Energy Disputes

Contributing editors
William D Wood, Neil Q Miller, Holly Stebbing, Justin P Tschoepe and Ayaz Ibrahimov

2019

GETTING THE DEAL THROUGH

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CONTENTS

Preface

Energy Disputes 2019

Fourth edition

Getting the Deal Through is delighted to publish the fourth edition of *Energy Disputes*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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GETTING THE DEAL THROUGH

London
January 2019

Argentina

Luis Erize
Abeledo Gottheil Abogados

General

1 Describe the areas of energy development in the country.

Argentina's energy matrix is highly diversified. Power sources include hydro (around 34 per cent), natural gas-fired turbines (60 per cent), nuclear (5 per cent) and other (2 per cent). However, since 2003, Argentina has evolved from being an energy net exporter to a net importer, owing to the market interference by government policies (now abandoned) that stalled investments. Up to 25 per cent of the natural gas aggregate demand is supplied by natural gas imported by the government from Bolivia, and from LNG sources to be regasified, at significantly higher prices than the domestic prices imposed on the local upstream offer, amid a maze of price differentials according to the supply source (existing production, 'new' or non-conventional production under specially approved programmes, now coming to an end, apart from the existing approved shale gas projects under Resolutions ME 46/17 – as amended by Resolution MIM 12/18 and 447/17). These programmes contributed to a growing governmental deficit until 2014, since reduced because of the fall in international energy prices, in this case, of imported LNG. Since 2013, crude oil production has been spared this interference (that in previous years had established an export withholding tax resulting in a price of US$42 per barrel for the domestic crude oil producer at a time when the international price was at least double), by the government terminating such export withholding and sponsoring an 'agreement' between the downstream and the upstream oil industry ensuring US$67 per domestic barrel (though it was not entirely respected, as refineries reduced purchase price to lower values than those of the agreement, described below) until the end of 2016, passed on a heavily taxed gasoline and gas oil price to consumers. In December 2016, convergence with international prices was sought by a renewal of an agreement between the upstream (supported by the oil producing provinces and the unions) and the downstream for establishing a floor of US$55 per barrel (US$47 for the heavier kind) for 2017, under the supervision of the government. The government acted as an 'umpire' by loosening the grip on imports and, on the other hand, allowing quarterly gasoline increases (to keep pace with inflation) to align them with upstream crude oil prices on a netback basis. As is evident, such higher-than-import parity prices for crude oil were sustained through an import control limiting the highly concentrated four refineries' procurement of imported crude oil. As international prices for crude oil increased in 2017, reaching the same level as local ones, the government announced no prior control on crude oil imports (and their by-products) would be made as from the end of 2017 onwards. Decree 962/17, superseded Decree 192/17 and Resolution E 47/17, which had established the pecking order for importers according to accrued data that had made official an, until then, little publicised import control measure adopted by the government. At current prices, there are no incentives envisioned for secondary or other enhancement recovery techniques on existing conventional, predominantly oil producing fields, to counter the 7 or 8 per cent decline in Argentine oil aggregate production in 2017. However, there is with an upward curve reflecting 2018's shale oil expansion, which will also require the expansion of the current Oldeval oil pipeline. Apart from this, under Decree 872/18 (Re SE 65/18), large offshore areas have been offered for open bidding in the three potential basins in Argentina's Atlantic territory and exclusive economic zone, under Hydrocarbons Law 27007. The general framework for offshore exploration permits grants:

- two periods, four + four years, plus up to five years' extension after a 50 per cent relinquishment, under heavier surface charges than those in the former period (trade off with works, admitted), and a right to request a 30-year (plus 10 years' successive extensions, with a 3 per cent royalties increase for each extension on top of the former royalty, up to 18 per cent) exploitation concession, subject to a sliding scale of 5, 6 or 12 per cent royalty as per certain hydrocarbons sales over investments ratios (but it can be reduced by up to half, depending on the bidding terms); and
- exports proceeds spared from remittance – except for the current, exceptional general exports withholding of 10 per cent at the current exchange rate, decreasing at par with domestic inflation from the third quarter of 2018, imposed as a consequence of the crisis at such time, informed below – up to 60 per cent (exports are currently totally exempt from remittance and foreign currency exchange restrictions, thus this 60 per cent acts as a floor in case of future restrictions).

The bidders (with economic and technical satisfactory qualifications) will offer an access bonus, work commitments or investments to develop the prospect and compliance bonds (and, if awarded, performance bonds). The highest commitment plus a bonus is awarded.

As for natural gas, the road has been bumpier. The government had set forth (Resolution of the Ministry of Energy and Mining 28/16) the upstream cost for the natural gas tariffs at circa US$5 per MMBtu, to be passed through to distribution tariffs, thus reducing the gap with historic depressed prices for natural gas production, depending on the different destinations (residential or large customers). In a partial attempt to correct them the Resolution was, however, based on prior resolutions adopted by the former government in excess of regulatory powers. In a class action case, the Federal Supreme Court (although it was limited to residential customers) annulled the pass-through of such upstream costs to tariffs (details of the case are discussed below). The government swiftly followed the criterion set out in the award and, after calling public hearings to discuss these issues, reduced the increase for pass-through to a median price mix of US$3.97 per MMBtu (US$5.22 for the gas producer) with an increased price path (as from March 2017, US$4.72 and US$5.64 for the gas producer, as per Resolution E 74/17) for the next three years, up to US$6.8 per MMBtu to the end of 2019 (Resolution E 212/2016; superseded by Resolution 474-E 2017). Both power and natural gas distribution tariffs continued to experience increases to realign price-subsidised values to market prices. However, under article 8 of the federal budget implementation Decree 1053/18 (replacing Resolution ENARGAS 20/18, which deferred price hikes from foreign exchange variations), as from the second quarter of 2019 gas distributors will be prevented from passing through to tariffs dollar upstream gas price variations within each six-month tariff period, and supply contracts with the producers shall reflect this restriction. Until then, the government is taking on the burden of the foreign exchange loss represented by interim foreign exchange variations due and unpaid by gas distributors.

