STABILIZATION CLAUSES AND PERIODIC REVIEW OUTLINE

Speaking notes (to be shared)

I. Introduction

1. Most energy contracts are long-term agreements that cover long time periods. It comes as no surprise that a lot may change with time, especially in developing countries. Governments may change their policy which might have a significant impact on the investor, or even directly interfere with the long-term agreements. As a result, there is a need to offer investors some protection from future unforeseen circumstances and significant changes. Stabilization, hardship, force majeure and price review clauses are often resorted to for such protection.

II. Stabilization Clauses

2. In response to the possibility of modification of contractual rights by unilateral governmental actions, a significant number of contracts include stabilization clauses. The function of these clauses is to ensure that the contract will not be altered and will remain “stabilized”. The sole objective of the stabilization clause is “to preclude the application to an agreement of any subsequent legislative (statutory) or administrative (regulatory) act issued by the government or the administration that modifies the legal situation of the investor.”

Therefore, such clauses do not preclude a state from enacting new legislation, but rather prevent it from enforcing new regulations against the other contractual party.

3. Stabilization clauses may extend to any law that affects the economic conditions of the contract. The scope of stabilization clauses may include: (i) property; (ii) fiscal regime; (iii) labor legislation; (iv) export-import provisions; (v) free transferability; and (vi) the general legislative and contractual framework. Concerns have been raised that such clauses limit a state’s ability to effectively legislate in line with their international human rights obligations. As a result, there may be carve-outs from the stabilization clause relating to employment, environmental or human rights laws - the areas where the state may not want to be constricted, and where it is harder for the investor to legitimately argue that amendments should not be introduced.

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i. **Freezing clauses**

4. The most far-reaching type of stabilization clause is a freezing clause, which aims to ensure that the law, fiscal regime or other essential economic conditions applicable to the investment will not change over the life of the project. Therefore, it freezes the legal regime on the day that the agreement was made and does not allow for any future legislative changes to apply to the investor. There is an increasing trend to move away from “traditional” freezing clauses as they can be rather unreliable.\(^2\) This is because they cannot guarantee against the state’s exercise of sovereign authority in the public interest (although such clauses may entitle the aggrieved party to a higher amount of compensation for any violation of its rights than in the case where such a clause is absent).\(^3\)

ii. **Economic stabilization clauses**

5. There has been an increasing tendency of the parties to favor clauses which ensure that adjustments and revisions can be made to a contract if the rights or interests of the foreign investor are adversely affected by a change of circumstances.\(^4\) These are known as economic stabilization clauses or economic balancing provisions.

6. Economic stabilization clauses function as indemnity clauses which provide balance to the economic equilibrium of the contract by ensuring that appropriate remedies are available to the investor if the host state’s actions adversely affect the underlying economics of the relevant project.\(^5\) This kind of stabilization clause requires that where the host state enacts any legislation or takes any administrative measures which aggravate the costs of the project, the parties will either consult to determine the economic consequences of such a change, or automatically adjust the terms of the contract, and the host state will compensate the investor accordingly. Therefore, these clauses do not restrict the scope of subsequent legislation, but mitigate its adverse impact on the investor.

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\(^5\) *Id.*
7. Economic balancing provisions are broadly divided into three categories: (i) Stipulated Economic Balancing (provide for the automatic amendment of the contract in a stipulated fashion), (ii) Non-specified Economic Balancing (while providing for automatic amendment, do not stipulate the nature of such amendment, nor do they require the mutual agreement of the parties for such amendment); and (iii) Negotiated Economic Balancing (require the parties to meet to negotiate amendments to the contract.). These categories are often found coupled with freezing clauses.

iii. Exceptions and qualifications

8. It is worth noting that there are a number of exceptions found in modern petroleum contracts and relevant national legislation to economic balancing provisions. For example, the economic equilibrium of the contract cannot be expected to be re-established when the new law or decree is enacted: (i) in response to a breach or lack of compliance by the contractor with any provision of the agreement concerned; or (ii) with the intent of protecting health, safety, environment or security.7

