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International Arbitration News

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Contents

Editor's Comments

Welcome to the eighth edition of the Squire Sanders' International Arbitration Newsletter.

In this edition, we look at a number of topics, each of which has an important impact on the broad spectrum of matters affecting international arbitration, be it enforcement, confidentiality or conditions precedent.

We are also delighted to announce that Squire Sanders now appears in the Legal 500 as a recommended firm for International Arbitration in Hong Kong and Dispute Resolution in China.

We also welcome new senior associates Alexis Martinez and Stephan Adell to our London and Paris offices.

We hope you find the topics of interest and if you would like to discuss any aspect further, please do not hesitate to contact any member of the team.

George von Mehren

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Procedural Conditions Precedent to Price Review Arbitration

By way of background, price review provisions in long-term gas and LNG contracts operate to preserve the long-term commercial relationship between the parties. They are found in supply contracts that often last for fifteen to thirty years and contain take-or-pay provisions requiring the buyer to pay for a substantial quantity of gas, whether or not the buyer takes shipment of the gas. On the one hand, take-or-pay commitments can be critical to the supplier's ability to obtain financing for the large capital costs necessary to produce and transport natural gas or LNG because the take-or-pay revenues are pledged as security[1]. On the other hand, the take-or-pay commitment may become financially onerous for the buyer when it cannot sell the gas at an adequate margin. A prolonged imbalance may actually destroy a buyer. In this context, buyers and sellers agree to price review provisions permitting either of them to initiate a process to consider if the price formula should be changed and, if so, how it should be changed.

In price review proceedings, a party seeking to change the price formula is required to provide notice to the other party. The parties are then required to engage in negotiations for a specified period – four to six months are typical for a mandatory negotiation period. If the price review claim remains unresolved following expiration of the negotiation period, arbitration is available to resolve the claim.

Based on these notice and negotiation requirements, three conditions precedent to arbitration usually exist: (1) a timely request for the price review; (2) adequate information in the price review request; and (3) negotiations that comply with the contract. Issues involving one or more of these conditions commonly are raised by the party who opposes a change in price. They are asserted as a basis for dismissal of the price review claim on preliminary grounds.

My observations in this article are general and, of necessity, based on my own experience over the last ten years representing buyers in Europe. There is little substantive material to support these observations as these price review proceedings are very confidential. While the bottom line results may become public in financial disclosures or otherwise, the sale purchase agreements themselves and arbitral awards dealing with price review requests are almost always confidential and closely-guarded commercial information. In each specific case, of course, the outcome is determined by analysis of the contract, the applicable law and the facts[2].

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[1] Holland and Ashley, 30 Journal of Energy & Natural Resources Law, p.29 (2012)

[2] There are, however, some useful materials available to a reader interested in reading more about the subject. For example, an interesting discussion of the contracts typically used for sales of natural gas from Norwegian producers can be found in A Brautaset, et. al., NORSK GASSAVSETNING Rettslige hovedelementer (NORWEGIAN GAS SALES Main Elements). G. Block, Arbitration and Changes in Energy Prices: A Review of ICC Awards with respect to Force majeure, Indexation, Adaption, Hardship and Take-or-Pay Clauses, 20 ICC International Court of Arbitration Bulletin 51-109, contains a very useful discussion of price review and related contract provisions. In addition, various aspects of price review arbitration are considered in Gas Natural Aprovisionameintos, SDG, S.A. v. Atlantic LNG Company of Trinidad and Tobago, 2008 WL 4344525 (S.D.N.Y Sept. 16, 2008)). The author was lead counsel for Gas Natural in the underlying arbitration.

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Timing

In most cases, price review provisions dictate that a review may only be initiated at specific intervals during the term of the contract. For these reviews – commonly known as “regular price reviews” – the periods between price reviews vary, but three year intervals are common. In addition, some provisions provide for a limited number of intermediate price reviews – commonly known as “jokers” – that may be used once or twice during the life of the contract before a regular price review is available.