Conventional source upstream gas prices followed the trend, while respecting public hearing procedures as per the Supreme Court guidelines, which defused conflicts, while distributors' value-added feed-in tariff increases resulted from the Tariff Reviews by the relevant government agencies ENARGAS and ENRE. In the second half of 2018, new ceilings on intake gas pipeline point prices were set out for the

passing-through of tariffs, reducing them to US$3.60 to US$4.42 per MM Btu, depending on each basin, for upstream gas not subject to the special programmes for shale gas developments. The gas plans were kept for 2017, rewarding non-conventional production (shale gas and tight gas, as well as the increased production beyond historic levels per basin and field, adjusted as per their natural depletion) with a differential guaranteed up to US$7.5 per MMBtu. Resolution of the Minister of Energy E 46/17, complemented with Resolution 419/17 (and Resolution E 447/17 up to the Austral basin), extended the US$7.5/MMBtu government's price support for non-conventional (tight or shale) gas to be continued in 2018 (Argentina is the second largest shale gas reserve in the world), and with a declining path until 2021 with US$6/MMBtu, guaranteeing such floor (net of royalties) with respect to the median price of the aggregate natural gas (conventional or not, of domestic sources) sales in Argentina (initially, the comparison was with the applicant's one). But such extension is now reserved for the incremental production of the fields (without taking into account their downward curve), or for new ones, as from 2017 onwards, confirming the old adage that what is new today becomes old tomorrow in the eyes of a regulator; a source for conflicts. A significant increase of shale gas production under the promotion programmes continues with a steep growth trend for the coming years, evidencing that the short-term ROI of each fracture is a bonus but at the same time a warning, as it is extremely sensitive to regulatory changes (and, though less so, market changes, once deregulated), with lesser sunk costs, which should defuse the temptation of government's predatory practices. This is not the sole factor predicating the need for continuity of regulatory practices, assuring open market, since the infrastructure needed to transport the same to consumers needs gas pipeline expansion, which also requires long-term, firm shipping agreements with producers and with a stable demand at the end of the pipe. A new gas pipeline is already being built to join shale gas fields to the trunk gas pipelines to the consumption centres, and further to consumers' hub and future LNG exports, through the Gasoducto del Litoral pipeline project, as the existing gas pipeline's transportation capacity is quickly reaching to its peak in gas intensive consumption seasonal periods (winter). In the winter of 2019 the domestic gas pipelines reaching consumers will have reached their maximum capacity, leaving for no room for open third-party access. The regulatory framework allows for one, or several gas exploitation concession holders together, to have their own gas pipeline for injecting their gas (article 1, Decree 589/17, amending Decree 729/95), leaving the tariff approval process to third-party gas transportation shippers in excess of their own gas.

Gas exports, forbidden (through lack of approvals and ridiculously expensive export withholdings) for more than 10 years, are now being allowed (Decree 962/17) provided they include interruptible supply clauses with no penalty for interruption, by coexisting with seasonal, substantial LNG imports and with the gas contract with Bolivia (Resolution 407/17 MEyM regarding exports by the State Agency Enarsa, and authorisation of swaps). Decree MEyM 962/17 for interruptible supply exports was followed by Res MEyM 104/18 for long and short-term exports, both with firm or interruptible terms, or summer exports with a swap duty to import gas or power in winter, with restrictions, however, linked with the periodic (five year) check that the aggregate domestic supply continues to be assured, and subject theoretically to domestic demand on similar terms at the time (five days) of the approval request, in which case such domestic gas purchase by the interested party prevails. Gas exports (from sources other than the one subject to the Res 46/17 price guaranty) are, however, subject to eventual interruption in case of domestic undersupply. Long-range planning and stable rules are also necessary in this field.

Argentina, as the second largest holder of shale gas resources in the world (swiftly becoming reserves, owing to the steep learning curve acquired with the existing exploitation), will soon achieve a third of its overall natural gas production with shale gas. It is therefore in an advantageous competitive position to (i) export gas to Chile and to Uruguay or Brazil through existing international gas pipelines that remained idle in the past decade because of domestic demand requirements in a government-led market and (ii) install liquefaction plants to export LNG (be it through two existing projects – by YPF and TGS – or through Chile, reaching the Pacific Ocean by setting up a liquefaction plant in such country). This would also allow a rapid change of an import parity domestic price matrix to an export parity one, with a profound impact, as the gas pricing in Argentina should develop in an open market, setting aside its current segmentation resulting from the coexistence of special shale gas programmes, imported LNG degasification and conventional gas prices' spread, on one hand, and the converging of current price differentials according to destination to industrial, residential or thermal power generation. One single market should define prices, where demand and supply meet.

