

Paying Up: Price Adjustment

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Key points

1. Drafting a good price review clause requires a clear understanding of the litigious aspects of the price review process (and, conversely, those who litigate price review clauses must understand the drafting process and the considerations underpinning each aspect of the clause).
2. Price review clauses are not boilerplate clauses and will differ depending on the type of commodity, the context of the transaction, and the nature of the parties and the relationship. However, the key elements of a price review clause are: the trigger event, the procedure for arriving at the adjusted price, the price adjustment guidelines, and the consequences of a failure to agree.
3. Litigation most commonly arises over the trigger event (for example, whether the price review process was properly invoked) and the parties' adherence to the price adjustment process (for example, whether the parties negotiated in good faith). Good drafting can minimise the likelihood of such disputes arising.

A challenge with setting the price under a long term contract is that the market price of the relevant commodity in 10, 15 or 20 years' time is unknown. Price adjustment mechanisms are a common feature of long term contracts to ensure that, over time, the price under the contract reflects a market price for the goods.

This paper serves as a drafting ('front end') and implementation ('back end') guide to price adjustment clauses, highlighting important legal and commercial aspects. Part 1 of this paper contains a discussion of 'front end' issues typically confronted by commercial lawyers in drafting price review clauses. Part 2 contains a discussion of the 'back end' price review issues typically confronted by dispute resolution lawyers implementing a price review.

The authors have sought to divide this paper into 'front end' and 'back end' sections for convenience only. Parts 1 and 2 overlap to some extent but provide different perspectives. What this highlights is that it is imperative

This is a preview. Not all pages are shown.