Energy Disputes

Contributing editors
William D Wood, Neil Q Miller, Holly Stebbing, Lauren W Varnado and Ayaz Ibrahimov

2018

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Energy Disputes 2018

Contributing editors

William D Wood, Neil Q Miller, Holly Stebbing, Lauren W Varnado and Ayaz Ibrahimov

Norton Rose Fulbright

Reproduced with permission from Law Business Research Ltd
This article was first published in February 2018
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2016
Third edition
ISBN 978-1-912377-43-5

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Preface

Energy Disputes 2018

Third edition

Getting the Deal Through is delighted to publish the third 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. Our coverage this year includes a new chapter on India.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

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.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, William D Wood, Neil Q Miller, Holly Stebbing, Lauren W Varnado and Ayaz Ibrahimov of Norton Rose Fulbright LLP, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
January 2018

Introduction

William D Wood, Neil Q Miller, Lauren W Varnado and Holly Stebbing
Norton Rose Fulbright

Welcome to the 2018 edition of *Getting the Deal Through – Energy Disputes*. We write this edition at a pivotal time for global politics and, consequently, for the global energy industry. While earnings have dwindled for some companies, others have begun to see brighter prospects ahead. Oil from countries such as Saudi Arabia, Nigeria and Algeria continues to move away from the United States and towards heightened competition in markets in Asia and elsewhere. Future energy demand is increasingly difficult to predict as technologies, policies and investor risks continue to change and evolve.

OPEC continues to stabilise potentially oversupplied markets. At the time of writing, OPEC has indicated that it will likely extend supply cuts implemented last year that helped remove nearly 180 million barrels from storage during that time. The success of this deal will depend on OPEC members' continued adherence to their promises, plus the participation of non-member countries and the ability of US shale drillers to quickly increase production as prices rise. Additionally, political turmoil and debt crises in member countries such as Venezuela could have adverse consequences on the effectiveness of OPEC stabilisation efforts. Driven by increasing LNG export capacity, the US remains forecast to become a net exporter of natural gas in the coming years, the first time since 1955 that the US will export more natural gas than it imports. Continued efficiency gains will also make natural gas cheaper going forward.

Although prices of OPEC's benchmark crude have fallen in recent years, markets and prices appear to be on the rise. Experts are optimistic about the growth of demand and near two-year highs for oil prices, as hedge-fund investment in oil futures approaches record highs. Despite recent gains, the global drop in the price of oil has resulted in decreased drilling worldwide and substantial job losses in the industry. At the time of writing, in North America alone, at least 134 exploration and production companies, 21 midstream companies and 155 oilfield services companies have filed for bankruptcy since 2015, with experts predicting that the current bankruptcy cycle is far from complete. However, the rate of bankruptcy filings has decreased this year, with only twenty exploration and production companies filing compared to sixty this time last year. Additionally, as of the time of writing, no new midstream company bankruptcies have been filed since April 2017. Still, as reorganised and insolvent companies are no longer able to honour contracts, disputes related to those contracts will necessarily follow. An increase in disputes related to royalty payments or other rights of leaseholders and host governments may also result. Major economic impacts on joint operating agreement (JOA) participants with cash flow crunches will lead to JOA defaults, with a possible impact on work programme obligations owed to host governments and their national oil companies, and growing concerns for unanticipated decommissioning costs not fulfilled by defaulting parties. That said, lower oil prices have encouraged producers to innovate ways to cut production costs to remain profitable, and investors have shifted focus to shorter-cycle projects which increases opportunities for narrower, specialist explorers and producers rather than large, generalist companies. If production costs are kept low as prices continue to rise, many countries could see increased gains in the energy sector.

Nearly a year into the Trump presidency, the President's commitment to deregulate the energy industry and achieve energy independence has manifested in a variety of ways and will continue affecting the energy sector in the coming years. The Trump administration, through the EPA, continues to dismantle Obama-era energy regulations that require states to develop clean energy plans, and has already fast-tracked massive pipeline projects such as Dakota Access and Keystone XL. Further, the President's protectionist trade policies have resulted in greater uncertainty regarding the US's role in the global energy industry. Increased emphasis on domestic coal production could hinder development of renewable energy sources, and the President's potential renegotiation of NAFTA could introduce new tariffs on US energy exports to Mexico. President Trump's recent commitment to 'decertify' the international nuclear agreement that lifted sanctions against Iran could slow the pace of investment in Iran's oil sector, and heightened geopolitical tensions in the region could threaten transit lines or otherwise destabilise the global oil market. In all, the President's domestic and foreign policy decisions have already begun to affect the global energy industry and the country's role as both an energy producer and consumer.

The new administration, however, is finding that deregulating is not so simple. As the EPA pushes deregulatory efforts, challenges to agency actions will likely result in new disputes that could affect the entire regulatory landscape. Environmental groups are already challenging EPA regulatory rollbacks, and the DC Circuit Court already upheld one such challenge to the EPA's suspension of the Climate Action Plan, an Obama-era policy encouraging clean energy production and reducing emissions. Vacancies in key administrative positions also limit the government's ability to deregulate. As the EPA attempts further deregulation, 2018 will likely see increased efforts to prevent the elimination of long-standing energy and environmental regulations in the US.