The government was considering reinstating the 1990s natural gas spot market from the second half of 2018, later subject to new postponements, while interim fixing supply quotas allocated to distributors at set prices and dispatch priorities. This is reminiscent of the overregulated market in segregated gas prices that led to the stalling of investments in the 2002 to 2009 period (a description of which can be found in 'Eminent Domain and Regulatory Changes' by Luis Erize, in *Property and the Law in Energy and Natural Resources*, Oxford University Press), now dampened by the price path for new investments in non-conventional exploitation. The transition to open market policies demands a series of measures to make different priced gas sources (conventional, non-conventional, imported) converge into a single priced market, at the level of net back, import parity price signals, to be passed through to tariffs for customers downstream, and for the market to set price to gas-fired generators (and industrial consumers, the single demand sector not regulated ostensibly at present). But this would require the leading role of a market of standardised term contracts for distributors, large customers, and power generators, also requiring similar reforms to the power sector to avoid opportunistic behaviour that could jeopardise the reliability of supply (which also requires power capacity agreements and non-interruptible gas supply contracts to be put in place). Thus, spot markets in both natural gas and power should be left to resolve the shortfalls of contract suppliers, and not be established as the market through which the bulk of transactions would be effected. (Apparently, the government is starting to consider solutions for contract markets that were proposed in the Luis Erize paper 'Electric Power in Argentina: a Diagnosis of Regulatory Distortion, Investment Deficit and a Sustainable Development Proposal', published in RADEHM, *Revista Argentina de Derecho de la Energía, Hidrocarburos y Minería*, No. 7, Nov-Dec 2015, pp 285-330). The government, through CAMMESA (the power dispatch and broker centre, who was converted into performing as supplier of gas to thermal power generators, monopolising the purchase from producers to such ends) has made for open bidding of summer gas supply to such consumers as per Res ME46/18 (and hoping to make the power generators to make for a joint purchase of gas from LNG sources replacing the government, thus sparing the loss incurred by the latter). However, it is not simply by calling for an electronic board serving as exchange market or hub that competition will be obtained: standardised term contracts, fully tradeable and with adequate guaranties of supply or payment of substitute gas at penalised prices, should be set accordingly in an entirely deregulated open market – both for power and natural gas, given their interdependence in Argentina. This also requires security of supply to be considered and dispatch orders to be set in both sectors in accordance with objective rules. In fact, the Mercado Electrónico del Gas, created by article 6 of Decree 180/04, never materialised owing to the interference by the government on prices, dispatch rules, segmentation of markets, etc. The re-instalment of such exchange by Resolution SE 1146/04, Subsecretary of Fuels 116/04 and Note SSC 987/06, and 260/05, ending with Disposition 156/06, did not serve any practical purpose at a time price and dispatch were the resort of the government.

In conclusion, the shale revolution of the energy sector has the momentum to replace LNG imports to a great extent. One of the LNG plant barges has been returned to its owner and, to the opposite ,YPF has reserved already a mobile liquefaction plant for gas to be delivered at the Bahía Blanca petrochemical pole to export LNG. The exports hence should be to Chile and Brazil via Uruguay, through the existing international pipelines, and to any other destination, once the liquefaction plants are installed, together with new pipeline projects already under way (the Gasoducto Litoral for an additional 1,000km, the one connecting Vaca Muerta shale gas area with the trunk gas pipelines), plus the increase of liquids processing of the rich shale gas.

The current scenario anticipates a regulated gradual increase of renewables' share in the power generation matrix to reach, as from the end of 2018, 8 per cent of the aggregate power supply, and to increase in the following years up to 20 per cent on a sliding scale (it is less than 3 per cent at present, excluding hydro, thus in practice postponing

the target date).This has led to successive rows (the first one, later on extended; a second one, by Resolutions ME&N 252/16 and 275/17; and a new one through Resolution SE 100/18 (easing the prior stringent requirements of minimum economic worth, and disabling adjustment and premium clauses applicable to the former rounds) of public bids by CAMMESA for 20-year supply agreements' offers (labelled as joint sales), at a price subject to escalation, to attempt to reach such targets in the supply side. Priority of dispatch for the supply of renewables is set forth in Res MEyM 281-E/17. Big consumers (industry, etc) over and above a capacity demand above 300KW must comply with the 8 per cent renewables quota with respect to their own overall power demand. Regulation of the aggregate demand of sourced renewables' power allows some kind of competition with power purchased by the government (joint sales), with either remaining renewables offers that may be installed for the industrial consumers, or renewable energy auto generated by large consumers. Such competition is subject to an iron-fisted choice (as per Resolution MEyM 281-E/17 and Disposition SSRE 1-E/18) by large consumers, to be made every five years, to decide if their 8 per cent renewables consumption quota will be filled either way, as they are unable to switch from one to the other source during such period.

To give some flexibility, large consumers were allowed to avoid making such a choice, thus both consuming renewable energy from CAMMESA's joint sales pool and from other renewable energy, but would then face incremental costs for power reserves and other charges.

Thus a quota system segregates captive demand for renewables from the rest of the aggregate energy supply, and a forced choice between:

(i) government-backed (the joint sales) supply (at the median price of all the bids referred to above); and

(ii) the supply obtained in a supposedly free market, or by auto generation by large consumers themselves, seems to be a confusing method to assure (by making it quite risky for a large consumer to opt out) that future production already acquired by the government from the winning bidders (the joint sales) will effectively meet their captive demand.

In effect, an individual default of the yearly quota of renewables consumption by each large industrial consumer, and the ensuing power consumption to match such deficit, from sources other than the renewables contracted out of the governmental offer mentioned in (i) above, will be heavily penalised.

The government aims to resolve the intermittency of renewables, for which bidding was permitted with no commitment on capacity, by offering capacity back-ups for the pass-through of such contracts to large consumers at a price that will be the subject of separate bids, with unpredictable results. The complexity of the system is compounded by the grid's shortcomings, with a priority of dispatch adding to the uncertainty in making such choices in the medium to long term. Also, the redistribution of power by customers able to inject their own generation back to the grid (Law 27424, as regulated by Decree 986/18) adds stringent requirements for metering and ensuring the system's reliability .

