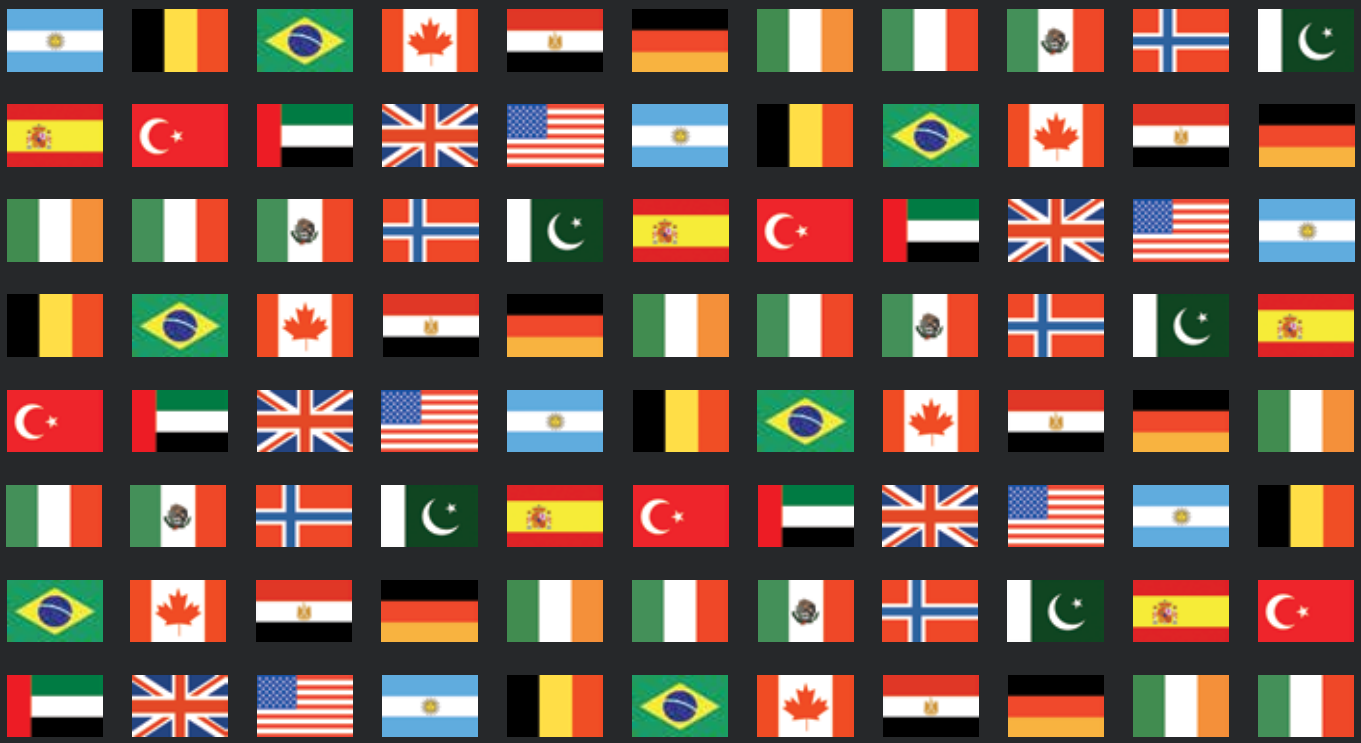
Energy Disputes

Contributing editors
William D Wood, Neil Q Miller, Lauren Hunt Brogdon and Holly Stebbing



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GETTING THE DEAL THROUGH

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Energy Disputes 2016

Contributing editors

William D Wood, Neil Q Miller, Lauren Hunt Brogdon and Holly Stebbing
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Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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Argentina

Luis Erize
Abeledo Gottheil Abogados

General

1 Describe the areas of energy development in the country.

Argentina's energy matrix is highly diversified, since power sources are hydro (around 40 per cent), natural gas fired turbines (50 per cent), nuclear (5 per cent) and other (5 per cent). However, since 2003 it has evolved from being an energy net exporter to a net importer, due to market interference by governmental policies that stalled investments. Twenty-five per cent of the natural gas aggregate demand is supplied by natural gas imported by the government from Bolivia and LNG to be regasified, at significantly higher prices than the domestic prices imposed on the local upstream offer, amidst a maze of price differentials according to the supply source (existing production, 'new', or non-conventional production under especially approved programmes). The result of this was to contribute to the growing governmental deficit up until 2014, which has recently been reduced because of the fall in international energy prices. Since 2013, crude oil production has been spared this interference (that had in previous years established an export withholding tax resulting in a price of US$42 per barrel for the domestic crude oil producer at times where the international price was at least double that), by the government deleting such export withholding, and sponsoring an 'agreement' between the downstream and the upstream oil industry presently ensuring US$77 per barrel until the end of 2015, passed through to a heavily taxed gasoline and gas oil price to consumers.

Argentina is currently one of the first world-ranking non-conventional (shale) resource countries (second in shale gas, fourth in shale oil) and one of the first countries to explore and develop these resources apart from the United States.

Prospects of further development can be expected despite the current low international energy prices as a result of the following:

- recent law reforms (in 2014) extending current exploitation concessions – mainly to the benefit of the state-controlled YPF – and further renewals;
- the apparent continuity of the domestic price agreement of the oil industry for crude oil referred to above; and
- the need to reduce the governmental budget deficit (also requiring a significant reduction to power and natural gas consumption subsidies) and the aggregate trade deficit caused by significant energy imports, which will lead to higher overall price increases for gas and power as well, while narrowing gas and power consumption subsidies to well-focused social tariffs for the disadvantaged.

2 Describe the government's role in the ownership and development of energy resources. Outline the current energy policy.

Federal and provincial states have the eminent domain of the subsoil and resources thereof in their respective territories. Federal legislation sets forth the legal framework for the oil and gas upstream, mid and downstream, as well as for power, on account of its many interjurisdictional issues. The traditional legal framework under which the 1990s energy growth was ensured through deregulation (and the ensuing privatisation of previously government-held entities) and market-oriented policies is expected to be enforced again, by dismantling a maze of regulations that made for captive markets, segmentation of demand, price caps and subsidies to compensate the resulting stagnation of the energy sector; and have disfigured the legal framework they were supposed to be implementing in detail.

