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Enforceability of take-or-pay provisions in English law contracts – resolved

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The present commentary, 'Enforceability of Take-or-Pay Provisions in English Law Contracts – Resolved', comments favourably on the recent resolution by the UK Supreme Court, the highest court in the United Kingdom, of a concern that certain take-or-pay provisions could be held unenforceable under English law. The decision clarifies that take-or-pay provisions should be enforceable, and not considered as an unenforceable penalty.

Introduction

This is the third in a series of commentaries in this publication that, over the last seven years, have commented on the enforceability of take-or-pay provisions under English law. Take-or-pay provisions are commonly found in international energy industry contracts. They have significant importance, given their wide use in long-term energy projects across the globe. As English law is a common choice to govern energy industry contracts, the enforceability of take-or-pay provisions under English law is an issue that affects numerous energy industry relationships within and outside the UK.

'Enforceability of Take-or-Pay Provisions in English Law Contracts'[1] commented with concern on the first English law case to question whether a take-or-pay provision could be held unenforceable as a 'penalty clause'. Thereafter, 'Enforceability of Take-or-Pay Provisions in English Law Contracts – Revisited'[2] commented on a second English law case which heightened this concern, expressing increased criticism that a view of such potential significance to the global energy industry had been delivered without consideration of its wider impact.

What are take-or-pay provisions?

Take-or-pay provisions are a very familiar feature in gas and liquefied natural gas (LNG) sales contracts, power purchase contracts and many other common energy industry contracts, and provide an option for the buyer to take supply of gas, LNG or power, or to pay for it anyway. Similarly, 'send-or-pay' (otherwise

1 See (2008) 26 JERL 610.
2 See (2013) 31 JERL 205.

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known as 'ship-or-pay') provisions are commonly found in energy sector transportation contracts and capacity reservation agreements. They provide an option for the shipper to either use the transportation service to which the contract relates, or pay for it anyway.

At least two send-or-pay provisions have been referred to the House of Lords.[3] In both *Total Gas Marketing Ltd v Arco British Ltd and Others*[4] and *Amoco (UK) Exploration Company v Teesside Gas Transportation Limited and Another*,[5] no issue was raised as to these provisions being unenforceable. In addition, take-or-pay provisions have long been, and still are, regularly included in English law energy supply agreements, to the extent that they form part of the fabric of energy industry risk allocation. The same applies in respect of send-or-pay provisions in transportation agreements.

The English law rule against penalties

The English law rule against penalties prevents the enforcement of clauses that operate as a penalty against the party in default. For example, where a contract stipulates that a specified sum is payable on breach of an obligation by a party to that contract, but the sum stipulated is not a genuine pre-estimate of loss suffered due to that breach, historically the clause will not be enforceable. The rule against penalties reflects the principle that, in English law, a party is normally free to breach its contractual obligations on payment of damages, the value of which is to be determined by English law applying established principles. A penalty clause operates in a way that attempts to fix a higher measure of damages. As this may have the purpose of deterring a party's freedom to breach its contractual obligations (for example, an attempt to tie in a customer to a hire-purchase contract) such provisions may be considered unenforceable.

However, because the rule against penalties is an anomaly within the English law of contract, which generally allows commercial parties the freedom to contract at will, English law is predisposed to enforce clauses to which the rule applies, and only rarely finds that they are a penalty. This predisposition is particularly strong in commercial contracts freely entered into between commercial parties of comparable bargaining power.[6]

For example, at no point in the lead case *Amoco v Teesside Gas*[7] did the party liable to pay the send-or-pay payments raise the issue of whether such provisions were a penalty. In that case, which related to a capacity reservation and transportation agreement whereby a party reserved part of the capacity in the Central Area Transmission System (CATS) export pipeline in the central area of the North Sea, send-or-pay payments were required to be made from the time that the pipeline was 'available'. The party that had reserved capacity did not seek to argue that the send-or-pay payments were a penalty, even though by the time that it challenged the provisions it had paid

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3 Previously, the highest court in the United Kingdom. The judicial function of the House of Lords has since been transferred to the Supreme Court of the United Kingdom.