If, on the other hand, the natural gas (from any source) market were free from any remaining regulatory interference, it would reach an import parity price (at present fluctuating around US$6/MMBtu for imported LNG regas sources), as Argentina is a net importer of up to 25 per cent of its aggregate gas consumption. This would thus free the government from the heavy burden of sustaining these programmes (as the price differential between the international price and the domestic market price would be substantially reduced). Import parity is the ironclad law of markets, sweeping away economically and technically flawed concepts of reference prices by computing Henry Hub prices plus transport costs into the country (liquefaction and transportation amounting each to a third of the LNG price), since LNG is a commodity that varies its prices on the spot depending on the availability of cargo. The shale and tight gas projects expect a soft landing into market prices that, when freed from regulatory measures, would reach import parity level, making them profitable. The significantly rapid decline in shale field exploitation and the need for continuing short-term investments requires stable rules to make a long-term forecast.

Argentina is currently one of the world's top-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.

The prospect of further development can be expected as a result of the following:

- the law reforms (in 2014) extending current exploitation concessions – mainly to the benefit of the state-controlled YPF (the most significant oil and gas upstream and midstream player in Argentina) – and further renewals;
- the soft landing of the end (for the time being, depending on the satisfactory evolution of international crude oil prices) of domestic prices; 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 also lead to higher overall price increases for gas and power, while reducing gas and power consumption subsidies to well-defined 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 notable domain (and collect legally capped royalties on the produced hydrocarbons) of the subsoil and resources thereof in their respective territories. Federal legislation sets forth the legal framework for the oil and gas upstream, midstream and downstream, as well as for power, on account of its many inter-jurisdictional issues. The traditional legal framework under which 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 the maze of regulations from the 2000s that created captive markets, segmentation of demand, price caps and subsidies to compensate the resulting stagnation of the energy sector. These regulations disfigured the legal framework they were supposed to be implementing. The path shown by the current government (by fixing a path for natural gas price increases for the next few years to reach import parity prices) has been defined, though some solutions, described above, are taken on a provisional basis in contrast with long-range plans that would allow the oil and gas industry to forecast a full return to open market policies. A selective reduction of the heavy taxes imposed indirectly on oil (by hitting gasoline prices) and gas production is necessary, to benefit investment in non-conventional oil and gas exploration and production, as a more stable substitute for the gas plans and for the crude oil 'agreement', has now been left aside. The confusingly dampening effect on tariffs of government-subsidised supply of imported natural gas (more than 25 per cent of the aggregate supply) at lower-than-cost prices alters the market signals with cheap energy, stimulating consumption and lack of efficiency. The gradual increase in prices described above is not sufficient to envisage a strong investment surge in the sector, which should be made on the basis of a forecast of stable rules. For more information the gas sector and its interaction with the power sector, see 'Electric Power in Argentina: A Diagnosis of Regulatory Distortion, Investment Deficit, and a Sustainable Development Proposal' by Luis A Erize, in *Revista Argentina de Derecho de la Energía, Hidrocarburos y Minería*, No. 7, pp. 285–330. The maze of gas prices imposed by the body of regulations that Argentina is now getting rid of can be revisited in 'Eminent Domain and Regulatory Changes' by Luis Erize, in *Property and the Law in Energy and Natural Resources*, Oxford University Press. The interaction between both markets has been studied for a long time, as shown in 'Proposal of Addendum to the Regulatory Framework of the Argentine Electric Sector', by Badaraco et al, prepared for submission to the First Latin-American and Caribbean Congress of Natural Gas and Electricity, organised by the Argentine Oil and Gas Institute, the American Gas Association and the Society of Petroleum Engineers (1997). In it, the interaction between both markets is analysed, and the proposal intends to show that a global approach on both is necessary, closing the circle between two entirely separate legal frameworks, for natural gas and electric energy.

Decree 1277/12, an all-encompassing framework that went far beyond the law that declared the expropriation of YPF's control, has been definitively scrapped. 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 disregard of decrees under which the existing concessions were granted previously). The 2015 government therefore committed instead to a policy of returning to the original legal framework.

It remains to be seen whether the significant effort by the federal government and confirmed at the mid-term parliamentary elections will restore market signals for attracting the necessary investment, especially by: dismantling the price segmentation of natural gas and power generation prices (and not merely by gradually increasing energy prices and tariffs), 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 passing-on of the resulting cost and the elimination of opportunistic behaviour, the spot markets would be limited to purchases (of their supply commitments under their term contracts) by non-performing suppliers to remedy this shortfall with such spot purchases from other producers.

The former government used to issue resolutions in excess of powers and force the oil industry to reach agreements with it, imposing losses on the industry. The current government did make a gradual increase in natural gas upstream prices and tariffs to correct this, but instead of leaving aside the former controls policy and making a clear transition to open market practices set forth in the Gas Law, it confusingly invoked the former regulations as a source of authority. The doctrine emerging from the September 2016 Federal Supreme Court award that provisionally suspended a tariff and price hike is that as long as the legal framework requires open market principles, the government should issue regulations that respect the same, at least as a goal for the future. It should set forth clear measures to achieve such passage, steering away from provisional measures establishing such levels on a day-to-day basis.

The current Hydrocarbons Law 27007, which granted extensions of exploitation concessions, caps on 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, especially owing 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, a 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 (and the Australian version), 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 (and in many cases, with partial incorporation of uncomplete formulas to address, for example, rights of first refusal, balancing, etc, a source for continuing conflicts), and eventually, requesting a financial or economic carry of the title holder, or a negotiated price, and possibly offering participation in the title as well, and with eventual sole risk provisions. Alternatively, production-sharing or services contracts may be entered into with the holder of the concession, mixed with a carry. Farm-in agreements do and will play a significant role in participating in 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 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 (the current lack of investments has given way to significant reforms of the collective bargaining agreements with the oil industry unions, to allow for the overall labour cost reductions, first in the Neuquén Basin Area, focused on shale exploration and exploitation, and then to other basins).