9. When the contract (and stabilization clause) is governed by domestic law, the foreign investor’s interest could be at stake as the state party can change its law reducing the effect of the stabilization clause, especially when it is a freezing clause and it stands alone.8 No matter what law governs the contract, either the law of the host state or international law or any other non-national law, the state’s exercise of sovereign authority in the public interest cannot be denied either in the context of freezing clauses or economic stabilization clauses.9 In particular, in the context of exploration and exploitation of natural resources, such powers are well recognized by the principle of permanent sovereignty of the state over natural resources. The consequences of states exercising their authority for the public good in the presence of stabilization clauses will depend on the type of such clauses and the applicable law. If the stabilization clause is invalid under the law of the host state, international law may not come to its rescue.10

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7 Id. at p. 127.
10. Stabilization clauses are not a guarantee against lawful nationalization or, for that matter, lawful expropriation. They impose on the state an obligation to act in good faith and give rise to an obligation to compensate in case of their breach. Moreover, in a number of recent cases, it has been reiterated by arbitral tribunals that the notion of the stability of the legal regime under which the foreign investor should operate is a part of fair and equitable treatment of investment. The concept of legitimate expectations is considered part and parcel of the fair and equitable treatment standard and is intricately linked to the idea of stability of the investor-state contractual relationship. The role of an umbrella clause as the treaty stabilization of the state’s contractual commitment, or the impact of such a clause on the contractual stabilization clause, may be understood in the context of four schools of interpretation. For example, the restrictionist, sovereign-centric and integrationist schools consider the umbrella clause to be conservative in scope in the sense that the clause itself is not the treaty equivalent of the contractual stabilization clause. Under the internationalist school, the umbrella clause is attributed a far-reaching role since the clause itself can operate as the treaty equivalent of contractual stabilization.

iv. Examples of stabilization clauses

- “The tax regime, benefits, privileges and exemptions provided in any of the articles hereof, which shall be recorded in the special operation contract, shall remain invariable for the duration thereof.”

14. An umbrella clause is an “observation of commitments” which “prevents the State from invoking its sovereign and regulatory powers in an abusive way to escape from contractual commitments assumed earlier.” Thomas W. Walde, *The “Umbrella” Clause in Investment Arbitration. A Comment on Original Intentions and Recent Cases*. J. of World Investment & Trade, Vol.6, 183 (2005), pp. 185, 200, fn. 64.
17. Id. at p. 153.
18. Please note these are given as examples, not recommendations.
• “In case of modifications to the tax regime, including the creation of new taxes, or the labor participation, or its interpretation, that have consequences on the economics of this Contract, a corresponding factor will be included in the production share percentages to absorb the increase or decrease in the tax burden or in the labor participation of the previously indicated contractor. This correction factor will be calculated between the Parties and approved by the Ministry of Energy and Mines.”

• “Should the income of the state or the Contractor be materially altered as a result of new laws, orders or regulations then, in such an event, the Parties shall agree to make the necessary adjustments to the relevant provisions of this Contract, observing the principle that the affected Party shall be restored to substantially the same economic condition as it would have been in had such change in laws or regulations not occurred. The cost of such restoration to the other Party may not exceed the benefit received by such other Party as a result of such change.”

• “The Host Government shall take all actions available to them to restore the Economic Equilibrium established under this Agreement and any other Project Agreements if and to the extent the Economic Equilibrium is disrupted or negatively affected, directly or indirectly, as a result of any change (whether the change is specific to the Project or of general application) in [name of country] law (including any laws regarding Taxes, health, safety and the environment) occurring after the Effective Date”.

• “… the State Authorities [i.e. the host government, local authorities and state controlled or owned entities] shall take all actions available to them to restore the Economic Equilibrium established under the Project Agreements if and to the extent that the Economic Equilibrium is disrupted or negatively affected, directly or indirectly, as a result of any change (whether the change is specific to the project

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20 Article 11.7 of the Model PSC of October 2002 for the Exploration of Hydrocarbons & the Exploration of Crude Oil (Ecuador), Barrows.
or of general application) in [Azerbaijan, Georgian, Turkish] Law (including any Azerbaijan Laws regarding Taxes, health, safety and the environment) occurring after [date of the HGA or its ratification]... The foregoing obligation to take all actions available to restore the Economic Equilibrium shall include the obligation to take all appropriate measures to resolve promptly by whatever means may be necessary, including by way of exemption, legislation, decree and/or other authoritative acts, any conflict or anomaly between any Project Agreement and such [Azerbaijan, Georgian, Turkish] Law”

III. Hardship Clauses

11. As “players” have recently stated: “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 1) the events occur or become known to the disadvantaged party after the conclusion of the contract; 2) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract: 3) the events are beyond the control of the disadvantaged party; and 4) the risk of the events was not assumed by the disadvantaged party.”