4 [1998] 2 Lloyd's Rep 209 HL; [1998] UKHL 22.

5 [2001] 1 All ER (Comm) 865; [2001] UKHL 18. The author assisted the successful company as one of its counsel in this case.

6 *Alfred McAlpine Capital Projects Ltd v Tilebox Ltd* [2005] EWHC 281 (TCC), [2005] BLR 271 (QBD) (TCC) considered below.

7 [2001] 1 All ER (Comm) 865; [2001] UKHL 18.

£45m in send-or-pay payments with no prospect of having any product to send down the pipeline (as it had none at the time to send).

Take-or-pay provisions – debt or damages

English law distinguishes between a claim for a debt and a claim for damages.

> A debt is a definite sum of money fixed by the agreement of the parties as a payment by one party in return for the performance of a specified obligation by the other party or upon the occurrence of some specified event or condition; damages may be claimed from a party who has broken his contractual obligation in some way other than a failure to pay such debt.[8]

The overwhelming majority of established English law decisions[9] make clear that a clause requiring a party to pay a set amount, such as a take-or-pay amount, cannot be held to be unenforceable as a penalty unless the paying party is in breach of contract, for example by failing to take LNG that it is *obliged* to take under an LNG sale and purchase agreement (SPA). Alternatively, in relation to a send-or-pay amount, by failing to ship gas that it is *obliged* to ship under a gas transportation agreement. This is because the rule on penalties is understood to only apply to amounts that the paying party has to pay by way of *damages*, not by way of a debt.

There are two separate obligations in most take-or-pay contracts. First, there is the obligation on the seller to make the gas available to the buyer. Secondly, there is the obligation on the buyer to pay for the gas that has been made available (either as well as, or instead of, taking up the gas).

Again, in relation to send-or-pay contracts, there are also two separate obligations. First, there is the obligation on the transportation company to make the gas transportation service and facilities available to the shipper. Secondly, there is the obligation on the shipper to pay for the service (either as well as, or instead of, taking up the service by injecting gas).

Both of these obligations create a benefit for the other party. This being so, it had been widely understood that take-or-pay payments, or send-or-pay transportation fees, would be considered by English law to be an amount due to the seller or transportation company as a debt for having made the gas or the transportation services available, and not as damages for any failure on the other party to take, or to ship, gas. This is because the seller or the transportation company is providing the service of making gas or transportation services available to the other party, in accordance with the Gas Sales Agreement (GSA) or Gas Transportation Agreement (GTA), which will create a debt owing to the seller or the transportation company for that service. On this basis, it had been long understood that the rule on penalties should not apply at all.

Support for the fact that making a gas transportation service available for use, should the shipper opt to use it, would create a debt is found in the speech of Lord Hoffmann in the House of Lords in *Amoco v Teesside Gas*,[10] which referred to 'the income

8 Hugh Beale, *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012) vol 1 at para 26–008.
9 See nn 13, 14 and 15 below.
10 [2001] 1 All ER (Comm) 865; [2001] UKHL 18 [24].

stream from the send-or-pay payments'. Although it was not in issue in that case whether the send-or-pay payments were damages or a debt, Lord Hoffmann's reference to the sum as an 'income stream' was a clear reference to the sum being a debt.