Natural gas term supply agreements are 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 corresponded (in recent years, the government authority had established 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 such natural gas to thermal power plants in its name. Power term supply agreements between generators and large customers were banned in 2013 (Resolution 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), and for gas to be delivered to thermal power plants out of bid calls from gas producers (starting for the summer supply, an easy task given the seasonal abundance of supply) together with supply from Bolivia and LNG imports re gas, at subsidised, lower than import, prices.

CAMMESA was originally 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. This role of CAMMESA is further strengthened by making it the purchaser agent of long-term renewable energy contracts under the Renovar plan, for new gas-fired power projects voiced the second quarter of 2016 and beyond, and as the counterpart for the new integrated projects it has invited interested parties to present. All these programmes make CAMMESA the monopolistic purchase agent that will have to pass such energy acquisition costs to distributors and large customers, in an as-yet undefined energy matrix that will instead have to respect open market practices to gain the economic equilibrium of aggregate supply and demand.

The regulations that have accumulated over the years are now being changed to eliminate the burden of energy-related price distortions. This should, however, provide a new opportunity to develop state-of-the-art, standard-term agreements for both gas and power supply, as 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 medium-term contract supply to large customers, eventually traded in a term contract 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. As seen in question 1, the to-date open question on markets to be mainly driven by term contracts, in both gas and power, is being analysed, but both the transition path and the final legal framework are pending. As for pipelines to be built for shipment of shale hydrocarbons, Decree 589/17 has extended the exclusionary rule of pipelines built by hydrocarbons concession holders (freeing them from the regulated framework of the gas pipelines licensees), to agreements to be reached by groups of producers with gas transportation licences for the expansion of the pipelines network at freely agreed prices and economic arrangements between them.

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 (the rather novel distinction of a traditional subject, now made express, is clear support to such principle as a supplementary requirement to be considered when interpreting the contract's language and the performance of a contract party);
- 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 effects 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, and of loyalty (the above-mentioned new Code establishes this duty for administrators in general – article 159). The conduct must at least be negligent 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).

In general, the parties under their agreements can establish limitations to otherwise liability standards which could make them liable to the other parties, by exempting negligence to the extent no gross negligence is excluded, as it is deemed to be similar to wilful behaviour and hence not waivable. Knock-for-knock clauses can be set forth to delineate the effects of each party's defaults or assumption of risks. Good practice should carefully forecast the effects of regulatory changes in the economic equilibrium of the parties, especially in areas prone to be hit by such changes, such as supply agreements (both international – as could be the case for the renaissance of international export gas supply agreements and their limitations – and domestic, transportation and transmission (ie, dispatch regulations altering existing shipping agreements, interruptible or non-interruptible conditions, third-party access rules, effect of offtake agreements altered by market regulations, declaration of emergency and urgency measures by the government, etc)). The general question of who is to blame for the allocation of risks is of paramount importance, as well as definitions regarding these events, extraordinary circumstances, the dividing lines between direct and indirect, and consequential damages, and rules for guidance in case of conflicts with the regulatory agencies or government whenever a joint venture is affected (taxation matters, royalty determination, environmental standards and litigation, supply duties or price caps imposed through new laws, access restrictions, etc). Mitigation duties are also essential, and are seldom considered as a part of the contractual duties between parties of the variety of contracts and associations. These aspects should be addressed in detail.

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 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 labelled as force majeure under common law coexist with the concept of force majeure stemming 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 events 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 addresses 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. 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.

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

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 regular 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 the performance could have been achieved by extraordinary means and costs. Court precedents have instead used the concept of unforeseability of extraordinary circumstances, which 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, as 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 voiced 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 unforeseeability to request an adjustment.

Instead, floods, extraordinary rain and extreme winds have or have not been accepted according to whether the parties can foresee such occurrences with due consideration for past statistics. Fire is generally accepted as a reason when it is started outside the premises, and when 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 *Compañía de Aguas del Aconquija SA and Vivendi SA v Argentine Republic* case discussed below), given the threat under which consent was to be given, or else 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 we 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 (BIT)) to bring a concessionaire to the renegotiation table through threats of rescission (paragraph 7.4.31, p. 215 of the award). The *Total SA v Argentina* case demonstrates the lack of choice when the Acuerdo de Gas proposal of 2007 was 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 to satisfy local aggregate demand, thus relieving the signatories from having to supply at lower prices.

The Secretariat of Energy set up a 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 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 the same in good faith.

One of the most significant arbitration cases in recent times, besides the cases for international treaty arbitration addressed by me in the sister publication of the *Getting the Deal Through* series, *Investment Treaty Arbitration*, 2017 and 2019, is the CCI No. 1632/JRF/CA *YPF v AESU & TGM* (2016, continued in 2017). As informed by YPF to the Stock Exchange, the arbitral award imposed a significant amount as damages compensation for liability implied by an anticipated termination of export gas supply and in relation to a delivery or pay provision, and for anticipated termination of a gas transportation contract. The case has been commented on by Diego Fernández Arroyo in *Arbitration International 2017,0,1-28*, and court resolutions can additionally be found online. Therefore, the information from the facts involved can be discussed. Nullification requests by different parties involved in the multi-party arbitration were filed in two different countries, the courts of Uruguay and Argentina, with conflicting views (in the case of *YPF v AES Uruguaiana*, 15 Oct 2014, mandating the suspension of the arbitral procedure, and considering the court had jurisdiction on the annulment appeal as it was so empowered by the relevant arbitration clause). The case involved a gas-by-wire scheme ending up with a power supply agreement to Brazil under a grid of related contracts starting in Argentina with the export gas supply and shipping and transport contracts to Uruguay as delivery point, for gas firing a power plant in that country to sell power to Brazilian utilities. The case is a good example to address the current subject of FM, frustration and government regulatory changes stopping short of prohibitions, because the issue was, following said publication, related to the two-step restrictions on gas exports by means of removal of export permits or the imposition of absurd export withholdings with the effect of more than doubling the market price. The description of the facts adds the condiment of an anticipatory breach and, with respect to arbitration clauses, separate choice of law provisions for annulment litigation. The cross claims were addressed by means of a voluntary consolidation in a single multiparty, bifurcated (splitting liability and quantum phases), arbitration under ICC rules, and diverging arbitral awards annulment court procedures (based on conflicting views on *lex arbitri*, the law governing the arbitration procedure itself) in Uruguay and Argentina.