12. Hardship clauses are intended to apply to a variety of unexpected events. These clauses look broadly to the overall effect of such events on the parties rather than concentrating on the commercial viability of the deal struck.

13. The applicability of the general principles of hardship will vary not only between different jurisdictions, but even within those jurisdictions. Many national systems and non-state laws contain rules dealing with financial hardship provisions that apply even when the parties have not inserted a hardship clause into their agreement. Other legal systems, however, do not

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23 From the Baku-Tbilisi-Ceyhan (BTC) pipeline documentation. The clause above was contained in each of the host government agreements (with Azerbaijan, Georgia and Turkey).
provide any remedies for hardship if the appropriate clause is missing from the contract. For example, under English law, in the absence of a hardship clause in the applicable contract, the hardship issues are usually analyzed under the doctrine of frustration and the contract’s force majeure provisions.28

14. The main issues to consider in determining whether hardship exists include: the nature of the triggering event and the duty to renegotiate. The latter questions whether there is an inherent good faith duty to renegotiate in long-term agreements. The former addresses the following issues:

- whether the underlying event has to be specific or general;
- whether a price change (where relevant) was foreseeable at the time of the conclusion of the contract;
- what is the impact of the event on the parties;
- what is the extent of changes required to trigger the hardship clause;
- whether the assumption of the risk plays any role under the hardship clause;
- the nature of the request to renegotiate; and
- whether the parties are required to reach consensus before the contract can be modified.29

15. It is important to keep in mind that the hurdle to activate a trigger provision may be very high: the legislative provisions of many states require a party to establish events that “threaten the debtor with exorbitant loss” or to show that the obligations of one party have “become excessively onerous due to extraordinary and unpredictable events.”30

16. The finding of hardship requires a party to show that there was a change in circumstances. But not every change in circumstances affects the obligation to perform, only a fundamental change. Moreover, whether the change is fundamental will largely depend on the circumstances of each case.

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28 See id. at p. 578.
29 Id. at pp. 70-75.
The effects of a finding of hardship are the following: (i) the disadvantaged party is entitled to request renegotiation (without undue delay and specifying grounds on which such request is based); (ii) the request for renegotiation does not in itself entitle the party to withhold performance; (iii) if agreement is not reached within a reasonable time, either party may resort to the courts; (iv) if the court finds hardship, it may either a) terminate the contract at a date and on terms to be fixed, or b) adapt the contract with a view to restoring its equilibrium. \[^{31}\]

i. **Examples of hardship clauses**

- “(a) If at any time or from time to time during the contract period there has been any substantial change in the economic circumstances relating to this Agreement and (notwithstanding the effect of the other relieving or adjusting provisions of this Agreement) either party feels that such change is causing it to suffer substantial economic Hardship then the parties shall (at the request of either of them) meet together to consider what (if any) adjustment in the prices then in force under this Agreement or in the price revision mechanism contained in Clauses 4, 5 and 6 of this Article are justified in the circumstances in fairness to the parties to offset or alleviate the said Hardship caused by such change. (b) If the parties shall not within ninety (90) days after any such request have reached agreement on the adjustments (if any) in the said prices or price revision mechanism which are to be made then the matter may forthwith be referred by either party for determination by experts to be appointed in the manner set out in Article xviii hereof save that the appointment of the third expert referred to in Clause 1(c) of that Article shall in any event be made by the Minister of Power in consultation with the Lord Chancellor. (c) The experts shall determine what (if any) adjustments in the said prices or in the said price revision mechanism shall be made for the purposes aforesaid and any revised prices or any change in the price revision mechanism so determined by such experts shall take effect six (6) months after the date on which the request for the review was first made.” \[^{32}\]

\[^{31}\] See Article 6.2.3 of the UNIDROIT Principles of International Commercial Contracts (2010).