Similarly, in *Associated British Ports v Ferryways and Another*,[11] which related to a send-or-pay clause for handling charges for loading and unloading trailers and containers at a port, a failure by Ferryways to 'send' the expected quantity was not a breach of contract. The obligation to pay was held not to be: 'a secondary obligation that is triggered by a breach … but is itself a primary obligation given in exchange for ABP's promise to provide a new linkspan, and as such cannot be a penalty.'[12]

There had been overwhelming authority that the rule against penalties should not apply to debts. English law authority that such a debt claim is not subject to the rule on penalties can also be found, for example: in the judgments of (1) the House of Lords in *White & Carter (Councils) Ltd v McGregor*;[13] (2) Collins LJ in the Court of Appeal in *Euro London Appointments v Claessens International*;[14] and (3) the High Court in *The Office of Fair Trading v Abbey National PLC and Others*, where the High Court decided that bank charges were not a penalty, as they were a sum due for services performed and not a payment on breach.[15]

These decisions illustrate that there is a need to distinguish a take-*or*-pay provision from a take-*and*-pay provision. The revenue stream created by:

- A take-*or*-pay clause (whereby there is no obligation on the buyer to take a minimum quantity of gas), will create a primary obligation (debt), since no breach will occur if gas is not taken, and no secondary obligation to pay damages on breach will arise.
- A take-*and*-pay clause (whereby there is an obligation on the buyer to take a minimum quantity of gas) will also normally create a primary obligation (debt) and not a secondary obligation to pay damages on breach, but the existence of a breach makes the distinction less clear cut.

Therefore, it follows that payment due under a take-or-pay clause will be a debt, and payment under a take-and-pay clause will very commonly also be a debt and the law on penalties should not apply. This settled position had, however, been challenged.

Concern that take-*and*-pay provisions could be penalties

Two cases, both handed down by the same judge, with the second decision based on that judge's own earlier analysis, had, until November 2015, created uncertainty as to whether a take-*and*-pay provision can operate as a penalty. It is important to note

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11 [2008] EWHC 1265 (Comm).

12 *Ibid* at [50]. Although Ferryways appealed to the Court of Appeal, it did not appeal this section of Field J's judgment.

13 [1962] AC 413.

14 [2006] EWCA Civ 385, [2006] 2 Lloyd's Rep 436: 'The short answer to the client's point on penalty is that the agency was suing for its agreed fee. That cannot be a penalty.'

15 [2008] EWHC 875 (Comm). Although the case proceeded to the Supreme Court on other issues, this finding was not appealed (*Office of Fair Trading v Abbey National PLC and Others* [2009] EWCA Civ 116; [2010] 1 AC 696).

that in both cases the take-and-pay provisions were upheld and enforced as being fully valid, after having first been tested to see if they were penalties.

In *M & J Polymers Ltd v Imerys Minerals Ltd*,[16] the Commercial Court considered the application of the rule against penalties in the context of take-or-pay provisions in a commercial contract. M & J Polymers Ltd ('M & J Polymers') supplied chemical dispersants to Imerys Minerals Ltd ('Imerys') under a long-term supply contract. The contract contained a provision requiring the buyer to order a minimum quantity of chemicals and a take-and-pay provision. Burton J was asked, among other things, to resolve whether the sum owing under the take-and-pay provision was unenforceable as it offended the rule against penalties. To resolve this question Burton J considered two separate issues: first, did the take-and-pay provision give rise to a debt rather than damages; and, secondly, was the provision in question a penalty or was it an enforceable liquidated damages provision?

M & J Polymers argued that the claim under the take-and-pay provision was a debt, relying on the principle that: 'The law on penalties … is not relevant where the claimant claims an agreed sum (a debt) which is due from the defendant in return for the claimant's performance of his obligations.'[17] Despite concluding that the right to payment was a debt, Burton J went on to test whether the obligation was an unenforceable penalty although, after applying this test, he concluded that it was not, and enforced the clause.

In the second case, *E-Nik Ltd v Department for Communities*,[18] E-Nik Ltd (the supplier) was an information technology services company that entered into a contract with the Department for Communities and Local Government (the authority) to provide consultancy personnel to help with the government's information technology systems. Burton J again decided that the sum allegedly due should be characterised as a debt, not damages. In reaching this conclusion, Burton J accepted the supplier's argument that it was required to be 'ready, willing and able to provide the 500 days of consultancy per year throughout the period of the Contract'. As a consequence, the authority was receiving a specified obligation for the amount paid (a debt).