Showing that fiction anticipates reality, the case is strikingly similar to the moot arbitration case prepared by this author for a session in the IBA Annual Conference in Dubai, in 2011, in which the study of a hypothetical interruption of power supply from country B to country C owing to a feedstock agreement (natural gas supply) interruption by a natural gas supplier from country A (the A,B, C countries have become, in the real case, Argentina, Uruguay and Brazil) was proposed. In the moot arbitration, the gas supplier was invoking FM, caused by country A, considering in addition that it was a source of international liability of the country causing the regulatory changes. Some of the questions referred to in Dubai were: what would the effect be of FM defences in the ICC arbitration or litigation due to country A's actions; if the rejection of FM excuses by the gas supplier bore consequences on the defence by the power producer in the power supply interruption claims (and on ancillary transport agreements), and the effects of cross arbitration with an ICSID case for the government interferences with the legitimate expectations of the foreign investors. The temptation exists to add a subtitle as used in films: 'any relation to reality is mere coincidence.'

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 do not derive from the owners of the property where the exploitation occurs, as by law they have to admit such activities to be performed by the exploitation concession holder, limiting themselves to receiving 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 aquifers' 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, as 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.

Each time more caution has to be considered in farm-in agreements, in agreements for an adequate carve out of environmental risks arising from the past, allotting liability for farmers on non-disclosed contingencies, to attempt to solve issues that are well known in other countries.

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 that 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 2015 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 of 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, and for 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-signatories 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 because 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, and 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, 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 has 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, and in some cases include 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 described below.

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 the attached goods with new ones. They are flexible because the creditor may request the augmentation of 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 arises where the petitioner has a genuine motive to be afraid that he or she will suffer imminent and irreparable harm. Obviously, invoking 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

Because 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.

There have been ICSID cases where the issue on preventive measures has been addressed. In *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA (claimants) and The Argentine Republic (respondent)* (ICSID Case No. ARB/09/1), Decision On Provisional Measures (8 April 2016), it was:

> *(a) ordered that Respondent refrain from publicising the Complaints or the criminal investigation and any relation they may have to this arbitration, whether by communications to the press or otherwise; (b) it deferred its decision in respect of Claimants' Application for Provisional Measures as it relates to the suspension of the criminal proceedings in regard of counsel for Claimants and Claimants' court-appointed receivers, with liberty to Claimants to bring this Application back before the Tribunal in this respect should it become necessary; (c) reminded the Parties that they are obligated to refrain from aggravating the dispute; and (d) denied the remaining aspects of Claimants' Application for Provisional Measures.*

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, subsection 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, 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, subsection 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, subsection 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, subsection 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, subsection 5, if there is another judgment by an Argentine court affecting the same parties and regarding the same subject matter that 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 commence. 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 was judged. The International Court of Arbitration of the International Chamber of Commerce (ICC) had rejected the challenge, and this 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. The Court of Appeals quoted *Cartellone*. The case has been settled.

It is important to determine the exact scope of admissible claims that arbitration may have competence to decide on, especially because the new Civil and Commercial Law Code states, 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 those 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), as 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 applicable Argentine law.

Nullity of ICSID appointed tribunals awards regarding investment arbitration under BITs has been sought in foreign jurisdictions. In the United States District Court for the District Of Columbia, in *Republic of Argentina, Petitioner v AWG Group Ltd, Respondent* (30 September 2016), where the parties agreed that the case was governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), and which gave jurisdiction to such US court, Argentina's petition to vacate the arbitral award was denied and AWG's petition to confirm the award was granted, as 'Argentina failed to demonstrate evident partiality and excess of powers' by one of the members of the arbitral tribunal.

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 Business Centre for Mediation and Arbitration, the Mediation and Arbitration Centre of the Argentine Chamber of Commerce, 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 specialists in energy disputes. The International Centre for Dispute Resolution (of the American Arbitration Association) has a list of specialised energy arbitrators. Section 1,657, CCC refers 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, they must have experience in 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. 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 reserved for the exclusive scrutiny of the court, will not preclude such court from knowing the same.

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 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, 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 their supporting documents), which may be ordered to be shown to the court-appointed expert 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.

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 of cooperation in establishing the facts at issue.

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 7c of Law 23187 sets forth such privilege. In the rare cases where there has been an attempt to make such counsel be a witness, 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).

In the case of challenges to laws and regulations, and not to specific administrative acts addressed to the plaintiff, claims can be filed for lack of respect of constitutional provisions (ie, Federal Supreme Court, *Enap Sipetrol Argentina SA v Provincia de Tierra del Fuego, Antártida E Islas del Atlántico Sur s/ acción declarativa de inconstitucional*, 23 August 2016, LA LEY 21 September 2016, 7 online: AR/JUR/57236/2016, where royalties computation on a notional price, and not on the actual price, were rejected).