The new Minister of Energy and Mining has made known his strong commitment to eliminating Decree 1277/12, an all-encompassing framework that went far beyond the law that declared the expropriation of YPF, the most significant oil and gas upstream and midstream player in Argentina. This decree aimed to regulate all the stages of exploration and exploitation of hydrocarbons as well as all other downstream activities, impose mandatory investment plans to the exploitation concession holders, ensure full disclosure of costs and prices, and other restrictions that run counter to the existing laws (among others, the revocation of the decrees under which the existing concessions were granted in former years). The new government has therefore committed to a policy to return to the original legal framework.

This will require a significant effort by the recently elected federal government to restore market signals for attracting the needed investments, especially by dismantling the price segmentation of natural gas and power generation prices as well as the implied or express price caps, while building a market for medium and long-term contracts (both for power and for natural gas) allowing the pass-through of the resulting cost and the elimination of opportunistic behaviour, leaving the spot markets for the make-up of temporary supply deficits or producers themselves.

The current Hydrocarbons Law 27007 grants extensions of exploitation concessions, caps to government take, and promises of standardisation of terms thereof should be accompanied by a transparent market for the farm-ins that will be the basis of the market renaissance of new investments, eespecially due to the dominant position of YPF regarding shale resources.

Commercial/civil law – substantive

3 Describe any industry-standard form contracts used in the energy sector in your jurisdiction.

In the oil and gas upstream industry, the typical set of agreements is applicable, starting with the joint operating agreements ((JOAs), for which the choice is wide, as the AIPN models compete with AAPL, CAPL, AIPN (Australian version as well), OGUK, etc) that coexist in Argentina with its local, version (Unión Transitoria), as a non-partnership, unincorporated agreement to be registered in the Public Registry of Commerce, updated under the new Civil and Commercial Law Code that has recently come into force. The extended exploitation concessions are still operated with JOAs as initially used during the 1990s, therefore as per the AIPN model of such time. Farm-in agreements do and will play a significant role for participating in the existing exploitation concessions and those to be extended, the holder of title to the concessions being the other party:

- YPF;
- the provincial entities that have emulated the YPF's role under the redistribution of jurisdiction and eminent domain of the subsurface hydrocarbons to the provinces, even under the stricter terms imposed by the current Hydrocarbons Law 27007; and
- private oil companies.

As regards the oil services industry, the current international versions for seismics, drilling, workovers, etc, are adapted to local constraints that have to do with the market rigidities regarding labour and resulting lack of flexibility.

Natural gas term supply agreements are necessarily influenced by the many interferences of the regulated market and to a categorisation of

each of them as per the source and even the historic layer to which they did correspond (the government authority has established in recent years a priority of natural gas dispatch by each shipper, and exempted from such restrictions those supply contracts with incremental gas – exceeding a certain threshold, or of a non-conventional source – a source for disputes resulting from such restrictions and priority assignment). A wide dispersion of gas supply agreements followed, with numerous amendments to previously made gas supply agreements, and supply to CAMMESA, to deliver to thermal power plants in its name. Term agreements between generators and large customers were banned in 2013 (Res SE 95/13), and must now be entered into exclusively with the dispatch centre, CAMMESA (the power dispatch centre and broker between supply and demand for power, described below), for gas to be delivered to thermal power plants.

CAMMESA was designated by law to broker the supply and demand of power, arbitrating between spot prices paid to power generators and seasonal tariffs paid by distributors, with the balancing contribution of a self-adjusted but now extinct (because of the tariffs freeze) compensation fund. CAMMESA receives subsidies and imported gas from the government for supply to thermoelectric generators so that the latter are able to meet demand.

The regulations that have accumulated over the years should now be changed in order to eliminate the burden of energy-related price distortions. This will, however, provide a new opportunity to develop state-of-the art, standard-term agreements both for gas and power supply, since the reconstruction of the energy balance will require open-season bidding for firms to supply long-term commitments at posted prices in order to obtain investments to cover the current gap (which until now has been filled by imported natural gas supplied at a loss by the government) and restrictions on gas and power demand. Such term contracts' system should supply the aggregate demand of distributors, and additionally should be used for mid-term contracts' supply to large customers, eventually traded in a term contracts trade market.

Natural gas shipping agreements and power supply transmission agreements are of a more standard nature, though open access should be ensured to enable the grid's future expansion. This expansion will give new opportunities to sign contracts with third parties to make enhancements and ancillary extensions in order to optimise the current network of pipelines, gas distribution and power transmission.

4 What rules govern contractual interpretation in (non-consumer) contracts in general? Do these rules apply to energy contracts?

The new Civil and Commercial Law Code has updated the general guidelines for the interpretation of contracts (article 1,061: the common intention of the parties and the principle of good faith; article 1,063: the precise meaning of the words employed, as per their usual meaning; articles 1,064/5: the circumstances and preliminary negotiations, the behaviour of the parties before and after the agreement; article 1,066: the useful effect interpretation principle; and article 1,067: ensuring trust and loyal behaviour).

5 Describe any commonly recognised industry standards for establishing liability.

In Argentina it would be difficult to identify whether there is a fiduciary duty obligation of the operator towards the other contract parties. It is, however, subject to a general duty of care, of common reliance, of loyalty (the above-mentioned new Code establishes this duty for administrators in general (article 159)). The conduct must be at least negligent in order to be subject to compensation for damages (article 160). As per article 1,743, an anticipated waiver is not valid if it is against good faith or if there is a deliberate attempt to cause prejudice to the other party (article 1,743).

6 Are concepts of force majeure, commercial impracticability or frustration, or other concepts that would excuse performance during periods of commodity price or supply volatility recognised in your jurisdiction?

The definition of force majeure resulted from the reference to sections 513 and 514 of the Civil Law Code of Argentina (now article 1,730 of the Civil and Commercial Law Code), together with events that may be captured by a contractual definition.

According to common law, 'force majeure' means any event or circumstance (other than financial inability to perform) that is beyond the reasonable control of the party claiming force majeure. The circle of events so labelled as force majeure under common law coexist with the concept of force majeure that results from the Civil and Commercial Law Code provision, also identified as an unforeseeable event and will rule either expressly or by default (if there is no clause to the contrary, as the parties may shift the burden of such events between them) in any contract.

Under this section both unforeseeable event and force majeure concepts are considered jointly. The other Civil and Commercial Law Code provisions refer to both concepts as if they were one, by using the terms interchangeably.

The doctrine does not fully agree on the differences between one and the other case, the majority considering that one does address unforeseen circumstances, while the other concept addresses the impossibility of avoiding such events that do not allow the performance under the contract.

