# The Arbitral Tribunal as Adjuster of Last Resort in Long-Term Contracts

*An Overlong Excursus in a Dubious Register*

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A contract meant to last a generation cannot be finished by the hands that sign it: however careful the drafting, the terms that will matter most—the price in the twentieth year, the response to a market not yet formed, the effect of a law not yet enacted, the value of an investment not yet conceived—lie beyond anything that can be settled at inception, the facts that would determine them being not merely unknown but not yet in existence—an ignorance no diligence can cure and no disclosure remedy, imposed not by any failing of the parties but by time itself: temporal ignorance; and the parties, knowing it, make no pretence of completeness, but set down, in place of the terms not yet capable of expression, the machinery by which those terms shall one day be supplied—the formula that will reprice, the standard against which performance will later be judged, the procedure that will reopen the bargain once the ground has shifted—so that what appears upon the page as a finished agreement is, in truth, an instrument for its own completion.

The machinery is not one device but a graded order of institutions: the simplest work unaided—the indexation formula, the escalator, the pass-through keyed to a published figure—resetting a number against the world without recourse to judgment; others the parties are entrusted to work out between themselves, in the price review they are bound to conduct in good faith, knowing best what an accommodation must carry if it is to hold; others again call for a neutral hand—the expert appointed to determine a bounded question of value, the independent engineer certifying performance against a prescribed standard, the joint operating committee of the upstream venture, the dispute board holding the ring during the life of the works—each question committed to the institution its nature demands—by how much judgment it asks, by how far honest parties pursuing their own interests may differ over it, by whether it can safely be left with an interested hand, by whether an opinion will serve nicely or only a binding word will do; every decision kept at the lowest level capable of bearing it, no higher institution troubled unless the lower proves unequal to the task. At the head of that order stands the arbitral tribunal: its office created at signing, its members named when needed, the bargain's final institution, the adjuster of last resort, whose charge, when every nearer institution has reached the limit of its powers, is to complete from within a design which only time could perfect.

None of these devices is a discovery. Every practitioner has drafted the price review, disputed the expert determination, pleaded the rebalancing clause; the vernacular is the common property of the trades that coined it, and the learned have long attended

to each device separately, one lens to a device—hardship to the price review, interpretation to the open standard, the economists to the deferred term. Seen severally, they are drafting technique; seen together, they form a single institutional order—graded, convergent, and closed by the tribunal—and the order, once seen, changes the method by which the tribunal reasons: the first task is institutional before it is interpretive, and three disciplines govern it—time, office, order.

The method must be first earned — by understanding why the architecture exists. That the same design recurs in industries divided by every distinction of market, regulation, technology and history is the work of finance capitalism: these undertakings typically cost more than their sponsors can provide, are built long before they earn, are financed against revenue they hope to yield, by lenders who take no share of profit and so accept no part of loss and require, prior to commitment, a certainty the world cannot provide and the contractual order exists to approximate. Every institution the tribunal will one day operate was built to attend to that singular constraint, and none can therefore be read with the money out of the room.

The demand does its work by necessity: a venture begins as a single knot of hazards—that demand will fail, that price will fall, that the works will run late, that the plant will underperform, that the law will change—and no lender will finance the knot entire, so it is patiently untied, each hazard drawn out and laid upon the party best able to bear it, beginning with the revenue, which must first be lifted clear of the market before the lenders will so much as look at it: the gas trade achieving this by take-or-pay, the buyer paying for the annual contract quantity whether or not it is taken; the independent power project by the capacity charge—the fixed half of the two-part tariff, remunerating availability whether or not the plant is dispatched, and sized to service the debt; the transport concession by the minimum revenue guarantee or the availability payment, the grantor underwriting the traffic the road may never attract; the subsea cable by the indefeasible right of use, sold like an anchor tenancy before the traffic that will one day fill it exists—four industries, four vocabularies, one operation: the risk of demand lifted from the party who cannot bear it and fixed upon the party who can, none of these assets being financeable upon the mere hope of offtake. Each of these devices will one day stand before a tribunal as words upon a page; what the words record is not a term but a sale—a risk that changed hands at a price—and a tribunal asked to construe the words is being asked to confirm or to unsettle the sale.

