"Tailoring the Arbitral Process to Suit Natural Gas Price Reviews": The Case for Two-Stage Final Offer Arbitration

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I Introduction

The liberalisation of Europe's gas markets has impacted the way that natural gas price review negotiations are being resolved across Europe. Parties to long-term natural gas agreements now increasingly differ on how natural gas should be valued. These differences are regularly too wide to be bridged through negotiations. As a result, recent years have seen a glut of natural gas price review arbitrations. Many natural gas portfolio managers perceive this to be an expensive and inefficient process. More worryingly, some natural gas price review arbitrations have generated results viewed by some participants as un commercial.

Uniformly, parties are seeking to achieve better results when faced with price review arbitrations. If the price formula itself cannot be drafted in a way that leads to a more predictable outcome, the focus falls onto the drafting of the price review provision and the procedure to be used before the arbitral tribunal.

This article considers how the procedural flexibility of international arbitration may be used to overcome many of these challenges. We have previously recommended the use of a particular form of arbitration—final offer arbitration—in natural gas price review arbitrations. In this article we elaborate on this approach which, when coupled with a two-stage arbitral process, we call the Two-Stage Final Offer Arbitration (*Two-Stage FOA*) approach.

II Summary

We suggest that parties should invest care at the outset, tailoring the arbitral procedure to the specific needs of a natural gas price review:

- price review disputes under long-term natural gas supply agreements should in many circumstances be resolved, by agreement of the buyer and the seller, through a two-stage (bifurcated) arbitration, which includes a final-offer element;
- Stage One determines whether any threshold requirements for the price review have occurred (e.g., timely formal notification), identifies the required circumstances (e.g., a change in the market for substitute energy sources or increased competition within the relevant market) and (if relevant) determines what effect this has had on the relevant market;
- Stage Two determines the performance of the current price formula in light of these circumstances, including whether the current price formula needs to be revised to reflect these circumstances and, if so, how; and
- at Stage Two, each party must present a single, final revised price formula and the arguments supporting it. While the arbitral tribunal is not required to adopt one party's reasoning wholesale, the arbitral tribunal produces a final and binding reasoned award that must adopt one of the final offers.

We demonstrate why this approach may help promote more commercial results, as well as reducing legal costs and improving the efficiency of the process.

III Background

In natural gas sales agreements, the contract price for each delivery is typically arrived at through a price formula. Given that these agreements are of a long-term nature, the price formula seeks to reflect shifts in the relative competitiveness of the agreed price over time. For this reason, most historic price formulae were usually indexed directly or indirectly to alternative competing fuels, such as oil products (for want of a better proxy).

For buyers and sellers under long-term natural gas sales agreements, the frequency, scale, and contentious nature of price reviews is a fairly recent phenomenon. Aside from the risks arising from the massive natural gas market realignments in the United States (1980s) and the United Kingdom (1990s), market changes were not overwhelming in scale and were regularly overcome through negotiations. Buyers and sellers had long-standing commercial relationships, and natural gas portfolio managers would historically engage in negotiations that resulted in a commercial agreement. It was unusual for a natural gas price review to end in arbitration.

The reason for this was structural: Europe consisted of national natural gas markets, in which there was often one national publicly owned (or privatised) buyer selling exclusively into its national market. Most natural gas markets were historically national in geography. The buyers in these national markets were monopsonists charged with the responsibility of expanding importation, distribution and consumption of natural gas. A monopsony buyer, in the early years, had no competition from other natural gas supplies as there was no gas-to-gas competition. Natural gas purchased by the buyer would compete with alternative fuels. In addition, there was no natural gas liquid "market price" in these markets against which to index price formulae. There was limited, if any, cross-border integration, and the national markets were typically fully regulated. The monopsony buyer could typically pass on the cost of the natural gas it imported to the end consumer in the form of regulated tariffs.

Today natural gas markets in Europe are in a state of flux. Following the implementation of the European Gas Directives (*the Directives*),[1] natural gas markets in Europe have liberalised over the course of the last decade, albeit at different stages and to varying extents. The Directives aimed to separate potentially competitive activities from natural or de facto monopolies by requiring the unbundling of undertakings that were vertically integrated.