The effect of such force majeure is expressed under section 1,732 of the Civil and Commercial Law Code, whereby the debtor will not be liable for damages and interests caused to the creditor because of lack of performance of the obligation, when these result from an objective and absolute impossibility, not attributable to the obliged party, unless (article 1,733). The debtor would have committed performance regardless of such force majeure or, if this event would have occurred because of its fault or would have occurred when already in default, if this default had not been motivated by such fortuitous event or force majeure.

Doctrine and court precedents do not agree on the events that can be classified as force majeure, and several sections across the former Civil Law Code and Commercial Law Code did make reference, in specific contracts, to it by defining some of the consequences of a particular application of such concept. In order to clarify the concept, the doctrine refers to comparative law, and thus includes acts of God, similar to those defined under English law precedents; acts of the enemy, such as war and blockade; and sovereign acts, meaning a governmental resolution prohibiting, for example, foreign trade, etc.

It is less clear whether the doctrine and court precedents support the idea that, in order for the concept to apply, superior, out of the ordinary diligence by the party claiming force majeure should have been applied.

In general, it can be said that some elements have been identified as requirements under Argentine law for force majeure. The event in question must:

- have been unforeseeable, taking into account the nature of the expected performance, the parties' intentions (representations) and relevant circumstances;
- be irresistible, which means a total, unexpected impossibility of reasonable performance, either by action of law or of the facts that have occurred;
- be insurmountable and currently occurring, therefore excluding potential facts; and
- be 'exterior', which means that it must not be connected in any way with the party claiming force majeure.

In the many court precedents that refer to this concept, the case-by-case approach has been preferred, allowing for different rulings, depending on the set of circumstances under judgment. One of the typical matters for disagreement is if the impossibility or irresistibility of the force majeure case has to be 'absolute' rather than 'relative', barring any possibility of performing, excluding the application of force majeure if by extraordinary means and costs the performance could have been nevertheless accomplished, a case in which court precedents have instead used the concept of unforeseability of extraordinary circumstances, that have substantially changed the economic equation of the contract (a matter that has been largely addressed during periods of hyperinflation in Argentina, or substantial exchange devaluations, pegged with rigid exchange controls, if the price was quoted in, or adjusted by, foreign currency).

In general, it is requested that the set of circumstances be such as to be easily evidenced as constituting a notorious event.

As regards the concept of a fact 'exterior to' a non-performing party, it requires an absolute lack of connection with the latter in order to qualify. For example, it has been considered that a strike restricted to the personnel of the non-performing party cannot be an excuse, while a general strike or a revolutionary strike does qualify for such an excuse.

A shortage of supplies necessary to perform the obligation committed has also been considered as not qualifying, nor has an extraordinary increase in costs (except for the theory of unforeseeability, under section 1,198 of the Civil Law Code) with respect to the effects of sudden devaluation and hyperinflation, allowing the contract to be terminated. This theory

was able to be called in any case in which a fixed price has been destroyed by sudden hyperinflation or extreme devaluation. Article 1,091 of the Civil and Commercial Law Code rules the matter in a similar way, but now expressly grants the right to request a court's adjustment of the contract's balance.

With the agreement of the other party, instead of a termination the court may adjust such price.

In general, war or civil war, acts of God resulting from nature, such as a tornado or an earthquake, and sovereign acts have been accepted. Article 1,091 allows the party invoking such unforeseeeability to request an adjustment.

Instead, floods, extraordinary rain and extreme winds have or have not been accepted according to the possibility of the parties to foresee such occurrences with due consideration of past statistics. Fire is generally accepted as a reason when it is started outside the premises, and due diligence was applied in establishing preventive measures before the fact. However, if the fire originated in the premises of the non-performing party, it is generally not accepted as force majeure.

Several court precedents have established that, in principle, fire is not an unforeseeable event, unless special circumstances exist.

As it is assumed that lack of performance in a contract is by itself evidence of the non-performing party's guilt, the party calling for force majeure has the burden to prove its occurrence and its qualification as such.

Setting aside the theory of unforeseability that has allowed the revision of contracts regarding pricing, or its termination when there is a promise by one of the parties to deliver a product or a property at a posted price, always related to episodes of hyperinflation or extreme devaluation, the court precedents in Argentina have been very strict about allowing events to be considered as force majeure.

In the case of natural gas supply, the issue to consider is whether the restriction of international supply has been imposed on the seller by the authorities and new regulations, or if it is a result of the general natural gas supply agreement signed by the government with an aggregate of the majority of natural gas producers of 2004, more likely a kind of a forced choice (see the *In Compañía de Aguas del Aconquija SA and Vivendi SA v Argentine Republic* case discussed below), given the threat under which (i) consent was to be given, or else (ii) face the discrimination against the non-signing parties, redirecting their natural gas to local consumers at prices considerably lower than the price admitted for the other suppliers that would have signed the general agreement.

In Compañía de Aguas del Aconquija SA and Vivendi SA v Argentine Republic (ICSID Case No. ARB/97/3) award of 20 August 2007 – where were the co-counsel for the claimants – Argentina was found to have expropriated a water services concession through regulatory taking. The arbitrators determined that renegotiating in a transparent, non-coercive manner is appropriate, but it is wrong (and unfair and inequitable in terms of the relevant bilateral investment treaty) to bring a concessionaire to the renegotiation table through threats of rescission (paragraph 7.4.31, p. 215 of the award). In the present case, the Acuerdo de Gas proposal is completed by forcing those that would not sign it to have their natural gas output diverted from their contracted destination, and delivered instead to other consumers at substantially lower prices in order to satisfy local aggregate demand, relieving signors from being subject to supply at lower prices.

The Secretariat of Energy called the general agreement with natural gas producers that had committed a certain level of supply to the domestic market under a gradual price increase path, to instead divert the supplies intended for export to the domestic market consumers or, if not sufficient, to further force supply to domestic consumers that would not have reached a supply agreement. Given such experience, it is advisable to define these events and other governmentally imposed restrictions in new gas supply agreements, determine which party is to bear such risk, and their consequences. The contractual provisions should thus consider the end of hardship, the reduction of the restrictions, the sharing of the economic effect of the alternative benefits the natural gas producers might obtain in the case of a later increase in domestic prices, levelling them with international prices, with the idea of sharing losses and negotiations to mitigate the damage caused, or of the profits from a later upswing in the economic situation.

How the government interference with the international gas supply agreements would be interpreted by international arbitrators is case dependent, and results primarily from the wording in the agreements for such events, as well as the applicable law, and the arbitrators may have to review and decide on the effects of public policy in the duties assumed by the parties.

The new Civil and Commercial Law Code has set forth in section 1,011 that in the case of long-term contracts, a special duty of cooperation must be observed, with respect to the reciprocal commitments, by giving the chance to the other party to renegotiate in good faith the same.