These provisions have an important commercial purpose in that they establish price certainty for the specific periods agreed by the parties. Constant efforts to adjust price are not permitted. Both parties take the risk that economic and market developments between available opportunities to address price will be unfavorable to them – with the risk decreased when “jokers” are available.

Arbitrators may be asked to determine if the price review request was made in a timely fashion. Disputes dealing with this issue are resolved by application of the relevant contract’s general provisions on delivery of notice and the provisions of applicable law. If the party seeking the price review has not complied with the timing requirement, the claim is likely to be dismissed.

The Contents of the Request

Sometimes the party opposing a change to the price formula claims that the notice did not contain sufficient information. Some price review provisions say nothing about the content of the request except, of course, that it must convey the bare information that the requesting party has requested a price review. Others, for example, state that the requesting party shall provide information providing its belief that the price should be revised. Others call for an explanation in “reasonable detail.”

These requirements usually are not interpreted to require that a complete and detailed case be set forth in the price review notice. They typically are interpreted to require enough information so that, as a practical matter, the required negotiations may productively begin. The parties can exchange more substantial information about their positions, and data in support of their positions, during the negotiations.

The Obligation to Negotiate

Arbitrators may also be asked to determine if the party seeking a price change has fulfilled its obligation to negotiate. A variety of issues may be involved. Sometimes it is claimed that the arbitration was commenced before expiration of the contractual period for negotiations set out in the contract. There may be claims that the right to a price review was waived because negotiation sessions were not scheduled promptly or because there was a significant hiatus between sessions. Or the claim may be that the party seeking a price change did not advance adequately clear and complete positions during negotiations or that sufficiently detailed information concerning the claim was not provided during the negotiation process.

There are several ways in which these claims may impact the arbitration. One is the issue of whether a party may rely on grounds during the arbitration that are not related to those set out in the request or in subsequent negotiations. Another is whether either party may take positions in the arbitration that are significantly different from, or contradictory to, those that it took in the negotiations. Arbitrators may address these questions in various ways. Admissibility issues may be involved. Communications during the negotiation phase may or may not be “without prejudice” or “for settlement purposes only”. Or, put another way, applicable law or party communications on the

issue may have created legitimate expectations that the content of the negotiations would not be admitted into evidence in a subsequent arbitration. If the negotiations are admissible, however, arbitrators may consider the efficiency and fairness of the process and the credibility of the party that seeks to change (or, in particular, reverse) its position.

Conclusion

In my experience, parties have had limited success with claims that a price review arbitration should be dismissed based on conditions precedent to the arbitral proceeding. Written and oral submissions may spend considerable time on these issues but they are not necessarily outcome determinative. Perhaps this is based on a view that the notice and negotiation phase should essentially be a commercial process that is not hampered by procedural complexities. Under this view, if the party seeking a price change has provided a timely notice, the matter can then be pursued during negotiations with a commercial focus on what is important for business decisions by the participants. If that process does not produce resolution, the focus then shifts to the more formal arbitration proceeding in which claims and positions must be more extensively developed and supported by detailed evidence.

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Enforcing Arbitral Awards in France

International arbitration awards are, by their very nature, final and binding. However, despite these key characteristics, the awards are not always voluntarily settled by the other party. As a result, where a party has obtained a favourable arbitration award in another jurisdiction but the other party has not volunteered payment of the award, the successful party can try to enforce the arbitration award in France against any assets held by the other party in France.

The Legal Framework Applicable for Granting Exequatur

Although France is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York in 1958 (the "New York Convention")[3], an arbitration award is incapable of direct enforcement without the assistance of the local courts.

The New York Convention's principal objective is that foreign and non-domestic arbitral awards will not be discriminated against. It forces countries party to the New York Convention to ensure that such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. In accordance with the New York Convention and its objective, the French Civil Procedural Code governs the enforcement and recognition of foreign arbitral awards in France[4].

The recent reform of the French Law on arbitration, which was enacted through Decree n°2011-48 of 13 January 2011 ("the Decree"), has not modified the main features of the enforcement procedure.