In response, some markets have achieved a greater degree of liberalisation and gas-to-gas competition than others. Regional hubs have emerged, but the object of these actions—a single, competitive market—has not been fully achieved. No single "spot" price or market serves as the basis of long-term natural gas supply contracts within Europe. Linkage, at least in part, to oil product prices remains the basis of the price formula in these contracts.

Even so, through the ongoing process of liberalisation, buyers and sellers have experienced fundamental changes to the structure of the market, including:

- the introduction of gas-to-gas or contract-to-contract competition;
- the introduction of indexation to wholesale electricity prices;
- the introduction of new competing alternative energy sources;
- the increasing importance of hub prices; and
- the growth of LNG trade and competition.

These changes have resulted in downward pressures on natural gas prices, while at the same time there has been an increase in the market price for oil and oil products to which many long-term natural gas contracts are linked. These effects have polarised the positions of buyers and sellers. Differences in perception between buyers and sellers about recent market changes are increasingly hard to resolve through negotiations.

IV Tailoring the arbitral process

Concerns over restricting tribunal discretion

Long-term natural gas sales agreements often have a term of 20 years or more with contractual quantities exceeding a billion cubic meters annually. Even a relatively minor change imposed on the agreed price, when multiplied by the number of cubic metres to be delivered over a number of years, is a high-value, high-risk matter for both seller and buyer. It is little wonder that natural gas portfolio managers are reluctant to submit an element as critical as price to the judgment and discretion of an arbitral tribunal.

The discretion of the arbitral tribunal to decide any new price formula is only rarely fettered by restrictions contained in the price review provision. There is good reason for this.[2] Given the long life of a natural gas sales agreement, parties cannot confidently predict what natural gas markets will look like in five, ten or fifteen years when drafting and agreeing to the contract. When drafting price review clauses, parties will attempt to agree to a price provision that takes into account "known knowns" and "known unknowns",[3] while leaving the language of the price review clause broad enough to take into account "unknown unknowns"—things that the parties cannot anticipate may happen during the life of the contract.[4]

Even though the parties might desire a price review provision that is prescriptive (in order to guide the parties and the arbitral tribunal and to limit uncertainties) this is often not practicable. The countervailing goal is to ensure that the price review provision is drafted broadly enough to enable the price review to address unforeseen upheaval caused by "unknown unknowns". To illustrate this problem, the parties might agree to allow the arbitral tribunal to order future changes only to the fixed component (otherwise known as the "constant" or "base price"), or only to the slope (or pass-through factor), but not to both. Such a restriction may be unwise. Any limitation upon the scope or the scale of the price review (e.g., which elements of the price formula are subject to review) may prevent any revised price formula evolving to reflect market changes. For this reason, arbitral tribunals are almost universally endowed with broad

[1] The Directives are: (i) Directive 98/30/EC, dated 21 July 1998 (repealed by Directive 2003/55/EC): [*http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0030:EN:HTML*]; (ii) Directive 2003/55/EC, dated 26 June 2003 (repealed by Directive 2009/73/EC): [*http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:176:0057:0057:EN:PDF*]; and (iii) Directive 2009/73/EC, dated 13 July 2009: [*http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009L0073:EN:NOT*].

[2] Methods by which an arbitral tribunal's discretion could be limited by agreement were explored in Ben Holland and Jeremy Wilson "Price reviews and long-term uncertainties *LNG Business Review* 3(5) May 2010: European LNG.

[3] For example, we have seen parties include price review provisions that attempt to take into account the present state of liberalisation and the onset of further liberalisation.

[4] "Unknown unknowns" is a phrase used by former United States Secretary of Defence Donald Rumsfeld. "Unknown unknowns" represent things that the parties do not know that they do not know; or, rather, unanticipated unknowns. For example, while the techniques and technology for shale-gas extraction have been known for some time, parties in the 1990's were unlikely to anticipate the impact of the shale-gas explosion on gas markets. This development would have been an "unknown unknown" at the time. Today, the uncertainty caused by this development may be better classified as a "known unknown".

discretion, largely unfettered by any restrictions or guidance in the drafting of the price review provision or in the arbitral procedure.