7 What are the rules on claims of nuisance to obstruct energy development? May operators be subject to nuisance and negligence claims from third parties?

The principal obstacles for the operation of fields under granted exploitation concessions derive not from the owners of the property where the exploitation occurs, as they have by law to admit such activities to be performed by the exploitation concession holder, limiting themselves to receive a statutory compensation for the nuisances provoked, and eventually claiming for proven damages, if such compensation does not suffice.

The main obstacles result from claims related to the environment involving claims of acquifers' pollution (largely unproven), the remediation of open pools, etc. There is a significant caseload of claims pretending to request either restitution of the soil conditions, or damage compensation to adjacent surface owners or villagers (though such exploitation is generally made in scarcely populated areas, a fact that minimises the impact).

8 How may parties limit remedies by agreement?

The predetermination of damages estimate and the setting forth of caps or liquidated damages' lump sums is admissible to the extent they do not make the party acting with gross negligence substantially exempt from the consequences of the same, since a party may not be exempted from performing what it had committed to do, by giving it the chance to deliberately omit its duty of care, or acting with gross negligence that could be assimilated to such deliberate omission.

9 Is strict liability applicable for damage resulting from any activities in the energy sector?

Yes, strict liability is applicable in the case of contractual liability for lack of performance, to the extent damage is a consequence of a performance default, or in the case of tort liability.

The oil and gas industry is considered a risky sector, whereby a rule of balance of risks and benefits is implied to conclude that full compensation is due unless the event causing the damage was caused by the victim itself or by a third party for which it is not answerable.

Commercial/civil law – procedural

10 How do courts in your jurisdiction resolve competing clauses in multiple contracts relating to a single transaction, lease, licence or concession, with respect to choice of forum, choice of law or mode of dispute resolution?

The newly enacted Civil and Commercial Law Code considers the case of a contracts' network under sections 1,073/5, by which direct claims from subcontractors to the main contractor and the owner of the works are admitted (section 1,071), and from the latter against the former, reciprocally (section 1,072). Consolidation of arbitral claims is admissible to the extent consent by the relevant parties is granted, at the time the agreement is made, or later on.

Parallel proceedings can occur, and we have been acting in one case regarding an oil and gas producer, involving for the same series of events, separate US court proceedings (in Texas and New York), international arbitration, local exequatur court proceedings, local anti-suit injunction court procedures and Chapter 11 collective court proceedings. Argentinian courts and legislation are hospitable to international commercial arbitration, and their rulings are regularly applied and enforced unless there is a jurisdictional issue at stake. Resignation to appeal remedies is admissible, while requests for annulment cannot be waived beforehand. When several parties are involved, multiparty arbitration may only result from consent stemming from the agreements themselves, while in court litigation a complex set of rules is applicable for extending claims to third parties, notification of the litigation to later extend the effects of the award to the same, or for voluntary participation of such third parties when a common interest is present.

Consolidation of arbitration with non-signors is a much-discussed issue. In Argentina, the issue has been raised for the opposite purpose, as defence for lack of jurisdiction (the Argentine National Commercial Court

of Appeals holds that a third-party guarantor may invoke an arbitration clause, 2 March 2011). In a decision rendered on 19 October 2010 and published on 10 February 2011, the National Commercial Court of Appeals, chamber C, seated in the city of Buenos Aires, confirmed that a guarantor could invoke and benefit from the negative effect of an arbitration agreement even though the guarantor is not a party to the underlying contract.

In *Cemaedu SA y otro v Envases EP SA y otro s/ ordinario*, the Circuit Court dismissed a claim filed against the guarantor of a stock purchase agreement, holding that it lacked jurisdiction due to the fact that the stock purchase agreement included a binding arbitration agreement. The claimant appealed the decision, arguing that the arbitration agreement was only binding upon the parties to the contract. The National Commercial Court of Appeals upheld the decision of the Circuit Court, confirming that a contract in which the parties agree to submit every dispute concerning 'the contract, its existence, validity, qualification, interpretation, scope, performance or termination' to arbitration had to be construed in the broadest terms possible. Furthermore, the Court held that, under the Argentine Civil Code, where a guarantor undertakes an obligation equal to the one taken by the secured party, unless the parties agree otherwise, the guarantor may exercise every right of the secured party by virtue of statutory subrogation, including the right to settle the dispute through arbitration. The decision in this case is particularly important because it extends the terms of arbitration clauses to non-signatory parties on the basis of the statutory subrogation rules set out in the Argentine Civil Law Code, and now reaffirmed through the Civil and Commercial Law Code in force as from 2014.

11 Are stepped and split dispute clauses common? Are they enforceable under the law of your jurisdiction?

Two-tier dispute clauses are generally adopted in construction cases, less so in oil and gas supply or transportation agreements. In a long-term agreement, the virtues of avoiding an escalation of the conflict, and using a negotiation process to isolate the conflict, are recognised. Dispute resolution boards are not as common. The theory underlying arbitration clauses considers an agreement for arbitration as a contract, this giving such arbitral awards the effect of an undisputed contract. As per section 1,656 of the new Civil and Commercial Law Code, arbitration clauses must be respected by the parties that agreed to it, as well as by the courts, and the arbitral awards as well, provided there are no causes for nullification (such review may not be waived in advance, unlike the appeal, which may have been waived in such clause) and the award is not contrary to the legal order as a whole (a notion that may be assimilated by public policy or basic principles set forth in the National Constitution, and that may also be stretched to consider imperative, non-waivable provisions in the laws generally).

12 How is expert evidence used in your courts? What are the rules on engagement and use of experts?

Evidence production is ordered by the courts at the request of the parties in the dispute, provided it does have a close connection to the disputed facts and is considered by the court to be relevant to the issuance of an award on such matters. Among the different means proposed by any of the parties, experts with the necessary expertise on the matter can be called to report on the various areas in conflict. These are generally chosen by the court from lists of registered experts, and each of the parties may designate their own consultant to follow the investigation of facts by the court-appointed expert. Technical experts range from economists, engineers, geologists, public accountants and others, including, in some cases, a specialist in the regulations of the relevant sector. In the case of arbitration, it is more common to see expert witnesses proposed by each of the parties, in which case arbitrators may use any of the techniques admissible in international arbitration for debate between such experts.