Despite this, Burton J again held that the rule on penalties applies to debt claims, although this time clarifying that it applies *provided that* the event that would give rise to a debt claim *also* 'amounts to a breach of duty' (or where the debt claim arises in parallel to a breach of contractual duty). Burton J suggested that a breach of contract may have taken place and referred to 'the repudiatory failure by the Defendant to call off/request the minimum 500 days' services',[19] suggesting that the failure by the buyer to order the product or services is a *parallel* breach of contract (allowing a claim in damages).

This line of authority suggests that the rule on penalties was extended to any debt claim where a parallel breach of contract has occurred. This provided scope to question whether take-and-pay provisions or send-and-pay provisions providing for some form of minimum take of gas or use of a transportation service would be subject to the rule on penalties.

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16 *M & J Polymers Ltd v Imerys Minerals Ltd* [2008] EWHC 344 (Comm).

17 *Chitty on Contracts* discussing the principle in *White & Carter (Councils) Ltd v McGregor* [1962] AC 413, see *Chitty* (n 8) at para 26–183.

18 [2012] EWHC 3027 (Comm).

19 [2012] EWHC 3027 (Comm) [22].

Concern that take-*or*-pay provisions could be penalties

While this degree of uncertainty was itself unfortunate for the global energy industry, given that both take-and-pay provisions and send-and-pay provisions are widely used, these decisions have, in practice, given rise to even wider concern. This is because these cases suggested that the principles above could apply to take-*or*-pay provisions, (where there is no minimum requirement on the buyer) not only take-*and*-pay provisions (where there is). This is significant. It became arguable that the rule on penalties could apply where it was clear that the buyer had an *option* whether or not to take gas. This was so notwithstanding it being far less likely that a buyer with an option to purchase ought to ever be considered in breach of contract for deciding not to do so (as opposed, for example, to a buyer subject to some form of minimum purchase obligation).

This uncertainty had arisen because, while the clauses that were considered appear in both cases to be take-*and*-pay clauses,[20] in fact they were expressly referred to as take-*or*-pay clauses. The reference to take-*or*-pay has allowed parties to challenge the enforceability of take-*or*-pay payments, not just take-*and*-pay payments.

Burton J went on to sit as the judge at first instance in *Cavendish Square Holdings BV and Another v Talal El Makdessi.*[21] Relying on the parallel breach line of argument that he had previously upheld,[22] Burton J stated that one 'development [in the law on penalties], to which I referred, was to expand its operation, although in the event unsuccessfully, into what was otherwise a claim in debt'. In making this statement, Burton J relied on his own judgment in *M & J Polymers Ltd v Imerys*[23] and a short passage in the first-instance decision of Colman J in *Lordsvale Finance Plc v Bank of Zambia.*[24] However, it is unclear from Colman J's judgment whether the additional default interest in that case was ultimately treated by the court as consideration (primary obligation) or liquidated damages (secondary obligation).

Burton J's decision in *Cavendish Square Holdings BV and Another v Talal El Makdessi* was appealed to the Court of Appeal,[25] following which the case was appealed to the Supreme Court, which heard argument in July 2015.

The enforceability of take-or-pay provisions – resolved

On appeal to the Supreme Court in *Cavendish Square Holdings BV and Another v Talal El Makdessi*[26] it was argued that there is no easily discernible rationale for the doctrine of penalties and that it should no longer apply in a commercial contract under modern English law. A clause which operates on breach in an apparently excessive fashion may have been negotiated on a level playing field between sophisticated and well-resourced commercial parties, each side having equal bargaining power and access to legal advice. In such a case, there is no objectionable conduct and no

20 In both cases the failure to 'take' was held to be a breach of contractual duty, so in fact these cases relate to take-*and*-pay provisions.
21 [2012] EWHC 3582 (Comm).
22 [2012] EWHC 3582 (Comm) [27]–[29].
23 [2008] EWHC 344 (Comm).
24 [1996] QB 752 (QB).
25 [2013] EWCA Civ 1539 (Patten, Tomlinson and Christopher Clarke LJJ).
26 [2015] UKSC 67.

inequality of bargaining power – but rather a negotiated deal designed to regulate the commercial relationship between the parties and to provide certainty as to the terms of that relationship.