Enforcement of foreign arbitral awards is obtained through an ex parte application to the Tribunal de Grande Instance in Paris to obtain an enforcement or "exequatur order", i.e. turn a foreign arbitral award into an enforceable French judgment. In accordance with article IV of the New York Convention and article 1515 of the French Civil Code, the application to enforce a foreign arbitral award must be supported by (i) an authenticated original of the arbitral award or a duly certified copy; (ii) a copy of the arbitration agreement; and, where applicable, (iii) a translation of these documents.

The presence of assets in France is not a pre-requisite for the court to grant exequatur.

As the enforcement procedure is ex parte, the claimant is not required to disclose it to the other party. However, upon obtaining the enforcement order, the claimant must notify the other party in the country where it is based. This notification is critical because it triggers the other party's right of appeal.

Once the time period available for setting aside the enforcement order has expired and the enforcement order is final, the arbitral award can be immediately enforced in France, in the same way a French judgment would be.

[3] The New York Convention entered into full force in France on 24 September 1959.

[4] French Civil Code, Articles 1514-1527.

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The Potential Escape Routes

In France, a foreign arbitral award is not subject to appeal, but only to annulment on a limited number of grounds, as defined by the French Civil Procedural Code[5]. However, the enforcement order may only be challenged by the other party before the Court of Appeal only on the basis of the grounds available for annulment,[6] which are:

(i) the Arbitral Tribunal wrongfully declared itself either competent or incompetent;

(ii) the Arbitral Tribunal was not appropriately formed;

(iii) the Arbitral Tribunal acted beyond the scope of the mandate conferred on it by the parties;

(iv) the adversarial principle was breached; or

(v) the recognition or enforcement of the award is manifestly contrary to international public policy.

Any appeal against the enforcement order of a foreign arbitral award must be made by the other party within one month of the notification to the other party. Although the grounds available to challenge the validity of the enforcement order are scant, the appeal procedure follows the normal appeal track[7].

One of The Reform's Innovations

Although Decree n°2011-48, has not modified the main features of the enforcement procedure, it has introduced a key innovation to the French legislative regime, which demonstrates that France is striving to become a more attractive and arbitration-friendly seat for arbitration proceedings.

Since the introduction of the Decree, an appeal to set aside an enforcement order no longer suspends the enforcement of the award in France. This modification aims to prevent dilatory actions from unsuccessful parties and, provide a higher protection of the rights of successful parties. Prior to the introduction of the Decree, actions for setting aside the enforcement order suspended the enforcement of the award, as long as the appeal procedure was still pending[8]. As a result of the reform, and as a matter of principle, the claim to set aside an enforcement order does not stay the execution of the order and an immediate execution is possible.

However, the French legislators have introduced an exception to this rule. Pursuant to article 1526 (2) of the French Civil Procedural Code, the judge may only grant a stay of enforcement of the award where the unsuccessful party's rights would be seriously impaired or prejudiced by such an automatic execution.

The Paris Court of Appeal has adopted a very strict interpretation of the conditions and has thus set a very high threshold that must be satisfied to obtain a stay of enforcement. As a result it has not made it easy for unsuccessful parties to obtain such measures.

The Court of Appeal reiterated that those measures must remain exceptional and be limited to cases in which the rights of the party are seriously impaired or breached and where immediate enforcement would cause material and irreparable harm to the unsuccessful party[9]. This serious impairment or

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[5] French Civil Procedural Code, Article 1520.

[6] French Civil Procedural Code, Articles 1520 and 1525.

[7] French Civil Procedural Code, Articles 900-930-1 and 1527.

[8] French Civil Procedural Code, former Article 1506

[9] CA Paris, 18 October 2011, n°11/14286 ; CA Paris, 13 juillet 2012, n°12/11616; CA Paris, 23 April 2013, n°13/02612.

irreparable harm may not include any financial difficulties that would result from the immediate enforcement of the award[10].