Concerns over uncertainty in price review arbitrations

With its broad discretion the arbitral tribunal is left to digest the complexities of the dispute and decide a new price formula (if one is required). In a price review arbitration, the arbitral tribunal will interpret the contract, make conclusions regarding the underlying economic data and determine the price formula going forward. Coupled with the fact that buyers and sellers increasingly differ on how natural gas should be valued, the widening difference can incentivise the parties to submit competing proposals that, in certain instances, may be characterised as extreme. The adversarial nature of price review disputes encourages these polarised proposals, particularly given the perception (often incorrect) that arbitral tribunals will "split the baby". As data changes, the proposals frequently evolve over the course of the proceedings. Parties are incentivised to run multiple arguments (a primary claim, followed by alternative fall-back arguments) in order to account for any possible finding that the arbitral tribunal may have on submissions or data. As a result, price review arbitrations feature more arguments, longer hearings and more complex awards with higher legal costs.

There is a potential further cost to this process: accuracy. Given the adversarial nature of data-intensive price reviews it is often a challenge to keep submissions short and simple, as the parties are incentivised to run alternative arguments. The arbitral tribunal may become overburdened by data and multiple competing arguments. In some circumstances the arbitral tribunal, using its discretion, may mix and match various aspects of the parties' competing proposed price formulae, creating a new, hybrid, price formula. As neither party will have requested this hybrid, it has the potential to lead to a result that was unintended by both parties and which might prove to be un commercial.[5] In addition, the revised price formula eventually chosen by the arbitral tribunal may not be properly tested or examined at the hearing.

The risk is exacerbated by the possible lasting impact of the arbitral award. Practically, an award may result in significant back-payments owed from one party to another and changes in commercial strategy. The resulting price formula will dictate the price of natural gas until the next price revision. Legally, previous proceedings will often inform future proceedings under the same agreement (even if earlier proceedings might, depending on the relevant applicable law, have no binding precedential value). In today's market, parties may enter into a second price review under a long-term natural gas sales agreement, before having received an award under an initial price review under the same agreement. All of these factors necessitate efficiency and certainty in process and outcome.

Customizing the arbitral process

Parties, counsel and arbitral tribunals can neither influence the structure of natural gas markets nor simplify the complex data or arguments associated with price review disputes. However, parties can adapt the arbitral process to cater for their specific needs. Procedural flexibility is one of the enduring advantages of arbitration, as it can: (i) accommodate the complex issues raised in a price review dispute; (ii) improve the parties' control over the process; (iii) improve the efficiency of the process; and (iv) provide greater opportunities for settlement.

A price review provision will usually require some, but not necessarily all, of the following elements to be satisfied before a review can take place:

- timely formal notification and other contractual and procedural requirements as to the form and content of any such notice;
- any threshold requirements for the price review sometimes referred to as trigger events (the "Trigger") (a common example is the occurrence of any required circumstance(s) in the market);
- (if relevant) demonstrating what effect the required circumstance(s) (e.g., a change in the market for substitute energy sources or increased competition within the relevant market) has had on the relevant market(s);
- analysis as to whether the price formula ought to be revised in light of such circumstance(s); and
- analysis as to what any revised price formula should be.

Each step may be complex in itself. For example, many long-term natural gas agreements contain price review provisions that potentially require the claimant to satisfy: (i) the occurrence of circumstances beyond the control of either party; (ii) that the circumstances result in some relevant change to the energy market(s) of the buyer compared with a specified date; (iii) that this change is not short term in nature; and (iv) that this affects the value of gas in the relevant market(s).

Determining the meaning of the words "value of gas" can become an extensive debate on its own. It can be seen from the example above that proving an effect on the "value of gas" would only form one small element of the Trigger conditions to be satisfied under such a price review clause. Determining all of these elements together in a single hearing and arbitral award can easily test the vigour of international arbitration.

[5] See, for example, *Gas Natural Aprovisionamientos, SDG, S.A. v Atlantic LNG Co of Trinidad and Tobago*, 2008 WL 4344525 (S.D.N.Y. Sept. 16, 2008).