• “When, however, as a result of exceptional and unpredictable events of a general character, the performance of the contractual obligation, without becoming impossible, becomes excessively onerous in such a way as to threaten the debtor with exorbitant loss, the judge may, according to the circumstances, and after taking into consideration the interests of both parties, reduce to reasonable limits, the obligation that has become excessive. Any agreement to the contrary is void.”

• “Where, however, as a result of exceptional and unforeseeable events, the fulfilment of the contractual obligation, though not impossible, becomes excessively onerous in such a way as to threaten the obligor with exorbitant loss, the judge may, according to the circumstances and after taking into consideration the interests of both parties, reduce the excessive obligation to a reasonable level. Any agreement to the contrary shall be void.”

ii. Relevance of force majeure

18. A hardship clause is sometimes found in conjunction with a force majeure clause (the latter being particularly common). The difference between the two concepts is that hardship refers to the performance of the disadvantaged party that has become much more burdensome, but not impossible, while force majeure refers to contractual requirements that have become impossible to fulfill. Force majeure clauses excuse a party from liability if some unforeseen event beyond the control of that party prevents it from performing its obligations under the contract. A hardship clause, on the other hand, calls for re-negotiation of the contract if the continued performance of one party’s contractual duties has become excessively onerous due to an unforeseen event beyond the control of that party.

19. Force majeure can be defined as follows “1) non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences; 2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable

33 Art. 147.2 of the Egyptian Civil Code 1948.
34 Art. 171.2-3 of the Qatari Civil Code 22/2004.
having regard to the effect of the impediment on the performance of the contract; 3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform (if the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt)."\(^{36}\) International commercial contracts, however, often contain much more precise and elaborate provisions on force majeure.

20. The applicable law plays a significant role in the interpretation of force majeure clauses: under common law, as there is no general concept of force majeure, it is generally treated as a creature of consent, and will apply only if it is written into the contract. However, under civil law, which generally recognizes the doctrine of force majeure, the parties are allowed to circumvent possible limitations set forth in the applicable law.\(^{37}\)

21. The general list of events written into a force majeure clause includes, but is not limited to, the acts of God, war, hostilities, rebellion, revolution, contamination by radio-activity from any nuclear fuel, or from any nuclear waste from combustion of nuclear fuel, riot, strikes, embargo, acts of terrorism, fires, explosions, floods, etc. Moreover, force majeure clauses may include judicial or governmental actions, but this is usually limited to agreements between investors and a state-owned entity.\(^{38}\) Natural disasters and armed hostilities are the most commonly included events.

22. Usually, in order to invoke a force majeure clause, one must satisfy the notice requirement set forth in the clause. Often the notice has to be given in writing and within a specific timeframe or within a reasonable time. Moreover, usually a party claiming force majeure is required to provide evidence of an event that triggered the force majeure clause in the contract. The notice requirement is extremely important; where a party does not comply with this, the party risks losing the right to invoke the clause.\(^{39}\)

\(^{36}\) Article 7.1.7 of the UNIDROIT Principles of International Commercial Contracts (2010).


\(^{38}\) Id.

\(^{39}\) See id. Here, some argue that failure to respect a notice deadline should result in loss of the right to invoke the same, yet others are less demanding and argue that delay will simply give rise to the other party’s right to recover any losses arising from the delay. M. Augenblick & A. B. Rousseau, *Force Majeure in Tumultuous Times: Impracticability as the New Impossibility*, 13 J. World Investment & Trade 59, 71 (2012).
23. The force majeure clause specifies what happens if it is successfully invoked. In long-term international contracts, force majeure has a suspensive effect, at least initially. The clause generally provides for an extension of the contractual performance period or, as a measure of last resort, termination of the contract. Some clauses provide that if the force majeure event continues for some time, then renegotiation or termination will follow, either after a fixed time limit or after a reasonable time. Moreover, force majeure clauses may provide for renegotiation in contracts where, due to the complexity and financial obligations incurred, it is unsuitable to cancel the contract.

iii. Examples of force majeure clauses

- “Each party shall act in good faith and shall without delay renegotiate the terms of all agreements and other related documents in an event or circumstances of Force Majeure. In this Agreement, Force Majeure means Act of God, explosions, fires, acts of war, public disorder, strikes, breakdown of machinery and equipments, but only if the event of Force Majeure is beyond the reasonable control of the party claiming Force Majeure.”

