice of gas compared with the choice of the most competitive alternative energy available to the end-user” (ibid, p75). This economic concept, known as the ‘indifference principle’ remains relevant for insulated markets. However, the same contractual terms would no longer be considered as referring to this concept in a Western European context. In fact, in a subsequent arbitration based on the very same contract, in ICC Case No 13504, the tribunal upheld a different interpretation of the same contract terms.

effect of the previous award, it may be mindful of the position taken by the parties in the arbitration in relation to issues that remain unaffected by the economic context.

Parties would therefore be well advised to consider whether the positions taken in a given arbitration could not later be used against them in a subsequent arbitration, in which the context may be different and roles reversed.

(b) *Previous decisions with different parties on similar GSAs*

Although the record of publicly available anonymised commercial arbitration awards is growing,²⁸ only very few awards rendered in gas pricing disputes have been made public, most likely because of the sensitive information these contain, including the outcome itself which a party may have an interest in shielding from its customers, suppliers and competitors.

However, since parties to price revision disputes are often 'repeat players', with repeat experts, and even repeat arbitrators, these groups may over the years end up with a unique private record of arbitration awards.

Parties may thus wish to use previous awards as evidence in subsequent proceedings. Sellers who seek to harmonise the contractual provisions throughout their portfolio may have an interest in ensuring that these provisions are interpreted uniformly by producing excerpts of previous awards. Likewise, buyers who have obtained favourable decisions against sellers based on changed conditions in their market will consider these awards as relevant to subsequent arbitrations. However, the issue of the confidentiality of these materials will arise. Indeed, if an award is presented unredacted, it is likely to be considered as infringing the rights of the third party involved. The party seeking to produce the award may seek a waiver from this third party, but is doubtful whether it may secure it. Conversely, in case the award is produced redacted, the other party may claim that it was deprived from the benefit of reviewing it in context so that due process may be affected in case inferences are drawn therefrom.

In the same vein, a party may request that the other party produce awards rendered in or materials from other cases, if it considers that it may help its case. Here again, it is likely that the party requested to provide such sensitive materials will decline from doing so on the ground that they are confidential.

Either way, the tribunal will thus have to decide whether to admit such evidence based on the applicable law and procedural rules.

A review of the practice adopted in several gas pricing disputes shows that tribunals are usually reluctant to order a party to produce previous unrelated

28 For instance, the *Journal du Droit International*, the *ASA Bulletin* or the *ICC Bulletin* publish excerpts of arbitral awards on a regular basis. Likewise, a large number of investment arbitration awards are publicly available on the ICSID website or other specialised publications.

awards, including excerpts or redacted versions. Beyond confidentiality, tribunals may have concerns regarding the relevance of other awards under different GSAs with different price review provisions and potentially relating to different markets. Tribunals may also be wary that such awards may be used by the party requesting their production for purposes other than the arbitration, especially if it is a competitor of the third party involved in the other arbitration.

Tribunals are thus more inclined to admit a previous award, or excerpts thereof, if a party voluntarily offers to produce it to support its case. Even then, the weight it will give to such evidence will still depend on its relevance to the case the tribunal has to decide, particularly in view of possible differentiating factors as noted above.

5. Concluding remarks

When it comes to evidence, gas pricing arbitrations – like other commercial arbitrations – must contend with issues of burden and standard of proof, admissibility issues, and evidentiary presumptions. And also, like other commercial arbitrations, they often involve documentary evidence, fact witnesses and expert witnesses. However, the particularities of these arbitrations bring with them also certain specificities when it comes to evidence and the best manner to support a case theory. These particularities must be navigated carefully, in order to secure the most effective outcome.