How to Enforce an Enforcement Order

The main method of enforcing an enforcement order in France is to exercise various types of seizures of the other party's assets identified as being located in France. These seizures, which are carried out directly by a French bailiff once the enforcement order is obtained, mainly consist of:

- attachment on the bank accounts located in France of the judgment debtor;
- seize money that is owed by a third party to the judgment debtor, by which the unsatisfied creditor holding the enforcement order will seek payment of his debts from a third party who in turn owes money to the judgment debtor;
- seizing movable or immovable property of the judgment debtor located in France; and
- seizing intangible rights and assets of the judgment debtor located in France, such as shares, interests, securities etc.

The seizures performed by the bailiff may be challenged by the debtor before the French enforcement judge upon receipt of the notification of said measures. Insofar as the challenge proceedings are pending, the funds are escrowed either by the bank or by the third party and are unavailable for both parties[11].

In no challenge has been formed, once the challenge period has expired the funds/monies/assets are awarded to the successful party holding the arbitral award enforcement order.

Conclusion

The provisions of Decree n°2011-48 illustrate the confirmation of France as a key location for enforcement of foreign arbitral awards and arbitration proceedings. The flexibility and innovation demonstrated by the legislation will accord an improved level of protection to parties who wish to enforce an arbitral award within the jurisdiction. The option of enforcing an award whilst an appeal is pending will discourage unsuccessful parties from commencing vexatious appeals intended to delay enforcement. However the true success of these provisions will depend upon the stance adopted by the French Courts. To date the Courts have supported the underlying philosophy of the Decree, requiring the existence of exceptional reasons to justify staying enforcement. It remains to be seen whether this approach will continue, or whether unsuccessful parties will manage to secure stays on the basis of less demanding criteria.

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[10] CA Paris, 18 October 2011, n°11/14286.

[11] This concerns in particular seizures in the hands of third-parties.

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Public Eye: New Transparency Rules unveiled for Investor-State Arbitrations

After a discussion period of almost three years, on 11 July 2013 the United Nations Commission on International Trade Law ("UNCITRAL") adopted the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitrations (the "Transparency Rules").

The Transparency Rules will take effect from 1 April 2014 and will apply to all treaty-based investor-state arbitrations that refer disputes to the UNCITRAL rules, unless the parties agree otherwise.

The rationale behind the Transparency Rules represents a shift from the traditional international arbitral landscape which has historically been underpinned by confidentiality and privacy. Confidentiality has long been considered to be one the greatest advantages of arbitration over litigation. Arbitration is, with limited exceptions, a confidential process in which commercially sensitive information can be shielded from the public domain. For this reason, parties will often select arbitration as their means of dispute resolution in order to keep the details of their disputes private.

The concept of confidentiality is more problematic in investor-state disputes where competing issues of privacy and public interest have created an increasing demand for public access and scrutiny. Investor-state disputes involve alleged breaches of international investment conditions. Consequently, improved transparency and public knowledge of these breaches will aid investors in their investment risk assessments or the potential merits of a treaty-based claim.

Accordingly, the Transparency Rules have been produced and adopted. They represent a general shift towards greater transparency in international arbitration where public interests and tax payer funds contend against sovereign state confidentiality.

The Transparency Rules: The Key Features

The applicability of the new rules will be dependent on the date of the treaty under which the claim is based. The Transparency Rules will automatically apply to those claims brought under a treaty, concluded after 1 April 2014, provided that the parties to the dispute have not expressly opted out of the Transparency Rules. For those claims brought under a pre-1 April 2014 treaty, the disputing parties can agree to adopt the Transparency Rules, thereby opting-in.

A significant amount of information will be made publically available under the new rules, including details of the parties themselves, the industry sector involved and the investment treaty under which the claim has been brought. Moreover, under Article 3 of the Transparency Rules, pleadings, written submissions and the eventual award will be publically accessible and stored electronically by UNCITRAL. Witness statements and expert reports may also be disclosed with certain limited exceptions relating to the publication of exhibits.

Under Articles 4 and 5, non-disputing parties to the treaty, or otherwise, (as defined in the Transparency Rules) will, at the tribunal's discretion and following a consultation with the disputing parties, be permitted to make submissions in the proceedings. This may occur where, in the tribunal's opinion, those persons hold an interest in the proceedings or where they can add information to the legal and/or factual issues in dispute. In addition, Article 6 will allow for public access to the hearing itself.