The remaining hazards are distributed in the same fashion: capital committed late in the venture's life—the renewals, replacements and improvements a long-lived asset must continually attract, the recovery of whose cost may outlast the relationship itself—is protected by the compensation payable upon termination, measured by unamortised investment or outstanding debt and equity return, and by the value recognised at handback, the handback obligations disciplining the closing years against the calculated neglect an operator with nothing left to gain would otherwise find it rational to inflict; operation across the decades, which no rule framed at the

outset could hope to prescribe, is held instead to a named standard—good and prudent operatorship in the upstream venture, good industry or prudent utility practice in power and water, a performance regime administered through an independent certifier in the availability-based concession—conduct judged, when its day arrives, against a measure fixed before the conduct occurs; and upon the whole allocation lies a further layer of protection—the reserve accounts, the guarantees, the liquidated damages—shielding each party from the extremity of the risk it agreed to bear, every allocation answering to the appetite of its holder: senior debt, enjoying priority and none of the upside, takes the assured; equity, the residual claimant rewarded by the upside for carrying what debt will not, takes the contingent and the deferred; the grantor, no less irrevocably committed in conceding decades of a public service, takes its assurance through the performance standards, the rights of step-in, and the calibration of that same termination compensation—each hazard coming to rest with the party paid to bear it, so that to disturb a single allocation is to lose not merely the allocation itself but the participant who insisted upon it, and with him the venture.

And the allocations cohere, a system entire: the protection the lender derives from the revenue mechanisms is worth having only while the equity remains to operate the asset—a security enforced against an abandoned enterprise being no more than a security over a ruin; the equity remains only while its residual retains its value, and that value depends upon the asset being maintained and renewed; the necessary investment is forthcoming only where its recovery is assured, through the termination compensation and the buy-out; that assurance is credible only under a governance framework—the prudent operator and independent engineer—sufficiently stable to determine in advance what expenditure shall count; and that governance itself can endure across the decades only because the machinery of adjustment keeps the terms it administers in tolerable relation to a changing world, thereby preserving the equity on which the revenue depends and the revenue upon which the debt was always secured, the circle closing where it began—a problem admitting of solution only as a whole, and leaving its designers few workable forms; hence the convergence, trade after unrelated trade arriving at the same order of institutions; and hence, too, a discretion narrower than the jurisdiction that carries it: a design that admits few workable forms admits few workable amendments, and an adjustment that reads well within one clause may unwind allocations settled in five others—the coherence of the system being not the setting of the tribunal's task but the first constraint upon it.

All this can be settled at signing, because these hazards, however numerous, are known in kind from the outset. But the price of the thirtieth year is not; nor are the terms upon which the venture must meet a world not yet taken shape; and against that day, too, every industry has fashioned the same institution in its own vernacular: the gas agreement contains its price review, reopening the indexed formula—the S-curve tying the contract price to a basket of crudes—once the market has moved beyond what the formula was designed to track; the regulated airport submits its charges to periodic review, the price cap reset against the regulated asset base; the concession provides

for tariff revision and economic rebalancing, restoring the contractual equilibrium when a change in law or other defined event has disturbed it; the power purchase agreement adjusts through indexation and its change-in-law machinery—the dialects differing, the institution the same, declining to state the future term, stating only the procedure by which it shall someday be determined. The clause knows not the answer, only who shall give it, when, and how. The drafter leaves the bargain incomplete not through want of foresight but because there is, as yet, nothing to see—and so it is that where the allocation of risk reaches its limit, the machinery of adjustment turns, and with it the chain of institutions at whose end the office of the tribunal waits.

A design derived in this way predicts the contracts not yet written: take an enterprise no settled practice has yet standardised—a thirty-year off-take from a green-hydrogen plant, a tolling arrangement over a grid-scale battery, a concession for a carbon-capture facility whose market does not yet exist—and knowing only that it requires large and irrecoverable capital, must be financed against a revenue it cannot guarantee, and must endure for decades across a future no one can read, one may set down, before a line is drafted, the institutions its contract must contain: a device to make uncertain demand bankable, a procedure to revise the terms time will falsify, a means of recognising the continuing investment longevity will require, and a standing institution for deciding what cannot yet be foreseen. The vocabulary each new industry will coin for itself; the institutions are dictated already, by the structure of time and the conditions of capital.

What is left open in this way is not a gap, for a gap is a question the parties failed to answer; this is a question they could not answer, because its answer did not yet exist to be given. The fair price of the twentieth year is not concealed but unborn. That distinction is not taxonomy; it is jurisdiction: orthodox interpretation, in all its schools, proceeds upon the opposite premise—that the correct answer already exists somewhere within the instrument and awaits discovery, by construction of the words, by implication from the structure, by the hypothetical bargain, by commercial purpose—and where the premise holds, these techniques are honest. Here the premise fails, and fails by design: the parties refrained from deciding because no decision was yet capable of being made, and what they supplied in its place was not a latent answer but a delegation—authority conferred upon an institution to decide once the future had made decision possible. So, there is nothing to recover, and every technique of recovery can only manufacture what it purports to find—not enforcing the bargain but substituting another for it, and defeating the design at the point where the parties depended upon it most. The tribunal's task in the silence with which we are here chiefly concerned is not the reconstruction of a hypothetical bargain nor the recovery of an implicit meaning; it is the discharge of a delegated office. The institution is the answer to the incompleteness.