13 What interim and emergency relief may a court in your jurisdiction grant for energy disputes?

Under Argentine law, precautionary measures are those preliminary remedies granted by the court at the commencement of the proceedings or thereafter in order to ensure that the judgment to be entered in the case will not be frustrated. Therefore, precautionary measures pursue a preventive role by making sure that the subject matter of the proceedings is not damaged while the proceedings are being conducted. By carrying out the precautionary measures, the courts are also fulfilling the purpose of the judicial proceeding, which is to fairly decide a specific dispute by means of a judgment capable of producing practical results.

The requirements of the most important precautionary measures under Argentine law in accordance with the Federal Civil and Commercial Procedure Code are here described.

Characteristics

All precautionary measures under Argentine law are characterised for the following features:

- They are ancillary to the proceedings. They are granted considering that the rights of the parties will be finally determined during the proceedings conducted observing the forms required by due process.
- They are issued without giving notice and requesting the appearance of the other party (inaudita parte, ex parte proceeding) because otherwise the purpose thereof may be frustrated.
- The judge's jurisdictional determination of whether the requirements of these measures have been satisfied is conducted by means of a summary proceeding that focuses on the appearance of right, not on its certainty.
- They are provisional in nature, because they will be effective only as long as the facts upon which they were based continue to exist.
- They are changeable and flexible. In order to avoid unnecessary damage or encumbrance to the owner of the goods being attached, the owner may at all times offer to substitute with new ones the attached goods. They are flexible because the creditor may request to augment the scope of the measure, its amendment or to extend such measure to other goods.
- They do not produce res judicata effects, nor, if denied, preclude the party from requesting the same measure again in the future before the same judge, nor should they directly affect the substance of the claims being decided in the main proceedings.
- They are urgent.

Conditions

In order for the judge to issue a precautionary measure under Argentine law, the following three requirements or conditions precedent must be satisfied.

Appearance of truth of petitioner's right

The petitioner must demonstrate that he or she is the holder of a 'credible right' (ie, that he or she is 'prima facie' entitled to the remedy being claimed). This is largely the equivalent of showing that the petitioner is likely to succeed on the merits.

Danger that harm may result from the delay

The petitioner must show that, unless the measure is granted, there would be a danger that a harm to or a frustration of remedy may result during the pendency of the proceedings. It is enough to show that there is a possibility of danger. Danger resulting from the delay exists where the petitioner has a grounded motive to be afraid that he will suffer an imminent and irreparable harm. Obviously, to invoke the sole duration of the proceedings is not enough to satisfy this requirement. This condition has been liberally construed by the courts.

Posting of bond

Since precautionary measures are issued ex parte, without the appearance of the other party, the judge must determine the type of bond and its amount. The bond is set as a security for the petitioner's liability for damages caused to the other party by a precautionary measure that should not have been issued. The bond may be any of the following:

- an 'oath bond', which consists of a promise under oath to pay any damages cased by the measure;
- a personal bond, consisting of the bond posted by a bank, surety or a person with sufficient wealth; and
- a real estate or personal property bond. The other party may always object to the type or sufficiency of the bond posted by the petitioner.

14 What is the enforcement process for foreign judgments and foreign arbitral awards in energy disputes in your jurisdiction?

Section 1 of the Code of Civil and Commercial Procedure admits the extension of jurisdiction to foreign judges and arbitrators in international matters, which are defined by identifying foreign connection items: the different nationality of the co-contracting parties, the existence of an international trademark, the reference to a local and international market,

in which case the foreign award, to be acknowledged and enforced in Argentina, shall be subject to an exequatur process (section 519, Code of Civil and Commercial Procedure) or summary proceeding in which the judge considers whether the rules of due process have not been violated and whether a public policy regulation has not been infringed by means of it.

Regarding the procedure to enforce foreign judgments and arbitral awards in Argentina, if no special treaty applies, an exequatur process has to be followed, where the Argentina-competent judge will examine the foreign judicial order, to review if it complies with the requirements set forth in the National Civil Procedural Law Code, mainly consisting of due process of law and public policy requirements. Section 517, section 1, provides that the foreign judgment must be issued by a court with appropriate jurisdiction over the case. Such jurisdiction is to be determined under the Argentine rules on international jurisdiction of the courts. Likewise, it requires that the foreign judgment has the authority of res judicata (final decision), which should be analysed under the rules in force in the state in which the foreign judgment was issued. This is shown by means of a statement to be included in the foreign judgment itself or in a court certificate or any other acts showing that the foreign judgment has such authority (section 528). Section 517, section 2 requires that the party against whom enforcement is sought has received a personal summons of process, and that due process has been respected.

Section 517, section 3, sets forth that the judgment must meet all necessary requirements to be considered as such in the place where it had been issued and that it is authentic pursuant to the provisions of Argentine law. This item is shown pursuant to the provisions of the judgment itself, by the corresponding consular report, and in accordance with the rules in force in Argentina.

Section 517, section 4, requires that the foreign judgment does not affect public policy rules under Argentine law. That is to say, the court must examine whether the foreign judgment affects principles set forth under the Argentine Constitution, international treaties with constitutional hierarchy and the respective procedural laws.

Finally, under Section 517, section 5, if there is another judgment by an Argentine court affecting the same parties and regarding the same subject matter, which has the authority of res judicata, the enforcement of a foreign judgment in Argentina becomes inadmissible. Once the exequatur proceeding has a final judgment (so that the foreign award is assimilated by a local ruling), the enforcement procedure (basically for the seizure or attachment of goods or property) may be started. Once the exequatur process is successfully approved, the foreign decision is equivalent to a local decision.

Interim or precautionary measures are flexible and may adopt many methods (from the classical attachment or embargo, court-appointed observers or interventors, to the more sophisticated of prohibition to innovate or change the status quo, and in some extreme cases can be similar to antisuit injunctions).

In Argentina the Federal Court of Appeals on Contentious-Administrative Matters, Panel IV, upheld a precautionary measure requested by the Argentine government. It suspended arbitration until the challenge of an arbitrator would be judged. The International Court of Arbitration of the International Chamber of Commerce (ICC) had rejected the challenge, and such rejection was contested with the local courts. In *Argentine Republic v. International Chamber of Commerce*, Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal, 3 July 2007, a stay of proceedings was ordered under the UNCITRAL Rules, but administered by ICSID, pending a decision on a request to annul an ICC decision rejecting Argentina's challenge of one of the arbitrators.

In *EN –Procuración del Tesoro v International Chamber of Commerce*, the Federal Contentious Administrative Law Appeals Court, panel IV (17 July 2008) ordered the suspension of the arbitral procedure, pending the challenge of one of the arbitrators by the Argentine Republic (on the basis that the rejection of the challenge by the International Court of Arbitration, of the ICC, had not made the grounds for such decision public.