- “Force Majeure Event” means the occurrence of:
  
  (a) an act of war (whether declared or not), hostilities, invasion, act of foreign enemies, terrorism or civil disorder;
  
  (b) ionising radiations, or contamination by radioactivity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof;
  
  (c) pressure waves from devices travelling at supersonic speeds or damage caused by any aircraft or similar device;

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44 Article 12 of Qatari Rasgas Joint Venture Agreement 2001.
(d) a strike or strikes or other industrial action or blockade or embargo or any other form of civil disturbance (whether lawful or not), in each case affecting on a general basis the industry related to the affected Services and which is not attributable to any unreasonable action or inaction on the part of the Company or any of its Subcontractors or suppliers and the settlement of which is beyond the reasonable control of all such persons;

(e) specific incidents of exceptional adverse weather conditions in excess of those required to be designed for in this Agreement which are materially worse than those encountered in the relevant places at the relevant time of year during the twenty (20) years prior to the Effective Date;

(f) tempest, earthquake or any other natural disaster of overwhelming proportions; pollution of water sources resulting from any plane crashing into [ ];

(g) discontinuation of electricity supply, not covered by the agreement concluded with the [utility company]; or

(h) other unforeseeable circumstances beyond the control of the Parties against which it would have been unreasonable for the affected party to take precautions and which the affected party cannot avoid even by using its best efforts,

which in each case directly causes either party to be unable to comply with all or a material part of its obligations under this Agreement;

(1) Neither Party shall be in breach of its obligations under this Agreement (other than payment obligations) or incur any liability to the other Party for any losses or damages of any nature whatsoever incurred or suffered by that other (otherwise than under any express indemnity in this Agreement) if and to the extent that it is prevented from carrying out those obligations by, or such losses or damages are caused by, a Force Majeure Event except to the extent that the relevant breach of its obligations would have occurred, or the relevant losses
or damages would have arisen, even if the Force Majeure Event had not occurred (in which case this Clause 20 shall not apply to that extent).

(2) As soon as reasonably practicable following the date of commencement of a Force Majeure Event, and within a reasonable time following the date of termination of a Force Majeure Event, any Party invoking it shall submit to the other Party reasonable proof of the nature of the Force Majeure Event and of its effect upon the performance of the Party’s obligations under this Agreement.

(3) The Company shall, and shall procure that its Subcontractors shall, at all times take all reasonable steps within their respective powers and consistent with Good Operating Practices (but without incurring unreasonable additional costs) to:

(a) prevent Force Majeure Events affecting the performance of the Company’s obligations under this Agreement;

(b) mitigate the effect of any Force Majeure Event; and

(c) comply with its obligations under this Agreement.

The Parties shall consult together in relation to the above matters following the occurrence of a Force Majeure Event.

(4) Should paragraph (1) apply as a result of a single Force Majeure Event for a continuous period of more than [180] days then the parties shall endeavor to agree any modifications to this Agreement (including without limitation, determination of new tariffs (if appropriate) in accordance with the provisions of Clause 7(4)(e)) which may be equitable having regard to the nature of the Force Majeure Event and which is consistent with the Statutory Requirements.  

45 WorldBank.org.

- “1. Any Party liable for non-performance or delay in performance with respect to any obligation or any part thereof under this Agreement, other than an obligation to pay money, shall be excused liability for such non-performance or delay in
performance to the extent that it is caused or occasioned by Force Majeure, as defined in this Agreement.