Indeed, the rule on penalties is seen by many as an early form of consumer protection, which has been overtaken by both UK statutes and European Union directives. As such, it was argued that the law of penalties is out of step and should no longer apply: it is uncertain when and how it applies, it leads to arbitrary differences in certain cases, it undermines the freely agreed bargains of sophisticated commercial parties and it lacks any coherent rationale by which these results can be explained to those commercial parties in a satisfactory manner.

On the other hand, it was also argued before the Supreme Court that the rule on penalties should be substantially extended, so as to apply in situations other than a breach of contract. In a unanimous decision, the High Court of Australia, Australia's highest court, recently held – but only in a consumer context – that relief against penalties may be available even if the obligation at issue is not triggered by a breach of contract.[27] The High Court of Australia decided that the rule on penalties applied – in principle – to charges by banks for honour, dishonour, non-payment and over-limit fees, even though these fees did not arise out of a breach of the agreement between a customer and its bank.

Navigating a middle course, the Supreme Court in *Cavendish Square Holdings BV v Talal El Makdessi*[28] held that there was a fundamental difference between English law stepping in: (1) to review the fairness of a contractual obligation; and (2) to regulate the remedy for its breach. English law did not review the fairness of men's bargains. The rule on penalties ought only to regulate 'the remedies available for breach of a party's primary obligations, not the primary obligations themselves':[29]

> where a contract contains an obligation on one party to perform an act, and also provides that, if he does not perform it, he will pay the other party a specified sum of money, the obligation to pay the specified sum is a secondary obligation which is capable of being a penalty; but if the contract does not impose (expressly or impliedly) an obligation to perform the act, but simply provides that, if one party does not perform, he will pay the other party a specified sum, the obligation to pay the specified sum is a conditional primary obligation and cannot be a penalty.[30]

And also:

> It is true that clever drafting may create apparent incongruities in particular cases. But in most cases parties know and reflect in their contracts a real distinction, legal and psychological, between what, on the one hand, a party can permissibly do and what, on the other hand, constitutes a breach and may attract a liability to damages for – or even to an injunction to restrain – the breach.[31]

27 *John Andrews & Others v Australia and New Zealand Banking Group Limited* [2012] HCA 30. Although not binding, the Supreme Court stated that 'Any decision of the High Court of Australia has strong persuasive force in this court.' [2015] UKSC 67 [42].

28 [2015] UKSC 67.

29 [2015] UKSC 67 [13] (Lord Neuberger and Lord Sumption).

30 [2015] UKSC 67 [14] (Lord Neuberger and Lord Sumption).

31 [2015] UKSC 67 [130] (Lord Mance).

The approach of the High Court of Australia, in extending the doctrine to apply on the occurrence of events which were not breaches of contract, was seen by the Supreme Court to be ‘a radical departure’[32] and doubt was cast on this line of authority:

> There is no freestanding equitable jurisdiction to render unenforceable as penalties stipulations operative as a result of events which do not entail a breach of contract. Such an innovation would, if desirable, require legislation.[33]

The impact of this re-confirmation that the rule on penalties applies only to damages, not debts, is significant:

- A take-*or*-pay payment should be viewed as being due on the performance of the seller’s ‘specified obligation’ in making gas available. There will not be any parallel breach by the buyer (the failure to take gas), as the buyer will normally have an *option* to take gas, and not be subject to a minimum volume obligation. The buyer should not be able to rely on the rule against penalties: ‘if the contract does not impose (expressly or impliedly) an obligation to perform the act, but simply provides that, if one party does not perform, he will pay the other party a specified sum, the obligation to pay the specified sum is a conditional primary obligation and cannot be a penalty.’[34]
- A take-*and*-pay payment should also normally be viewed as being due on the performance of the seller’s ‘specified obligation’ in making gas available, such that the buyer should, again, not be able to rely on the rule against penalties as:
    - The primary threat to the enforceability of take-and-pay payments arising from the previous line of authority had been the suggestion that the rule on penalties might be extended to any debt claim where a parallel breach of contract has occurred. This approach was not followed.[35]
    - Although the Supreme Court noted that ‘where a contract contains an obligation on one party to perform an act, and also provides that, if he does not perform it, he will pay the other party a specified sum of money, the obligation to pay the specified sum is a secondary obligation which is capable of being a penalty’,[36] it also held that such an amount may instead be a debt due to a seller on the performance of a ‘specified obligation’.
    - Provisions which, upon breach, provided that the defaulting party would not receive an amount otherwise due, and required the compulsory sale of shares, were held by the Supreme Court to be primary obligations: ‘Although the occasion for its operation is a breach of contract, it is in no sense a secondary provision … [it] belongs among the provisions which determine Cavendish’s

32 [2015] UKSC 67 [41] (Lord Neuberger and Lord Sumption).
33 [2015] UKSC 67 [241] (Lord Hodge).
34 [2015] UKSC 67 [14] (Lord Neuberger and Lord Sumption).
35 Despite Burton J being the first-instance judge in *Cavendish Square Holdings BV v Talal El Makdessi*, meaning that seven Justices of the Supreme Court had the opportunity, had they wished, to endorse this approach.
36 [2015] UKSC 67 [14] (Lord Neuberger and Lord Sumption).

primary obligations, i.e. those which fix the price, the manner in which the price is calculated and the conditions on which different parts of the price are payable'.[37] The rule on penalties did not apply to these primary obligations as: 'It is not a proper function of the penalty rule to empower the courts to review the fairness of the parties' primary obligations, such as the consideration promised for a given standard of performance.'[38]

- Take-and-pay provisions likewise govern the price to be paid to the seller. They are provisions that fix the price, yet the occasion for their operation is a breach of contract. It is difficult to understand why a parallel breach by the buyer should entitle the buyer to rely on the rule against penalties.[39]

Further, even if the rule on penalties does apply, in a circumstance where payments are seen to arise because of a breach by the buyer to take gas, and not as a payment for having gas available, a different test now applies before a take-or-pay (or take-and-pay) payment might be seen to be an unenforceable penalty. This test is of particular assistance to gas sellers or transportation companies, and adds further assurance that take-or-pay (or take-and-pay) provisions and send-or-pay (or send-and-pay) provisions will be enforced by English law:

> I therefore conclude that the correct test for a penalty is where the sum or remedy stipulated as a consequence of breach of contract is *exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract*. Where the test is to be applied to a clause fixing the level of damages to be paid on breach, an extravagant disproportion between the stipulated sum and the highest level of damages that could possibly arise from the breach would amount to a penalty and thus be unenforceable. In other circumstances the contractual provision that applies on breach is measured against the interest of the innocent party which is protected by the contract and the court asks whether the remedy is exorbitant or unconscionable [emphasis added].[40]

As a matter of practice, take-or-pay (or take-and-pay) provisions in GSAs or send-or-pay (or send-and-pay) provisions in GTAs will very often be seen to protect the need for the seller or the transportation company to make an agreed rate of return on its (often extremely large) investment. The restated test emphasises that the payment has to be 'exorbitant or unconscionable' when viewed against the innocent party's interest in the performance of the contract. Given the significant investment by the seller or transportation company, and its interest in the secure revenue stream which the payments provide, this test is more helpful than the previous test, which relied on a distinction between a 'penalty' on the one hand and a 'liquidated damages' clause that was a genuine pre-estimate of damage on the other.