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, 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 operate under the resolutions described below.

Resolution ENARGAS 419/97, which regulates the resale of transportation capacity (to be traded theoretically in the Mercado Electrónico de Gas, the gas electronic board, still inactive), 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 make large customers 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, with its first manifestation being a limitation of volumes of natural gas as per the history of each consumer's demand, emerged 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 from 2011 Resolution SE 1410/10 (afterwards complemented by Resolution 89/16 and resolution ENARGAS 3833/16 – and further, Resolution ENARGAS 4502/17, superseded by Resolution 124/18 – that set forth the procedure of nomination and re-nomination of daily gas for emergency reasons, which supposedly is a transition solution until open market policies are again put in place) 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 (under programmes that have now expired) and non-conventional gas production (that are now reserved for new production).

The ex Minister of Energy and Mines has anticipated that the many regulations distorting the legal framework still in force, though not respected, would 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 BITs, 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*, in which we were co-counsel for the claimant, 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) where an award determined the state responsibility and damages compensation. The award is now final as the annulment request was rejected by the Ad Hoc Committee in February 2016. A settlement was reached as for the enforcement of the award on the second quarter of 2017, through a payment of marketable, government-issued foreign currency bonds at a discount. 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. One of the most recent developments in ICSID was the rejection of the annulment request by Argentina of the arbitral award issued in favour of claimant, Saur. In February 2018, the decision on jurisdiction and admissibility (*Salini Impregilo SpA v Argentine Republic*, ICSID Case No. ARB/15/39) was issued, rejecting the preliminary objections to the jurisdiction of the Arbitral Tribunal (once again, the typical objection by Argentina to the derivative lawsuits was rejected). In June 2018, C*asinos Austria International Gmbh Y Casinos Austria Aktiengesellschaft v Argentina* (ICSID case ARB/14/32, the arbitral tribunal affirmed its jurisdiction, rejecting objections based on the derivative claims issue as well as on the pretence to exclude its jurisdiction because of the existence of an exclusive jurisdictional clause in the terms of the concessions and bidding terms, a matter that was defined by the *Vivendi* precedent years ago. In *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentine Republic* (ICSID Case No. ARB/09/1) the arbitral award granted compensation to the claimant on July 2017.

The tariff 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, owing to the inconsistency of such regulations with the legal framework or even between themselves.

Update and trends

The energy sector is subject to significant challenges, as the novelty of huge reserves of shale gas and crude oil is matched by the experience and lessons gained in the past four years, allowing such reserves to be de-risked and be considered for booking as assets in the financial statements, as soon as price signals stabilise and demonstrate stability. Tensions will arise, however, as their valuation will depend on access of production (issued from such reserves) to market, a matter inherently dependent on:

(i) the making of a consistent and reliable domestic gas market with the sufficient depth – by the diversification of sources – and standardised offers;
(ii) the availability of domestic gas transmission pipeline expansion
   - assuring third party access (if built under unbundled gas transportation licences); or
   - matching the aggregate offer of the gas producers, teaming up for building gas transportation concessions granted to them under the Hydrocarbons Law;
(iii) the consolidation of the export trend, by means of the existing gas pipelines, to Chile and, through Uruguay, to Brazil, and the making of liquefaction plants to export LNG; and
(iv) a simultaneous and parallel development of power regulations and market, allowing a smooth interaction between both gas and power markets, given their interdependence (two-thirds of the aggregate power is from thermal, gas burning, generators).

The amendment to the hydrocarbons law brought by Law 27007 has consolidated the title – by non-conventional exploration permits and exploitation concessions – on shale oil and gas shale formations, many of which were granted to the holders of existing conventional concessions in the same area, and by granting a limitless rollover of the concession's life. To diversify the agents in this market a very active farm-in agreement market will be required (as the investments needed require a large amount of FDI, based on a substantial reduction of the country risk yet to be proved), if these resources are not left to remain underground, as one more unfulfilled promise. A promissory sign is given already by the entering into four new shale gas export agreements with Chile and one with Brazil, the building of a gas pipeline from Vaca Muerta, the most promising shale formation, to reach a trunk pipeline, the project of an additional gas pipeline (litoral gas pipeline) and of a dedicated one to reach a liquefaction plant on the Argentina's Atlantic.

The strong expectation of the government relies on new forms of financing of the infrastructure needed, by means of public–private participation (PPP) schemes, owing to the severe limitations on public spending given the zero deficit commitment by the government to the IMF (which was a condition for the granting of a substantial standby credit to help Argentina overcome its current financial burden). Such formulas are now tested for public works (roads or highways), and for their eventual regulatory streamlining: the setting of expert dispute boards to follow the performance of the contracts, replicating ICC Rules on the subject, seem, however, to be burdened with their complex constitution procedure, and by the fact that the list of experts, from which the relevant ones are to be shortlisted for each contract, is provided by the government itself.

Arbitration (a classic for energy disputes), both domestic and international, has been freed of the constraints of the Procedural Law Code and other restrictive provisions, as the amendment of the Civil Law Code (now the Civil and Commercial Law Code) has regulated arbitration as a contract and expressly allowed the extension of competence to foreign tribunals when the subject has foreign points of contact, and a law on international arbitration was enacted basically following the UNCITRAL guidelines.

Public order, public policies and the ability of state entities to submit to arbitration continue to be debatable issues (ie, *CRI Holding Inc Sucursal Argentina v Compañía Argentina de Comodoro Rivadavia Explotación de Petróleo SA*, National Court of Appeals on Commercial Matters, section C, 5 October 2010, see question 14). The Civil and Commercial Law Code in section 1649 excludes from arbitration matters where public order is compromised (an exceptional circumstance that involves the essential principles and guaranties of public order, and certainly not precluding arbitrators from deciding on disputes between the parties as to which rights may be based on public policies and regulations).