The case for two-stage (bifurcated) arbitration

Many price review arbitrations commonly focus on the following: (i) whether the Trigger event has occurred, what it is and (if relevant) what effect it has had on the value of gas; and (ii) if there has been a Trigger, whether the price formula ought to be revised and, if so, what the revised contract price should be. Each stage is routinely contested by the other party with considerable legal and factual evidence and argument being deployed.

Without any directions otherwise, all issues in dispute will typically be addressed concurrently. The parties' proposed revised price formulae, designed to take into account changed circumstances in the market, will have been carefully prepared before the parties know what the arbitral tribunal's findings are in relation to those changed circumstances. The concurrent determination of these issues is responsible for much of the complexity and confusion in proceedings. We set out the benefits of a two-stage approach below.

(i) Limiting the complexity of the dispute by narrowing its scope

Where the price review clause requires that the price formula takes into account any changed circumstances, it is helpful for the arbitral tribunal to decide first on what the changed circumstances are, before being asked to determine how to revise the price formula. These issues should not be addressed in tandem. In any event, parties will often disagree on the Trigger. Was the price review properly commenced? Was a price review notice served in time, to the correct address, in the correct form? Was the test entitling a party to commence the price review properly met? For example, if the price review clause requires that there is a "significant" change in order to commence a price review, the parties may agree that a change has occurred, but disagree that it was "significant"; alternatively they may agree that there was a significant change but disagree on what that change was. One party may argue that the significant change was a change in oil or oil product prices, while the other may argue that it was based on liberalisation and the introduction of renewables into the market. Because these issues may be legally complex, the arbitral tribunal may determine that one or both parties' arguments are correct, for example, where there are multiple qualifying circumstances or other Trigger events occurring in the market. All of these matters will be determined by the arbitral tribunal at Stage One.

The arbitral tribunal's determination at Stage One simplifies Stage Two of the proceedings. A common problem under the traditional approach, using the example set out above, is that submissions as to whether, and if so how, the price formula ought to be revised to take into account liberalisation will likely be very different to submissions as to whether, and if so how, the price formula ought to be revised to take into account a change in oil prices. Consequently, the parties may spend the proceedings making submissions proposing price formulae based on different circumstances, not aware until the final award what the arbitral tribunal might determine in relation to the Trigger. This creates unnecessary complexity and expense. Two-Stage FOA permits the parties and their counsel the opportunity to take the determination on the Trigger into account when considering their proposed revised price formula, simplifying the later stages of the proceedings.

Finally, parties often wish to debate first whether the price review process is legitimate at all, avoiding detailed engagement in price formula proposals for fear of undermining arguments about the Trigger. Bifurcating the proceedings enables a party to challenge whether a Trigger event has occurred, before having to propose any revised price formula. Stage Two then follows only if the arbitral tribunal decides the required conditions are satisfied at Stage One.

(ii) Shortening the length of the dispute

In situations where the Trigger has not been satisfied, Stage One will significantly shorten the length of the dispute. The arbitral tribunal will not have to consider arguments regarding whether and, if so, how the price formula should be revised. If the price review notice has been served on a speculative basis and the tribunal determines the Trigger has not been satisfied, the price review dispute is over. Additionally, when the arbitral tribunal determines that the Trigger has been satisfied, the basis for the revision has been determined and Stage Two of the proceedings should be simpler and shorter as the relevant change—the underlying basis of the dispute—has been identified.

(iii) Creating opportunities for settlement

A determination at Stage One may also bring the positions of the parties closer together. By determining the merits of the parties' submissions on the Trigger as a preliminary stage in the arbitral proceedings, commercial differences may narrow, allowing for opportunities to settle. For example, if the arbitral tribunal determines that one party's alleged basis for revision is justified, while the other party's alternative basis is not, core issues in the dispute will be determined and commercial differences may narrow, allowing for opportunities to settle.