These cases were preceded by *Entidad Binacional Yaciretá v Eriday et al* (lower court judgment, in contentious administrative matters, 27 September 2004, where a sort of antisuit injunction was issued on account of a lack of agreement by the parties – the binational hydroelectric plant, and a construction company – to the terms of reference and the following procedural decisions).

In the 2007 *National Grid* decision, the Argentine National Court of Appeals annulled a decision of the International Chamber of Commerce. The latter had rejected Argentina's challenge to the arbitral tribunal in the National Grid's arbitration against Argentina. The Court of Appeals ordered the arbitral tribunal to suspend the proceedings. In 2008, a new interim measure followed suit. The Court of Appeals quoted *Cartellone*.

It is important to determine what is the exact scope of admissible claims that arbitration may have competence to decide on, especially since the new Civil and Commercial Law Code has stated, in addition to the classical exclusion of non-arbitrable matters in section 1,651, that awards contrary to the juridical order may be set aside, and it could be that under such warning a renewal of discussions of whether arbitrators can have competence to decide on issues where public law review is involved, such as the ones where public policy law (ie, antitrust, fair competition, administrative law – see CNCom, panel C, 5 October 2010, *CRI Holding Inc Sucursal Argentina v Compañía Argentina de Comodoro Rivadavia Explotación de Petróleo SA*) and if they can exercise a constitutional law control is applicable.

Nullity has also been declared of an international arbitration award in *EDF International SA v Endesa International (Spain)*, 12 December 2009, National Appeals Court in Commercial Matters (commented on by Julio César Rivera, *La Ley*, 1 December 2010), since it found it dealt with public policy law matters reserved for the exclusive jurisdiction of the courts and out of the scope of matters subject to waiver by the parties, and had resolved on the issue without applying the substantive Argentine law however applicable.

15 Are there any arbitration institutions that specifically administer energy disputes in your jurisdiction?

The most-used arbitration forum selected to resolve energy disputes in Argentina is the one resulting from the International Court of Arbitration Rules. There are local arbitration centres as well, such as the Centro Empresarial de Mediación y Arbitraje, the Centro de Mediación y Arbitraje de la Cámara Argentina de Comercio (CEMARC), and the Arbitration Court of the Buenos Aires Stock Exchange (with permanent arbitrators), under their respective arbitration rules, but it cannot be said that they are specialised in energy disputes. The International Centre for Dispute Resolution (of the American Arbitration Association) has a list of specialised arbitrators energy, of which I am one. Section 1,657, CCC, does refer to arbitral institutions as suitable administrators of arbitration carried on under their respective rules, deemed incorporated in the arbitral agreement.

16 Is there any general preference for litigation over arbitration or vice versa in the energy sector in your jurisdiction?

Arbitration is almost always chosen in the energy sector. The complexity and specificity of the disputes thereof, which require arbitrators with experience in such fields, are the reason for this, moreover, if the arbitration clause requires the arbitrators to be chosen by the parties as well as the chairman of the arbitrators tribunal, to have experience in both both energy and arbitration law. In the case of litigation in court, the reliance of the system on court-appointed experts previously listed and registered with the judiciary under broad incumbency qualifications is a significant obstacle to obtaining the necessary expertise and in-depth knowledge.

17 Are statements made in settlement discussions (including mediation) confidential, discoverable or without prejudice?

The rules under which the mediation or arbitration shall be carried out govern the issue of confidentiality, as far as the parties will have agreed to. Professional secrecy duties apply, and a breach of the same may constitute a crime, provided certain elements are met. Argentine courts are generally hospitable to arbitral procedures, and furthermore section 1,656 of the new Civil and Commercial Law Code declares the lack of competence of the judiciary (the courts) on the disputes subject to arbitration as per arbitration clauses that are not blatantly null and void. However, if a motion for nullity of the arbitral award is filed by one of the parties, the files will be brought as evidence, which, besides their being kept reserved for the scrutiny of the court, exclusively, this will not preclude such court from being in the knowledge of the same.

Discovery is limited under the procedural law codes and there is a general principle that the party subject to a request for documents production order may refuse to deliver confidential documents and working papers. This refusal could, however, be seen by the court as confirmation that the allegations by the other party in this respect are credible, if supported by other evidence, or if there is a refusal to deliver the documents by the party

better-suited to filing them, this being a breach to cooperate with establishing the facts at issue.

18 Are there any data protection, trade secret or other privacy issues for the purposes of e-disclosure/e-discovery in a proceeding?

The general principle contained in the Argentine Data Protection Law 25326 is that personal data may only be processed if the data owner has given his or her prior consent in writing. As an exception, the consent is not necessary where such data is processed within the scope of a contractual or professional relationship with the data owner. According to the Law, personal data must be processed fairly and lawfully, and collected for specified, explicit and legitimate purposes, of which the data owner must be informed.

E-discovery is seldom admitted by courts if requested to be practised on the opposing party's premises and data centre (unless ordered by a criminal law court in the process of investigating a crime). This naturally does not extend to the accounting files (annotations in commercial books or electronic files requested by law, generally, and its supporting documents), which may be ordered to be shown to the court-appointed expert in order to reach conclusions on the financial statements of such party or on transactions booked by the same. Law 26388 made it a crime to have undue access to electronic telephone communications.

19 What are the rules in your jurisdiction regarding attorney–client privilege and work product privileges?

Attorney–client privilege is granted as the constitutional guaranty of due process of law so requires. Article 7,c of Law 23187 sets forth such privilege. In the rare cases where there has been an attempt to make such counsel be a witness, the counsel has the right to refuse to answer based on the duty to maintain professional secrecy and the judge may not insist on such enquiry.

20 Must some energy disputes, as a matter of jurisdiction, first be heard before an administrative agency?

In the case of disputes regarding access to transport of natural gas, or of power, through the grid, and any other dispute between the different agents of the respective markets, the specific control entities, ENARGAS (articles 66 and 70, Law 24076) and ENRE (article 25 – claimant customers can opt out and go directly to the courts – and articles 72 and 76, Law 24065) must receive such claims and decide on them, and such administrative rulings are subject to appeal with the Federal Appeal Court on Contentious Administrative matters (article 66, Law 24076), but such appeal must ensure full access to justice and review of facts and law (*Angel Estrada & Co v Secretary of Energy, Federal Supreme Court*, 5 April 2005).

