

CHAPTER 2

Drafting

Introduction

Socrates famously said that ‘I know nothing except the fact of my ignorance’. We have seen from Chapter 1 that, although no two long term contracts are the same, there is one common feature among all long term contracts: the need to address future uncertainties. In other words, long term contracts are directed to addressing known unknowns at the date of contract.

The draftsman’s pen is the best tool that parties can employ to minimise the risks associated with inevitable changes that will occur over the course of the contract’s duration. In the energy and resources context, a number of clauses of long term contracts assume particular significance, including price adjustment, termination, change of circumstances, frustration and *force majeure*, and dispute resolution clauses.

The first paper in this chapter, by Sharon Wilson and Michelle Cole, deals with the first of those clauses: price adjustment. The paper provides insightful perspectives from both a draftsman and a litigator on price adjustment mechanisms and the price adjustment process under long term contracts. As to price adjustment generally, see Chapter 1, pages 7-8.

The second paper, by Barry Irwin, considers termination clauses with a particular emphasis on coal and iron ore contracts. The author’s review of a number of long term commodity supply contracts reveals a surprising tendency for commercial parties to rely on limited and essentially boilerplate termination provisions that give rise to a significant risk of parties becoming trapped in uneconomic relationships.

The third paper, by John Kelly, provides a general guide to the drafting of long term contracts. The author considers the commercial goals underpinning long term contracts and offers a series of drafting solutions in respect of the key terms noted above.

A series of sample price review and change of circumstances clauses compiled from case authorities and secondary sources has been included at the end of the book, to be read in conjunction with the sample termination clauses attached to Barry Irwin’s paper.

This is a preview. Not all pages are shown.