(iv) Engaging the arbitral tribunal

By requiring an early determination at Stage One, the arbitral tribunal is required to consider core issues underlying the price review at a relatively early stage in the proceedings, as opposed to at the very end. Parties have complained that arbitral tribunals fail properly to engage in the substance of their price review until just before the final hearing, after there have been multiple exchanges of submissions. In a complex dispute, this is far too late. An accelerated focus on certain core legal and economic arguments obliges the arbitral tribunal to fully engage in the dispute.

The case for FOA

The Trigger is addressed at Stage One. This enables the parties and arbitral tribunal at Stage Two to focus on the remaining key legal issues, for example, an analysis of the current price formula, the relevant economic factors, and any revision of the price formula given the market conditions that were determined in Stage One. Final offer arbitration further modifies this two-stage (bifurcated) process. Two-Stage FOA provides the advantages set out below.

(i) Narrowing the issues in dispute

In many traditional price review arbitrations, one party is likely to be incentivised to argue that no revised price formula need be awarded, often regardless of the weight of evidence suggesting the opposite. This can lead to extreme commercial differences. For example, a buyer may seek the largest decrease in price. A seller may believe that no revision is necessary, but in order to counterbalance the buyer's proposal, may put in a proposal for the largest price increase possible, arguing that it is entitled to all value up to a fixed margin for the buyer, with the hope that the arbitral tribunal uses its discretion to find that the appropriate price is somewhere in the middle (often referred to as "splitting the baby").

From this example it can be seen that under the Two-Stage FOA approach, parties will be incentivised to make more commercially prudent offers, because the arbitral tribunal will likely choose the offer that is most supported by objective, verifiable data. Parties putting forward proposals based on less credible data or expert evidence will risk leaving the arbitral tribunal with only one alternative: agreeing with the opposing case. The consequence of incentivising more commercially prudent offers will be to lower the difference (value in dispute) between the parties, which can further increase the possibility of settlement.

(ii) Eliminating multiple alternative fall-back price formulae

In a traditional price review arbitration, theories underlying each claim may evolve, as the counterparty calls into question the other party's assumptions about data or the correct legal interpretation of the price review clause. To mitigate this risk, the parties may not maintain their initial positions through the proceedings. Parties may introduce "fall-back positions" to provide the arbitral tribunal with alternatives if it finds against that party on a particular issue and so as to account for all the possible factual and legal permutations. This situation can be avoided through the Two-Stage FOA approach.

(iii) Reducing complexity for arbitral tribunals

Rather than considering multiple fall-back positions coupled with shifting arguments, the arbitral tribunal will be able to weigh the merits of the two clear options before it, making the matter less complex. This also streamlines submissions in support of each proposal. The arbitral tribunal will likely require less time to consider the merits of one proposal versus the alternative and the lawyers will be able to produce submissions and prepare for the hearings more effectively. The expense and cost of management time to the parties in resolving the dispute may also be reduced.

(iv) Avoiding unexpected and untested outcomes

The uncertainty caused by long-running price review disputes can be debilitating for both buyers and sellers. Sellers may be uncertain about entering into other long-term contracts and buyers may have difficulty predicting how the resolution of the dispute may impact their portfolio.

Under traditional adversarial arbitration, there is the danger that none of the solutions put forward by the parties will be adopted by the arbitral tribunal. As noted above, this can result in un commercial outcomes that suit neither party in the long term. Under the Two-Stage FOA approach, the proposals may be tested, so the arbitral tribunal will be unable to award a revised price formula that neither party has had the opportunity to comment on or consider. By limiting the results of the arbitration to just two options, parties (before the hearing) can inform management of what the two possible outcomes are, and management can use this information in reporting to investors, in balancing their portfolio, and in considering the impact of any back-payments that may be necessary in either outcome.

(v) Concerns about the drive towards compromise

As an arbitral tribunal in a FOA may reject any proposal that it considers to be out of market, one concern is that in some instances parties resist proposing a revised price formula that reflects their preferred understanding of the contract in favour of a more conservative proposal. For example, a party that considered that the current price formula did not require a revision in light of changed circumstances might consider it, in a FOA setting, less risky to propose a (compromise) revised price formula instead. The concern would be that FOA puts pressure on parties to achieve a "fair" price, not designed necessarily to protect the original bargain. It may also motivate any party wishing to see a change in the price formula to initiate a price review process and argue that a Trigger event had occurred, even if there was little support for this (as that party would hope that the other party would be driven to offer at least a nominally improved price formula). Two-Stage FOA addresses these concerns as any unmeritorious price review should be resolved at Stage One, before the other party would be obliged to present any proposed revised price formula at all.