Regulatory

21 Identify the principal agencies that regulate the energy sector and briefly describe their general jurisdiction.

See question 20. The issue of the limits of such competence has been a matter for discussion and the aforementioned case has set forth the standards of the review of appeals. As relates to the licensees or concessionaires (both for transportation and distribution) and customers and producers, the government authorities mentioned above have the role of regulating and controlling compliance with the respective legal frameworks, through a considerably extensive number of regulations, as a consequence of which such authorities have the power to grant authorisations and permits, impose penalties, and conduct public audiences to allow the public to participate in the authorisation process for the activities regulated under such legal frameworks.

22 Do new entrants to the market have rights to access infrastructure? If so, may the regulator intervene to facilitate access?

The legal framework for gas transmission and distribution has been largely distorted by regulations against the letter of the law. Thus, the open access principle set forth in article 2,c,f of Law 24076, which was set forth under a system of a free market for natural gas as a result of the unbundling in the 1990s of the state monopoly, operates differently from how it was intended to under the resolutions described below.

Resolution ENARGAS 419/97, which regulates the resale of transportation capacity, originating from the principles on which Resolution 267/95 is based, had been opposed by several natural gas distribution licensees. By such resolution any new transportation capacity on a firm basis offered by a natural gas transmission licensee should be awarded by an open bidding system, while the holders of existing contracts that grant transportation capacity on a firm basis may directly assign such contracts to third shippers, provided such assignment is the result of an open bidding made by the first shipper itself. The exception for these open bidding systems is for the case of bundled – supply or transportation – sale or a transport sale to a distributor in case of emergency of supply according to the regulations.

Resolution Enargas 1483/00 revisited these issues to allow non-discriminatory third parties' open access to transport and distribution networks to the extent not reserved, already contracted, looking for a fair allotment of available capacity, subject to the precedence of firm capacity already contracted, but with no obligation to contract other, bundled, services. Open bidding was chosen for such purposes. Roll-in or incremental costs methods had to be chosen beforehand by the transporter for the expansion that may be requested. Resolution Enargas 1748/00 further provides for access by customers over 5,000 cubic metres a day.

In theory, the system provides open access, at least on an interruptible basis, to unbundled transportation services by the natural gas distributors to make the resale of transportation capacity (at the level of the transmission licensees) possible. The idea was to create an electronic bulletin board for resale of spare transportation capacity contracted by shippers, by means of a bidding with an award based on the combination of price, term and volume requested by the offeree. Resolution Enargas 289/00 requested the distributor and the customer to contract under interruptible distributor transportation, but anticipated Enargas would regulate that large customers would then have to prove that they have equipment and installations that can be switched to alternative fuel consumption.

The first come, first served attitude that informed the open access transportation system came to an end, due to the mismatch between supply and demand resulting from frozen prices imposed by the government. Rationing, and its first manifestation being a limitation of volumes of natural gas as per the history of each consumer's demand, came as the first answer. It was a new form of making ration coupons. The rerouting of export natural gas supply for domestic uses was one of the ways to cope with such mismatch, and with it followed a dispatch system on a discretionary basis by the Secretary of Commerce.

Under a stretched 'agreement' forced by the government under a Resolution SE 599/04, as form 2011 Resolution SE 1410/10 set forth a dispatch priority procedure to administrate scarcity, establishing a priority demand and a first rank in the dispatch to incremental gas, gas plus and non-conventional gas production.

The new Minister of Energy and Mines has anticipated that the many regulations distorting the legal framework still in force, though not respected, will be revoked in order to restore the articulate system set forth in Laws 24076 and 24065, which includes a non-distorted open access principle.

23 What is the mechanism for judicial review of decisions relating to the sector taken by administrative agencies and other public bodies? Are non-judicial procedures to challenge the decisions of the energy regulator available?

See questions 20 and 21. Challenges to the decisions of the energy regulator have been frequent, the most significant ones being the international investment arbitration cases under bilateral investment protection treaties, whereby the international standards of international rights are deemed to have been breached by the regulations implementing energy policies by the past government. This began with *Total v Argentina*, related to the oil and gas upstream (prohibition and redirecting of the natural gas supply, retroactive taxation of crude oil exports, freeze on gas transportation tariffs) and power (thermal and hydroelectric generation destruction of the price structure through governmental regulations). The following companies have now filed claims against Argentina under the International Centre for Settlement of Investment Disputes: National Grid, Sempra Energy, Enron, Repsol, Compañia General de Electricidad, Mobil, Wintershall, BP, Saur International, EDF, Enersis, El Paso, Gas Natural, Camuzzi, CMS, Endesa.

The tariffs freeze and price differentials have produced a number of challenges at the time of the establishment of increases and charges imposed on certain sectors of the energy markets, due to the inconsistency of such regulations with the legal framework or even between themselves.

Update and trends

There have been numerous changes to government policy as a new federal government has been elected. New policies focus on improving efficiency and attracting business, with private buisnees managers appointed as high-ranking government officers to ensure an efficient administration, free from everyday politics. There is a strong feeling that the previous government subjected the country to four years of recession and inflation amid growing public expense. The policies being applied now are oriented towards the free market, with an already free foreign exchange market seemingly having access to considerable reserves of foreign currency from previously withheld foreign and domestic investments, and exports that were stopped by the agricultural sector and others on account of estimated losses resulting from the many price and foreign exchange controls.

The Minister of Energy and Mines is a former Shell chief executive officer, and has explained his intention to dismantle an energy system that survives on governmental subsidies due to price segregation and freezes, as well as tariffs continuing reductions.

Regulatory distortions on a former market-oriented legal framework have further aggravated a persistent deficit of power supply for more than a decade, with growing sunk costs. It was necessary to cover such needs with an LNG and natural gas fuel supply that was subsidised and imported. To increase output in the energy sector in a sustainable way and avoid short-term self-destructive competition, medium and long-term supply commitments through the entire energy value chain should be required. This would leave the spot market for power generators to buy power, to supplement their own power generation in order to meet their commitments in case of shortages, and to reserve subsidies for establishing social tariffs for the disadvantaged.

24 What is the legal and regulatory position on hydraulic fracturing in your jurisdiction?

Law 27007 has specifically considered fracking as one of the non-conventional exploitation methods that are subject to special privileges, as it has incorporated the benefits previously set forth in Decree 929/13, and described it in article 5, as the article 27-bis, to be a part of the Hydrocarbons Law. The provision grants the existing exploitation concession holders shale in their concession area, the right to request new exploitation concessions with non-conventional techniques for 35 years (subject to renewable 10-year extensions) to non-conventional hydrocarbons exploitation concession in such areas where there are shale formations.

