Natural Gas Supply Chain Workshop
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Responding to Litigation and Arbitration over Disputed Gas Supply Agreements

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Agenda

- Creating Protections in Contract Terms
- Mediation Requirements
- Arbitration or Trial
- Takeaways
Creating Protections in Contract Terms
Creating Protections in Contract Terms

- Drafting in compliance with Governing Law of the Contract
- Drafting in compliance with applicable law especially where:
  - A dispute may be filed; and
  - A regulatory action may be filed.
Creating Protections in Contract Terms – Liability/Insurance Drafting Concerns

- Inserting appropriate definitions (e.g. terms for gross negligence or willful misconduct) since local law may not define
- Understanding that some language may not be enforceable and other accommodations made in the wording (e.g. some indemnities are not enforceable in certain jurisdictions)
- Scope of damages, e.g.:
  - Direct damages, indirect damages, fines, penalties, environmental damages
  - Criminal acts, acts of war, acts of terror
Creating Protections in Contract Terms – Obligation to Mitigate Losses

Each Party shall use **Reasonable Efforts** to mitigate or avoid any loss or damage caused by the failure of the other Party to meet its obligations under this Agreement, whether or not such failure is the result of a Force Majeure Event.

Source *AIPN Model GAS Sales Agreement*
Creating Protections in Contract Terms – Limitation of Liability and Remedy Exclusions

To the extent that a Party’s breach of its obligations under this Agreement results solely from such Party’s Willful Misconduct and/or Gross Negligence, the [Limitation of Liability and Limitation of Remedy provisions of the Agreement] shall not apply to limit the liability of such Party or the remedies available to the other Party.

Source AIPN Model GAS Sales Agreement
Creating Protections in Contract Terms – Warranty Drafting Concerns

- Implied Warranties (e.g. merchantability, fit for a particular purpose)
- Express Warranties (e.g. meet specifications)
- Effectiveness and scope of disclaimers especially when considering applicable law
Creating Protections in Contract Terms – Warranty Drafting Concerns

- Disclaimer of Other Representations and Warranties

- To the full extent permitted by applicable Law, except as expressly stated in this Agreement, the Parties negate any other representation or warranty, written or oral, express or implied, including any representation or warranty for merchantability, conformity to samples, or fitness for any particular purpose.

Source AIPN Model GAS Sales Agreement
Mediation requirements
Mediation

• Voluntary under the Agreement
• Compulsory
  – Under the Dispute Resolution Provisions in the Agreement
  – Under the law of the applicable jurisdiction
Damages; when and for what?

• Referral to an expert is usually quicker and less expensive than arbitration but most parties are often nervous of leaving their fate in the hands of a single expert.

• Some Dispute Resolution Provisions permit a multi-tiered approach, mediation, expert and subsequent recourse to arbitration or court by a disaffected party.

• Courts can often be quicker and less expensive than arbitration

• Courts generally lack confidentiality and there is sometimes a concern of fairness of the Court or the expertise or sophistication of the Court hearing the dispute.
Cases
Cases

- Sale of natural gas considered a firm offer – force majeure clause narrowly interpreted and did not excuse non-delivery of natural gas
- Third party claims for non-delivery under a sales contract
- Liability for shipping of natural gas out of specifications

➢ Critical in all cases is proper case management
Takeaways
Takeaways

• We need to draft contracts in a manner that enables the Parties to administer the contract in a clear and enforceable manner.

• Contracts should have applicability and provide a clear understanding of the responsibilities of the parties for the events that arise after execution of the contract.

• Balance and clarity in drafting, as well as communication in accordance with the terms of the contract will substantially minimize the risk of litigation in a contract.