As in the example above, a party opposed to revising the price formula may feel compelled to propose a compromise price formula. If this occurs, a change to the price formula would be inevitable, as the arbitral tribunal would be constrained to choose one of the proposals presented by the parties. However, because of the final-offer approach this proposal would likely be a less extreme revision, and would be based on the original bargain (as the party wishing to retain that bargain would be unlikely to tender a proposal that was not closely connected to it).

V Two-Stage FOA—How the process works

In Two-Stage FOA, a price review is initiated by either party filing a price review request. Commonly, a negotiation period follows after which either party can formally request that the price review is referred to arbitration. The arbitral tribunal is constituted and the parties and the arbitral tribunal hold a hearing to determine the procedural calendar. All of these steps are consistent with standard practice in natural gas price review arbitrations.

However, the procedural hearing provides the parties with flexibility to adapt the arbitral process. If the parties have not anticipated and provided for Two-Stage FOA in their price review clause, the first procedural hearing allows the parties to agree to adopt a Two-Stage FOA approach. If so, any parallel issues (that are not directly related to the price review) can also be resolved between the parties and integrated into the Two-Stage FOA procedure. For example, if there is a parallel dispute about take-or-pay requirements, the parties may agree that these be addressed in the Stage Two submissions, but not treated as part of the parties' final offer. Following the procedural hearing the parties enter into Stage One.

A. Stage One: The Trigger Stage

Stage One (the Trigger Stage) is the first step in the proceedings. Experience suggests issues relating to the Trigger will be hotly disputed. Depending on the language of the price review provision, the parties make submissions at Stage One about: whether the Trigger event has occurred, what it is (e.g., a change in the market for substitute energy sources or increased competition within the relevant market) and (if relevant) what effect it had on the relevant market. The respondent, through its defence, may either deny that the matters set out in the claimant's submission have been satisfied, or argue that they are satisfied for different reasons. A hearing will invariably be necessary.

Following any hearing, the arbitral tribunal will make a determination on these preliminary issues through a partial award. The partial award will determine whether or not any Trigger has been satisfied and, if the Trigger has been satisfied, the circumstances that satisfied the Trigger. As the arbitral tribunal does not need to consider at Stage One whether the price formula ought to be revised, or what any revised price formula ought to be, the exchange of submissions and any oral hearing may be abbreviated.

B. Stage Two: The Final Offer Stage

Stage Two (the Final Offer Stage) is the second step in the proceedings. In Stage Two there are two rounds of simultaneous exchanges. The first exchange includes the parties' respective initial proposals for the revised price formula. This is not binding. These initial proposals will include detailed changes to the price formula, as well as legal arguments and expert testimony supporting the proposed price formula revision.

The parties then have a reasonable period of time to review the other side's proposal before the next round of submissions and consider any arguments that may undermine their respective proposals. Any additional evidence upon which the parties wish to rely to support their proposed revisions would have to be disclosed by an agreed "drop dead" date. This avoids one party entering new evidence with its final offer, to which the other party is unable to respond. It also avoids a party tactically withholding its final position on critical issues, until the hearing.

In the second round of exchanges, the parties set out their final revised price formula and the arguments supporting that price formula. This price formula may differ from the initial proposal in view of the other party's arguments in the first simultaneous exchange. The parties have the opportunity to address the other party's arguments and initial proposal. Importantly, this second proposal is the final offer, which is binding on the parties.

Why simultaneous submissions?

Structuring FOA in this manner limits some of the generic risks of FOA. Including simultaneous exchanges in Stage Two reduces gamesmanship. If one party has the opportunity to put forward its proposed price formula first, then the other party may feel it necessary to make an offer that looked reasonable in comparison to the initial offer, allowing the first party to peg the debate. By making the initial proposals "blind", the outer limits of the debate are set against the background of the determinations made by the arbitral tribunal at Stage One.