Subdivision or unitisation of exploitation concession blocks is permitted, the title being held by the former holders of the concession, thus granting an option to request a non-conventional exploitation concession, by way of committing a pilot project, and such rights may coexist with a conventional exploitation in the adjacent field. Transport concession rights are granted for the same periods for those concessionaires. A minimum US$250 million investment commitment in a three-year period is required.

No export withholding tax will be assessed on the exported part of the production; a 20 per cent import duties exemption on capital goods (offshore 60 per cent) is also granted.

Royalties are capped at 12 per cent on market price (increasing to 15 per cent for the first extension, 18 per cent for the second), and tax and royalty stability is ensured (and up to a 50 per cent reduction of the royalties is promised depending on the kind of field involved and on the committed works).

The 10-year extension will be granted at the end of the concession, if the investment plan is approved, and compliance with the concession duties is proven, plus a bond of 2 per cent of proven reserves remaining in the exploitation concession to be paid to the holder of the eminent domain (the relevant province or the federal state, depending in which territory the concession is granted) at an average two-year median price-basin price; to be reduced to 2 per cent if the exploitation concession is transformed into a non-conventional exploitation concession, calculated on proven reserves (applying conventional exploitation methods) together with an increase of up to an 18 per cent royalty. Rights of way are granted for performing the relevant activities, reporting duties are established, together with the duty to submit yearly plans, etc. No sovereign new areas are reserved for national or provincial government-controlled oil companies (provincial), but 2.5 per cent of such amounts are to be paid to the province towards, for example, social contributions and infrastructure. An Environmental Uniform Act will be enacted, as a guideline for best practices, thus preserving the sharing of federal and provincial jurisdictions. The provincial excise tax is capped at 3 per cent, while the stamp tax on financing documents is to be defined.

Decree 929/ 13 benefits are granted for non-conventiomal exploitation concessions (tight sands, tight gas, coal bed methane, shale gas and shale oil, low permeability rocks). Free export of the resulting hydrocarbons is admitted, up to 20 per cent of the production (60 per cent offshore), with no export withholding tax or foreign exchange repatriation duty (if such benefit is curtailed in the future, there is a guaranty to assure international prices, and access to foreign exchange is committed to by the government).

Import rebates or import tax-free treatment are granted for capital goods (listed in Decree 927/13). The existing Natural Gas Plus and Incremental Gas regimes, which have set a threshold (backed by the government) of 7.5 US$/MMBtu, confirmed the government has committed itself to pay the difference between such amount and the effective amount obtained for the natural gas produced.

25 Describe any statutory or regulatory protection for indigenous groups.

Law 23302 declared the support of the aboriginal and indigenous communities existing in the country to be in the national interest, along with their protection and development for their complete participation in the social, economic and cultural process of the nation. There is a registry of each of the communities, and they are granted a right to sufficient land for agricultural and livestock farming. The principle of consultation to indigenous communities in relevant hearings is considered. Article 18 of the new Civil and Commercial Law Code reaffirms their right to communal property.

26 Describe any legal or regulatory barriers to entry for foreign companies looking to participate in energy development in your jurisdiction.

In the case of investments in areas near to the frontiers, a special law requests a prior approval. In the past there have been no specific requests that could be considered as a barrier to entry in the energy field. Regulatory barriers are only relevant for assuring the unbundling of the different sectors, but are clear cut and defined in terms of avoiding vertical integration and influence in the market. The new government, recently elected, is dismantling any and all barriers to trade and investment, by freeing the foreign exchange market, eliminating export withholding duties, reducing taxes for the import of capital goods, etc. It should be expected that the red tape and delays for the Antitrust Commission to approve concentration through acquisition or new investments be now considerably reduced up to international standards, in the same way that it is expected that some irrational taxation (such as collecting income tax on the capital gain artificially recorded by considering profit, the differential between acquisition and sale value of non-current assets on nominal currency) be adjusted.

27 What criminal, health and safety, and environmental liability do companies in the energy sector most commonly face, and what are the associated penalties?

Resolutions SE 105/92 and 25/04 set forth the procedures and guidelines on environmental protection to be observed by the upstream industry, including the environmental impact statements necessary; Resolution SE 341/93 and 201/96 regulate the remediation of hydrocarbon ponds; Resolution 342/93 and 24/04 handle contingency plans; Resolution 236/93 NS 143/98 on gas venting restrictions; abandonment and decommissioning of wells is dealt with by Resolution SETyC 5/96, midstream and downstream regulations also cover such sectors. Since jurisdiction on environmental matters is shared between the federal state (for interstate effects, and for guidelines in this general framework) and the provinces, each of them has developed an entire body of regulations on the subjects above, as well as enforcement authorities for the licensing, permitting and penalisation of infringements. The Federal Law of Hazardous Waste imposes penalties ranging up to prison terms for infringements of the entire process of disposal and elimination of the same.

Other

28 Describe any actual or anticipated sovereign boundary disputes involving your jurisdiction that could affect the energy sector.

At present there are no conflicts with neighbouring countries related to common reservoirs or territorial disputes. There are laws imposing prohibition of hydrocarbon exploration and exploitation offshore or in Argentine territory, specifically reaching the Falkland Islands, and imposing heavy penalties on companies developing such activities.

29 Is your jurisdiction party to the Energy Charter Treaty or any other energy treaty?

No. Protocols have been signed with Chile and later terminated, when Argentina unilaterally curtailed and finally closed natural gas supply to Chile and, similarly, Uruguay.

30 Describe any available measures for protecting investors in the energy industry in your jurisdiction.

In addition to the international access by foreign investors to investment arbitration, there is an array of remedies that the investors may call on for the protection of the property rights or acquired rights, depending on the kind of breach, ranging from summary proceedings, claims for unconstitutionality, outright administrative law recourses and appeals with the Federal Chamber of Appeals in Contentious Administrative Matters, and others (replicated, for example, in provincial jurisdictions). Injunctions and other preliminary measures may be requested autonomously or within such proceedings, the most typical being the suspension of the effects of the measure causing a definitive prejudice to the investor or the local company, after a scrutiny of the standing to sue of each of them.

31 Describe any legal standards or best practices regarding cybersecurity relevant to the energy industry in your jurisdiction, including those related to the applicable standard of care.

See question 18 on the Data Protection Law.

AG ABELEDO GOTTHEIL ABOGADOS
ERIZE - PINNEL - GALLO

Luis Erize **erize@abeledogottheil.com.ar**

Avda Madero 1020, 5th floor
Buenos Aires
Argentina

Tel: +54 11 4516 1500
Fax: +54 11 4312 4058
www.abeledogottheil.com.ar

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