37 [2015] UKSC 67 [74] (Lord Neuberger and Lord Sumption).
38 [2015] UKSC 67 [73] (Lord Neuberger and Lord Sumption).
39 If a take-and-pay provision was held to be void as a penalty, the seller would have to prove damages in law, and to demonstrate its loss. If it could not do so, it would not get paid, despite having made gas available as agreed. Therefore, a buyer that failed to take a minimum volume of gas under a take-*and*-pay provision would be in a *better* position than a buyer that had accepted no minimum volume obligation at all, under a take-*or*-pay provision. This would be a nonsense.
40 [2015] UKSC 67 [255] (Lord Hodge).

In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption also had to be that the parties themselves were the best judges of what was legitimate in a provision dealing with the consequences of breach.[41]

Conclusion

Take-or-pay (and take-and-pay) provisions are a very familiar feature in gas and LNG sales contracts, power purchase contracts and many other common energy industry contracts, and provide an option for the buyer to take supply of gas, LNG or power, or to pay for it anyway.

The Supreme Court's recent decision confirms that the English law rule on penalties should be maintained, but that it can only operate upon breach of contract. This makes it easier to argue that sums under a take-or-pay (or take-and-pay) clause must be enforceable. Under English law, a sum such as a take-or-pay (or take-and-pay) payment must be due as either a primary obligation (debt) or a secondary obligation (damages). It cannot be due as both. If the sum is due for performance of an obligation to make gas or a transportation service available, the payment of the sum must be a primary obligation (debt), and:

- A take-or-pay payment does not arise because of any breach, for example a failure to take, or to ship, a minimum quantity of gas: there will be no such obligation as the buyer will normally have an *option* to take gas, and not be subject to a minimum volume obligation.
- A take-and-pay payment should *not* normally be viewed as being due on the buyer's breach in failing to take gas, rather it should be considered as being due on the performance of the seller's obligation in making gas available. It will normally be immaterial that there is a parallel breach by the buyer or shipper.

Therefore, the rule on penalties ought not to apply and take-or-pay and send-or-pay (and take-and-pay and send-and-pay) provisions should be enforceable. Even if the rule was engaged, the restated test emphasises the commercial interest of the seller or transportation company. The test is whether:

> … the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.[42]

The importance of take-or-pay and send-or-pay provisions in order to project finance an investment supports the proposition that, in the energy industry, such provisions usually reflect a legitimate interest in covering the seller's up-front costs, given the significant capital costs required. This point is reflected in the speech of Lord Hoffmann in *Amoco v Teesside Gas*,[43] in which he relied on the commercial purpose of creating a secure

41 See n 6 above.
42 [2015] UKSC 67 [32] (Lord Neuberger and Lord Sumption).
43 [2001] UKHL 18.

revenue stream, as probably forming 'part of [the seller's] financing arrangements', under which the seller's project finance lending was to be repaid. In these or similar circumstances, it would be challenging to suggest that a take-or-pay or send-or-pay obligation was 'exorbitant or unconscionable'.

Further, in relation to take-and-pay, or send-and-pay, provisions these will be more likely to be considered enforceable if:

(1) They are drafted, if possible, so that the buyer does not have a contractual *obligation* to take, or to ship, a minimum volume of gas, instead only having an *option* to do so if it wishes.
(2) They are drafted as a fee for the service of 'reserving' capacity. In certain transportation agreements, an obligation to pay a minimum amount for that service in any year (even when not used) may be properly construed as a fee for the service of 'reserving' the capacity for use by the shipper. This is particularly the case where the relevant infrastructure is capacity-constrained and not easily replicated.
(3) A 'make-up' provision is included. Where a party has made a payment under a take-and-pay or send-and-pay provision but is entitled, through 'make-up' provisions, to benefit at a later date, it is difficult to construe the sum paid as damages rather than debt, since the paying party is simply making a payment for the future performance of an obligation.