2. **Force Majeure with respect to the Host Government shall be limited to:**

   (a) natural disasters (earthquakes, landslides, cyclones, floods, fires, lightning, tidal waves, volcanic eruptions and other similar natural events or occurrences),

   (b) wars between sovereign states where [insert name of the State] has not initiated the war under the principles of international law, acts of terrorism, rebellion or insurrection and

   (c) international embargoes against sovereign states other than [insert name of the State]; provided, in every case, that the specified event or cause, of the type set forth in (a), (b) and/or (c) above and any resulting effects preventing the performance by the Host Government, the State Authority and/or any State Entity of their obligations, or any part thereof, are beyond their control; and provided, concerning those events or causes of the type set forth in (a), (b) and/or (c) above which are reasonably foreseeable, that these are not caused or contributed to by the negligence of the Host Government, the State Authority and/or any State Entity or by their breach of this Agreement or any other Project Agreement.

3. **Force Majeure with respect to the Project Investors shall be limited to those events or causes and any resulting effects that prevent the performance of the obligations of the Project Investors or any part thereof which are beyond its (or their) control, and, concerning events or causes which are reasonably foreseeable, are not caused or contributed to by the negligence of any Project Investor, Operator or Contractor or by the breach by any such person of this Agreement or any Project Agreement.** Force Majeure under this paragraph shall include the following events and causes to the extent they otherwise satisfy the requirements of this Article: natural disasters (earthquakes, landslides, cyclones, floods, fires, lightning, tidal waves, volcanic eruptions and other similar natural events or occurrences), wars, strikes or other labour disputes not limited to the employees of the Project Investors or of any Contractor or Operator, rebellions, acts of terrorism, international embargoes, the inability to obtain necessary goods, materials, services or technology, the
inability to obtain or maintain any necessary means of transportation, the application of laws, treaties, rules, regulations and decrees, the actions or inactions of the State Authority and other events or causes, whether of the kind enumerated or otherwise, which are beyond the control of the Project Investors.”

IV. Price Re-openers

24. In essence, price review clauses allow for the periodic review and adjustment of price provisions in the applicable agreements. Because of the long-term nature of energy contracts, the changing nature of the energy markets and the absence of clear market-wide indicators of price, long-term gas price agreements frequently contain a clause providing for a price review. Price review clauses offer the parties to long-term energy contracts protection against being tied to a price which fails to reflect the agreed sharing of the value of the product. Therefore, price re-openers aim to preserve the feasibility of a contract, which involves the buyer’s ability to market the product in its end market.

25. Price review clauses usually contain several elements: (i) a limited number of times (or periods of time) when a review may be requested; (ii) a road map or indication of what information may be taken into account in any review; and (iii) the consequences if the parties are unable to agree.

26. Generally, a price re-opener will involve a trigger permitting one party to reopen the price formula. A price review begins with a written request from one or both parties. The date for triggering a price review is normally also the date on which the revised contract price takes effect. The first occasion for requesting a price review will often be specified by a certain date, and subsequent price reviews are fixed at certain intervals. In addition, a contract will usually

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47 M. Polkinghorne, Predicting the Unpredictable: Gas Price Re-openers. The Paris Energy Series (June 2011).
48 Id.
49 Id.
51 Id.
52 Id.
provide for “joker” price reviews\textsuperscript{53} that can be requested at any time during the life of the contract. Since the number of “joker” reviews is limited, a party might want to carefully consider if the circumstances are so bad that it cannot wait for the next regular price review.\textsuperscript{54}

27. In most of the price review clauses, to trigger a price review, the change in economic circumstances has to be significant or substantial compared to what the parties could have reasonably expected at the time of the last price review or the conclusion of the contract (if it is a first price review).\textsuperscript{55} Some price review provisions refer to a change in the value of gas in the buyer’s market.\textsuperscript{56} Moreover, there is a debate about whether clauses that include wording of “in any case” and provide that a revised price must allow the buyer to economically market the gas in competition with other energies, offer a separate system for triggering a price review.\textsuperscript{57} (See the first price review clause example below.)