Why two rounds of simultaneous submissions?

Including two rounds of exchanges provides the parties with the opportunity to adjust their final offer to take into account issues raised by the other party. Despite the fact that the arbitral tribunal has made a series of determinations concerning the Trigger at Stage One, the parties will disagree about the implications of the arbitral tribunal's determinations, the data to be used and/or the economic consequences of legal determinations. By allowing each party to review the position of the other before making a final offer, there is a greater possibility that the parties will narrow the amount in dispute on their own and potentially reach settlement.[6] Having two rounds of submissions also ensures that each party will fully consider their opponent's position in respect of all of the issues in dispute (e.g., differences regarding data) before submitting their final offer.

C. The hearing

Assuming that settlement has not occurred, the parties will proceed from Stage Two submissions to the hearing. The focus of the hearing in Stage Two is the proposed final offer of each party and the economic considerations supporting the two offers.

This results in a hearing that is significantly more efficient. The arbitral tribunal, parties and experts will focus on the two final offers, not on submissions regarding alternative arguments or issues not central to these arguments. The extent of the submissions for the hearing, amount of expert testimony required and overall length of the hearing should reflect this narrower scope. As parties will not need to worry about the danger of "mix-and-match" outcomes, the parties can focus on their respective price formula proposals and address reasons why the opponent's are inappropriate.

Additionally, the arbitral tribunal can test each of the final offers before reaching their decision. Experts can provide testimony about the final offers and how they will work in the relevant market. This will inform the arbitral tribunal on the practical impact of the price formula it will choose.

D. The award

In Two-Stage FOA the arbitral tribunal produces a final and binding reasoned award. The award addresses each of the issues raised by the parties, but adopts only one of the final offers. While the arbitral tribunal is not required to adopt one party's reasoning wholesale, it should explain the reasons why it adopted one final offer over the other. It should seek to relate the rationale and determinations of the first partial award to the conclusions it reaches in the final award.

Such an approach may ease the burden on the arbitral tribunal. As the scope of the dispute is limited, there will be fewer issues to decide. Additionally, in some cases where the underlying issues may be hotly disputed, members of the arbitral tribunal may struggle to forge a common consensus. Two-Stage FOA allows the arbitral tribunal to reach consensus on a price formula when it might otherwise be difficult. By focussing the award on identifying the supporting reasons for the chosen proposal, conflicts between tribunal members can be avoided, reducing the amount of time necessary for drafting the award.[7]

The award should also be easy to implement. FOA ensures that the arbitral tribunal can simply direct the parties to apply the preferred, fully developed, revised price formula. This avoids lengthy negotiations on how an award based on "principles" is reduced into a final revised price formula.

Finally, by requiring the arbitral tribunal to detail its reasoning and affording the parties a structured process by which to put forward their competing claims, the award should be final and enforceable in accordance with the provisions of the New York Convention.

VI Conclusion

Traditional price review arbitrations are leaving many parties dissatisfied. To overcome this, sophisticated (often repeat) players should seek to better control the way price review disputes under long-term natural gas supply agreements are resolved. Resolution should, by agreement of the buyer and the seller, be through a two-stage (bifurcated) arbitration, which includes a final-offer element. As it has in other price review contexts, this approach may achieve better results in a natural gas market that remains in considerable flux. In particular, this approach may help promote more accurate results, as well as reduce legal costs and improve the efficiency of the process. This, in turn, may ease tensions between buyers and sellers, avoiding potentially un commercial results and uncertainty for natural gas markets and consumers.

[6] Insight into the merits of this practice is offered in "Structuring Baseball's 'Final Offer' Arbitration Process for use in Proceedings Before the CRTC", a report by Samuel J. Reich analysing how final-offer arbitration mechanisms could be best adapted to resolve disputes efficiently before the Canadian Radio-television and Telecommunications Commission.

[7] An appropriate analogy to this situation is a ruling by a panel of higher court judges. While each judge may offer an opinion slightly different to the others on tangential points, the holding and result of the matter will be clear.