A delegation of that kind changes the object of interpretation: a contract that allocates only rights and obligations presents words whose meaning exhausts their content, but

a contract that also allocates the deciding of future questions presents something more—the constitution of an institution, the charter of an office established to answer what could not yet be asked—so that the tribunal construing it is reading not obligations alone but the design of a judgment; and once that is seen, the method follows of itself, and may be given its name, institutional interpretation: the inquiry begins with the office—the question the institution was created to answer, the judgment conferred, the discretion withheld—and only then descends to the answer the office requires, the institution determining the method of interpretation before interpretation determines the meaning, delegated authority taking the place of hypothetical reconstruction, the tribunal drawing its function from the office the parties deliberately created and not from doctrines framed for instruments that conceal their answers rather than defer them—not another canon to be weighed in the familiar balance, but the inquiry that comes before the balance and decides what may be placed upon it. The words do not disappear—the office lives nowhere else—but the order of operations reverses—the clause construed through the institution, not the institution assembled from the clause. Meaning belongs to words; office to institutions. And the office settles both what questions may be answered and how.

A consequence of this inversion is that it turns one of the law's habitual suspicion upon its head: the agreement to agree, the duty to negotiate in good faith, the open-ended standard—clauses so long condemned for uncertainty—are, in this species of contract, not failures of substance but institutions deliberately established where substance could not be supplied, failing only where they lack what every such institution must have: a knowable occasion, understandable criteria, and a workable procedure that refuses to deadlock. A price-review clause that identifies its occasion, prescribes its considerations, invites honest consultation, and commits impasse to determination and, if need be, arbitration, is obviously no agreement to agree in the condemned sense or a defective promise to salvage, but an institution whole and complete in everything save the figure honesty could not yet supply.

Nor is the instrument so far described the whole of what the parties have made, and a tribunal that reads it as though it were will misread the institutions it contains; for the design is directed not merely to a contract but to the enterprise the contract exists to govern, and that enterprise is constituted by an integrated suite of mutually dependent promises—the financing agreements that advance what the sponsors cannot; the engineering, procurement and construction contract that delivers the asset; the operation and maintenance agreement that keeps it earning; the direct agreements by which the lenders reach past their borrower to the parties on whom the borrower depends; the security package that encumbers everything of value; the shareholder arrangements that hold the sponsors together; the insurance programme that carries what no allocation can; the arrangements that govern the enterprise's end—each performing a distinct office, and together forming one contractual order. Within that order, the concession agreement, production-sharing agreement, power purchase agreement or equivalent instrument may be called—and the name claims nothing, it

only points—the main contract: the most visible of the instruments through which the enterprise is financed, built, run and governed, and ordinarily the one under which our tribunal's jurisdiction will one day arise.

The institutions of the main contract take their purposes from the order around it: the termination compensation calibrated to the debt outstanding, the performance standard framed for the certifier the financing required, the price review fashioned to preserve the revenue upon which the security was taken; so the main contract is read with the whole order in view, a clause within it carrying consequences far beyond its own terms—into the financing, the security, the compensation payable upon termination, the operation and governance of the enterprise itself—and never as though the paper in hand exhausted the transaction: its institutions are unintelligible without the order they were built to serve.

When a question under such a contract reaches arbitration, it seldom arrives alone: it has been generated by an institution operating upon a risk allocated, mitigated, and left to be adjusted. The tribunal's first task is thus institutional before it is interpretive: to find the institution within the clause, and behind the institution the problem it was built to solve, and behind the problem the allocation it protects and the capital that allocation was meant to reassure; to weigh the judgment conferred and the discretion withheld; to trace the consequences its operation will send through the rest of the order. A price-review clause read without the financing that called it into existence is a cipher, and a tribunal ignorant of the problem will answer it out of its own intuition, with a content the parties never chose. Yet that understanding enlarges none of the tribunal's powers; it is the very thing that confines them, a tribunal that knows why an institution exists being held by that knowledge to its purpose. The method confines before it empowers.

Once interpretation proceeds through the institution rather than merely upon the text, three consequences follow: every clause is read in light of the future for which it was created, its occasion lying always ahead of its words; in light of the institution it establishes, its content being the office it confers, the judgment it grants, and the discretion it withholds; and in light of the wider order of which it forms part, its consequences seldom ending where its language concludes, an adjustment in one place unsettling allocations in another—the first a discipline of time, the second of office, the third of order: a clause read without its future is a guess, without its institution a command without an officer, without its order a fragment mistaken for the tablet.