28. The price review clause will usually provide for a period of negotiation, often limited in time, during which the parties will seek a suitable pricing solution.\textsuperscript{58} Many clauses will specify the matters the parties may consider in their negotiations.\textsuperscript{59} At this stage, the change in value of the gas that resulted from the change in economic circumstances will be assessed in more detail and be subject to quantification. The permissible scope of price modification depends on the wording of the clause.\textsuperscript{60} Moreover, it is argued that the governing law of the contract provides for the scope of the permissible price changes.\textsuperscript{61}

29. The revision shall, in particular, take into account: the value of the energy product in the buyer’s market and the price level in comparable international long-term contracts (adjustment). In any case, the contract price shall allow the buyer to market the product economically, provided that the buyer applies sound marketing practices. The final part of the price review

\textsuperscript{53} A “Joker […] allows either party to ask for a price review outside the contractual framework either once during each three year price period, or once during the entire term of a contract.” J. Stern and H. Rogers, \textit{The Transition to Hub-Based Gas Pricing in Continental Europe} (Oxford Institute for Energy Studies, March 2011) p. 28.

\textsuperscript{54} Id. at p. 531.

\textsuperscript{55} Id. at p. 532.


\textsuperscript{58} M. Polkinghorne, \textit{Predicting the Unpredictable: Gas Price Re-openers}. \textit{The Paris Energy Series} (June 2011).

\textsuperscript{59} Id.


\textsuperscript{61} Id.
ensures that any revised price formula allows the buyer to market the product economically (comparing the prices the proposed revised price formula produces to the prices of competing energy products in the end user market).  

30. In most cases where the parties fail to reach an agreement, they submit their dispute to arbitration.

i. Examples of price review clauses

- “(a) If the circumstances beyond the control of the Parties change significantly compared to the underlying assumptions in the prevailing price provisions, each Party is entitled to an adjustment of the price provisions reflecting such changes. The price provisions shall in any case allow the gas to be economically marketed based on sound marketing operation.

- (b) Either Party shall be entitled to request a review of the price provisions for the first time with effect of dd/mm/yyyy and thereafter every three years.

- (c) Each Party shall provide the necessary information to substantiate its claim.

- (d) Following a request for a price review the Parties shall meet to examine whether an adjustment of the price provisions is justified. Failing an agreement within 120 days either Party may refer the matter to arbitration in line with the provisions on arbitration of the Contract.

- (e) As long as no agreement has been reached or no arbitration award has been rendered all rights and obligations under the agreement – including the price provisions – shall remain applicable unchanged.

Unless otherwise agreed or decided by the arbitral award, differences to the newly established price shall be retroactively compensated inclusive of interest on the difference calculated at a rate reflecting the conditions on the international financing market.”  

- “(a) If at any time either Party considers that 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, after the first Contract Price revision under this Article 8.5, at the time of the latest Contract Price revision under this Article 8.5, and the Contract Price resulting from application of the formula set forth in Article 8.1 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 in accordance with the remaining provisions of this Article 8.5.

(b) In reviewing the Contract Price in accordance with a request pursuant to sub-Article 8.5(a) above the Parties shall take into account levels and trends in price of supplies of LNG and Natural Gas [redacted] such supplies being sold under commercial contracts currently in force on arm's length terms, and having due regard to all characteristics of such supplies (including, but not limited to quality, quantity, interruptability, flexibility of deliveries and term of supply).

(c) The Contract Price as revised in accordance with this Article, shall in any event, allow the Buyer to market the LNG supplied hereunder in competition with all competing sources or forms of energy.... And such Contract Price Shall allow the Buyer to achieve a reasonable rate of return on the LNG delivered hereunder."  

- “The parties agree to meet regularly to proceed with the revision of the Contractual Sales Price defined in Article 9 above. They shall so meet for the first time during the first quarter of the year 1980 and thereafter every four (4) years. The revision of the price shall consist in adapting it in a reasonable and fair manner to the economic circumstances then prevailing on the imported Natural Gas market and on the market for the other imported energy supplies competing

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64 Atlantic LNG Company of Trinidad and Tobago and Gas Natural LNG SPA, 1995.
with this production in the East Coast and Gulf Coast areas of the United States of America within the framework of long term contracts. The parties shall take into account the individual characteristics of each of the above products including the quality, the continuity of deliveries, the production and transportation costs, etc....”

V. Conclusion.

31. Looking into the future: (i) what may one expect; (ii) new concepts and practices to be introduced; and (iii) points to be kept in mind when drafting stabilization, hardship, force majeure and price review clauses in the context of an energy contract.

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65 Sonatrach and Distrigas Corporation LNG SPA, 1976.