As for contracts governed by public law, either with the state or regulated by it, dispute resolution clauses allow for foreign arbitration (in the renewable power supply agreements, PPPs, in offshore bidding terms or in a renegotiated highway toll concession). However, there are discrepancies, probably as a result of Argentine governments' concern at having to rely on unlimited arbitration for public contracts and concessions – the reluctance to submit the state to foreign arbitral tribunals having yet not gone away – and given Argentina's history of ICSID Rules arbitration under BITs and foreign jurisdiction for sovereign foreign debt. (Though this is accepted in principle, still regarded with reservation, which makes for the inclusion in the concession or contractual terms of a contractual fork-in-the road, by making the private party choose between arbitration under the terms of the contract or concession, under the procedure thereof defined, or the ICSID Rules appointed arbitration tribunal, without considering that such local election does not bar access to ICSID/BIT arbitration, as expressed in the decision on jurisdiction in *Salini Impregilo SpA v Argentine Republic*, ICSID Case No. ARB/15/39.) See the *Vivendi I* decision on annulment, commented on in *La protección de las inversiones en la República Argentina*, by Luis Alberto Erize, LA LEY 2002-E , 1063; AR/DOC/8175/2001.

Finally, in the public works and infrastructure areas, the impact on related companies of a widespread criminal court investigation initiated upon the disclosure of a set of notebooks with a precise agenda of myriad corrupt payments requested by high-ranking officials of the former government, paid by private parties, is still to be defined. The Corporations Criminal Responsibility Law was enacted in 2018, with no retroactive effects to penalise the corporations involved in such payments that had been made at dates prior to this government's election.

Thus, Argentina is poised for energy transition, as the substitution of more polluting, CO_2 intensive energy sources by natural gas fulfils the guidelines set forth in the draft report from the International Energy Agency to the G20 Energy Transitions Working Group:

> *The G20 has identified natural gas as a flexible and clean energy fuel option, featuring lower emissions than combusting coal or oil. Gas resources have been unlocked thanks to technology innovation in the production of unconventional supply. The social and environmental benefits of natural gas require effective regulation and high standards of industry in order to ensure continued public acceptance for the role of gas and also to limit emissions of methane. The development of regional gas markets with larger balancing zones and hubs, many of them integrated across borders through pipelines and/or liquefied natural gas, are driven by security of supply, economic efficiency, notably price convergence and transparency . . . . Argentina has an opportunity to develop the vast potential of unconventional gas development from the Vaca Muerta field, one of the world's largest shale gas resources, which will allow Argentina to reduce import needs and become a leading pipeline and LNG exporter. In Argentina, the role of natural gas largely exceeds its function of providing flexibility. The significant substitution potential in power generation and in other uses allows for a faster transition towards a cleaner energy system.*

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 subject to special privileges, as it has incorporated the benefits previously set forth in Decree 929/13 and described it in article 5, as article 27-bis, to be a part of the Hydrocarbons Law. The provision grants the existing shale exploitation concession holders 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 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 (but a transitory export withholding has been set forth for any and all exports, see below).

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, and 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-conventional 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) though presently subject, as all exports of any nature, to a 10 per cent export withholding, down scalable implicitly since fixed in nominal Argentine currency at the exchange rate at the time the tax was enacted, to be diluted on account of local inflation.

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 (regimes expiring at the end of 2017) have now given place to incentives, above described, for new non-traditional oil and gas exploitation, which have set a threshold (backed by the government) of US$7.5/MMBtu (see question 1, *Resol ME y M* 46/17), confirmed the government has committed itself to pay the difference between such amount and the median price obtained for the natural gas from the aggregate production in each basin, from traditional and non-traditional sources.

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 states that prior approval is required. 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 current government, elected at the end of 2015, is thought to dismantle any and all barriers to trade and investment, by freeing the foreign exchange market, eliminating export withholding duties (though having had to set forth, on account of the current commitment to reach at zero deficit for public expenses in 2019, an overall export withholding of 10 per cent computed in local currency at the current exchange rate at the time the Decree was enacted, therefore meant to be diluted by means of a lack of adjustment to the foreign currency exchange at the time of each export), reducing taxes for the import of capital goods, etc. Many of such goals have been achieved by now (free exchange rate and remittances, exports freed from foreign currency proceeds' remittances, etc). It should be expected that the red tape and delays for the Antitrust Commission to approve concentration through acquisition or new investments should now be 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) should be adjusted (an opportunity now available indirectly through a tax protected adjustment of fixed assets, at a price, and adjusted in the following fiscal years, or by a fully inflation adjusted tax return, if certain very high inflation rate thresholds are reached).

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 necessary environmental impact statements. Resolutions SE 341/93 and 201/96 regulate the remediation of hydrocarbon ponds; Resolutions 342/93 and 24/04 handle contingency plans; Resolution 236/93 NS 143/98 regards gas venting restrictions; abandonment and decommissioning of wells is dealt with by Resolution SETyC 5/96 and midstream and downstream regulations also cover such sectors. Because jurisdiction on environmental matters is shared between the federal state (for interstate effects, and for guidelines in

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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.

There are currently no conflicts with neighbouring countries related to common reservoirs or territorial disputes. There are laws imposing prohibition of unlicensed hydrocarbon exploration and exploitation offshore or in Argentine territory, specifically reaching the Malvinas (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 were signed with Chile and later terminated, when Argentina unilaterally curtailed and finally closed the natural gas supply to Chile and, similarly, Uruguay. At present such Protocols are being revisited to allow the natural gas export already in progress.

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.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
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Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
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