The tribunal may of course be asked to perform other tasks tribunals ordinarily perform—to construe a phrase, to apply a standard, to declare a promise broken, or to fill a gap the parties neglected to close—familiar work, done here as it is done everywhere; but the function with which our species of contract is uniquely concerned is, of course, otherwise: to operate, when its moment arrives, an institution the parties established against that day, and through it to finish what the original writing could

only outline. The tribunal comes to this office only at the end: the graded order of institutions sends each question first to whatever or whomever can resolve it more cheaply, swiftly, privately, or expertly—to the formula, the negotiating table, the expert, the certifier, or the dispute board—and only what none of these can resolve reaches the arbitrators. The residual questions that reach them are, by design, the most complex and least tractable.

Nor is the arrangement akin to a ladder: several of these institutions are final within their own office, an expert's determination being not a step in the inexorable march towards the arbitration hearing but sometimes the end of the matter—assailable only where the expert exceeded his mandate, abandoned it, or answered a question never asked of him, not where he answered the right question wrongly. What the tribunal may do is only what was asked of it: sometimes no more than to see that another institution has kept the bounds of its office; sometimes to assume that office where the one nearer has failed; sometimes nothing at all, the question having been deliberately placed beyond its remit. The measure of deference to be shown by the arbitrators is no doctrine imported from outside but the parties' own allocation of judgment, bought and paid for like every other allocation in the order.

What the tribunal does, when it acts, is not, at bottom, to decide a dispute—dispute is not the wrong word, merely the lesser truth, for it names the form and not the function. What the tribunal confronts is the occasion the design foresaw, on which a decision long deferred at last falls to be made. Its true office is to operate, where no nearer institution can, the machinery of adjustment the parties established for precisely that contingency. Its function is often continuation before it is adjudication: through an institution the bargain always contained, an agreement intended to outlive foresight continues in conditions foreseen but not foretold.

The power the tribunal exercises is no general jurisdiction imported from without but a power of the parties' own making, and of their own confining. Unable to determine the outcome, they determined the determiner: the office, its occasions, its criteria, and the discretion they took care to withhold. The adjustment the tribunal makes, if properly executed, is among the most constrained known to commercial law—bounded on every side by the language defining the occasion and governing criteria, by the function the institution was created to perform, by its place within the contractual order, by the proof that the future has in fact arrived. Its jurisdiction may embrace every question the order can generate; its office fixes how far each may legitimately be answered. Jurisdiction measures the questions; office measures the freedom. Within those limits judgment remains indispensable: no formula relieves the tribunal of deciding whether the appointed occasion has come, or what, weighing what the parties said should be weighed against what the years have brought, the adjusted term must be. To find the occasion where none has arisen is to adjust a bargain that asked to be left alone; to refuse the adjustment the occasion demands is to abandon the parties at the moment of their greatest need; and to pass beyond the stipulated

criteria is not to construe the institution more liberally, but to abandon it altogether—the line between completing a design and rewriting a bargain being the line the whole architecture was drawn to fix.

That the tribunal can reach so far is the condition upon which the whole design rests: a contractual order intended to hold across decades cannot allow its final adjustment to depend upon a cooperation the need for adjustment may by then have destroyed. Every nearer institution runs on continuing consent—negotiation on the parties' willingness to agree, the expert and the dispute board on their willingness to submit and abide; the award runs on nothing of the kind. Because it binds regardless, the certainty of it, secured from the outset, lends every earlier institution its credibility, and makes it rational for the parties to defer what they cannot yet decide—the silence in which the bargain does its decades of work being, all along, a silence underwritten by an award waiting to be written.

Of last resort—but with what measure of judgment? The parties create the institution—appoint its office, name its occasions, say what its judgment shall weigh; the one thing they cannot do directly is fix how far that judgment runs; so they do it indirectly, by choosing the law that governs it, that choice being no adjunct to the institution but a critical element of its design. The same clause; the same office; the same stated criteria: one tribunal confined within limits set by the law, another permitted—even required—to transcend them. Arbitral authority over these bargains is, then, jointly made: by the clause, which creates the institution, appoints its occasion, and states its criteria; by the contractual order, which gives the institution its purpose and measures the consequences of its operation; and by the governing law, through which the parties determine the measure of judgment the office shall carry.

Yet even that is not quite the end of the matter; beyond the chosen legal order stand others, with their own aims, their own claims, and their own occasions for asserting both. But there I digress.