This being said, the principle of confidentiality has not completely eroded. The Transparency Rules do provide tribunals discretion to safeguard confidentiality and restrict transparency in certain circumstances, specifically:

- Confidential or protected information: including confidential business information, information protected against being made public under the treaty or under the law of the respondent state, or any other applicable laws, and information the disclosure of which would impede law enforcement; or
- Integrity of the arbitral process: where making information available to the public could hamper the collection of evidence, result in the intimidation of witnesses/counsel or members of the tribunal.

What are the implications?

The Transparency Rules undoubtedly mark a change in the arbitral legal framework governing investor-state disputes. They will allow for greater transparency than is currently available under the ICSID Rules, which only allow for interested third parties to attend hearings and to intervene in proceedings at the tribunal's discretion. The publication of awards and pleadings will certainly assist investors in gauging their rights and the merits of potential actions under the same treaties in dispute. Moreover, parties may decide to instigate contractual rather than treaty-based claims to avoid the heightened publicity afforded by the new rules in treaty based proceedings.

In reality however, the availability of an opt-out provision in the Transparency Rules for treaties concluded after 1 April 2014, together with the requirement of consent of the parties to opt-in for pre-1 April 2014 treaty based claims may significantly limit the impact of these changes.

We shall watch this space and update you in the Spring with the key practical implications, if any. If you would like any more information on these changes, please contact, the author, Max Rockall.

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Editor Profiles

George M. von Mehren leads the firm's International Dispute Resolution Practice Group, ranked by The American Lawyer's 2011 Arbitration Scorecard as a top arbitration practice globally. The 2009 edition of the publication also recognized one of George's recent arbitration victories, in which the client benefited by more than US$1 billion, as the second largest arbitration award by dollar amount in the world during the prior two years. The 2007 Arbitration Scorecard recognised another of George's victories as among the five largest arbitration awards in the prior five years. With more than 30 years of experience in complex adversarial proceedings, George spends 100 percent of his time representing clients in international arbitrations and providing strategic advice for litigation in courts outside the US. He has an established record of working effectively with counsel from around the world.

Paul Oxnard has over 20 years of experience dealing with high value commercial litigation, and international and domestic arbitration matters. He has been instrumental in developing the firm's market-leading Alternative Dispute Resolution practice in the UK. Paul has particular experience in relation to disputes in the heavy engineering, energy (particularly nuclear and gas) and telecoms sectors and white collar fraud, injunctive work (obtaining, enforcing and resisting general, freezing, and search and seizure injunctions). He also specialises in EU public procurement regulations related issues. Paul is recognised in Chambers Global 2012 within the dispute resolution category.

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Contributor Profiles

Antoine Adeline is a partner within the international dispute resolution practice of the Paris office. He is a French and Canadian national, has lived and practiced in England for five years and brings more than 20 years' experience to Squire Sanders, as a trial advocate and litigation and arbitration lawyer in a highly international environment. His particular focus is on arbitration, cross border disputes, alternative dispute resolution, particularly mediation, and corporate insolvency. Although he has particular experience in areas such as construction, software and various manufacturing industries, he represents a diverse range of businesses from public, multinationals and household names through to larger SMEs.

Laure Perrin practises in international arbitration and international commercial disputes. Laure has participated in arbitral proceedings conducted under the ICC and ICSID arbitration rules as well as commercial and civil litigations and enforcement procedures before French courts. Prior to joining Squire Sanders, her engagements included working on ICC commercial arbitrations relating to the termination of distribution contracts, a post-acquisition dispute and transnational public international law disputes relating to boundaries. Laure also participated in non-contentious undertakings, especially in relation to the renegotiation and price reviews of long-term gas supply contracts. She has also worked in-house on a US$400 million ICSID investment dispute in the energy sector in South America for a major energy company.

Max Rockall advises on a range of contractual and commercial disputes, including UK and international commercial litigation, arbitration, shipping litigation and alternative dispute resolution. Max has experience in handling disputes before the English High Court, the London Marine Arbitrators Association and the Court of Appeal.

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