There is some uncertainty over how the Brexit vote will affect UK energy policy. Withdrawal negotiations began in June of 2017, and the UK is currently scheduled to leave the EU on 29 March 2019. Although the Supreme Court has held that the UK government cannot give formal notice to exit the EU without first obtaining the approval of parliament, parliament approved the exit in March of this year. Until the UK exits the EU, the existing legal and regulatory regime is likely to remain in place in materially the same form. If the government follows Prime Minister Theresa May's proposal to introduce a Great Repeal Bill, converting existing EU law into domestic law, then this will provide further certainty that any changes are likely to be introduced gradually and following parliamentary debate. The government has always retained control over its energy policy, including key matters such as licensing and taxation of oil and gas exploration, appraisal, development and production activities. Consequently, it is generally expected that there are unlikely to be dramatic changes to the UK oil and gas industry. However, the Brexit vote has already affected the organisational structure governing the UK energy industry, particularly with the merger of the Department for Energy and Climate Change with the Department for Business, Innovation and Skills to create a new Department of Business, Energy and Industrial Strategy. This may indicate more active involvement by the government in the future with an energy strategy focused increasingly towards economic stimulation and business growth.

Recent months have also seen a proliferation of decommissioning litigation following the US Bureau of Ocean Energy Management's (BOEM) issuance of significant new supplemental financial assurance requirements. These requirements fundamentally change the way that BOEM calculates the financial strength and reliability of OCS

operators and lessees and will require greater allocation of capital than previously required to cover future potential decommissioning obligations. BOEM, under the direction of the Trump administration, subsequently delayed the implementation of these new requirements to receive additional input from interested parties such as industry leaders and leaseholders. The regulations may create serious barriers to entry for small and independent operators, and may drive larger companies to invest in frontier areas such as the Arctic and ultra-deepwater. In the mature UK North Sea basin, the UK Oil and Gas Authority called for the industry to reduce its decommissioning costs by at least 35 per cent, an estimated value of around US$80 billion. According to the *Financial Times*, between now and the 2050s, around 270 platforms, 5,000 wells, 10,000km of pipelines and 40,000 concrete blocks will have to be removed from the North Sea, a result of oil companies operating in a low oil price world and facing diminishing production from a basin where commercial production began over 50 years ago. Delays and costs overruns will likely be a feature of this latest phase in the history of the North Sea as the market gets up to speed with the challenges of decommissioning in this environment. This will no doubt lead to disputes between oil and gas companies and the oilfield services contractors and suppliers carrying out decommissioning. Experience shows that the costs of decommissioning can quickly escalate and industry players will be nervously watching the financial health of their joint venture partners to ensure they can meet the costs of decommissioning, especially for assets that do not have adequate decommissioning security arrangements in place. The role the new Oil and Gas Authority will play in decommissioning is also an area to watch.

Emerging cybersecurity concerns threaten virtually all major industry sectors, and the energy industry is not immune. Critical energy infrastructure installations, such as pipelines and electric grid facilities are particularly vulnerable, especially as energy grids invest in new smart digital technologies. While evolving smart grid technologies can bring massive benefits, they also present new and complex cybersecurity risks. Cyberattacks can manifest in the form of data breaches, operational systems shutdowns, and even potentially total grid blackouts, all necessitating increased cooperation between industry and government to combat these new threats. The US Department of Energy and associated agencies promulgate the Critical Infrastructure Protection Guidelines, which detail cybersecurity requirements for certain energy facilities. However, compliance with these guidelines is often costly and only applies to the most critical energy infrastructure assets. Other countries continue to work with the energy industry to develop cybersecurity guidelines, best practices, and threat assessment tools. Therefore, cybersecurity compliance in the energy industry is ripe for dispute as new threats emerge and new regulations are put into place to combat them.

This year, the US announced its intention to withdraw from the Paris Climate Agreement. The agreement generally requires signatory parties to submit and update reports on the country's greenhouse gas emissions, and parties then pledge nonbinding plans to reduce emissions. When the US announced its withdrawal, 147 countries had ratified the agreement. While the US's withdrawal threatens to weaken the force of the agreement, many other nations, including Canada, France, Germany, Japan and the UK have all reaffirmed their commitment to the Agreement. Additionally, the US's withdrawal does not take effect until 2020, and does not preclude states from implementing climate action plans and adhering to the guidelines and framework of the Paris Agreement. In fact, several states, such as California, New York and Washington have announced continued commitment to advancing climate policy. Thus, withdrawing from the Agreement is unlikely to stop the transition to renewable energy, especially as wind, solar and other alternatives become more competitive in the marketplace. The 23rd annual UN climate conference (COP23) in Bonn, Germany, gave the remaining parties to the Paris Agreement an opportunity to further develop the rules of the Agreement and discuss concerns about the US's withdrawal. The conference also saw the launch of the Powering Past Coal Alliance, led by the UK and Canada, seeking to phase-out traditional coal power by 2030 to meet the goals of the Paris Agreement. The next COP in Poland will likely see a finished draft of the Paris Agreement's 'rulebook', where parties to the Agreement plan to finalise these rules.

Energy disputes may arise in the near future as a result of the privatisation of certain oil and gas sectors in countries such as Mexico. Foreign (ie, non-Mexican) energy companies may benefit from such denationalisation, both economically and politically. However, it remains uncertain whether foreign companies will have sufficient incentives to partner with Petróleos Mexicanos (Pemex) on energy development, particularly deepwater transboundary development, as Mexico lacks significant deepwater experience to date, and foregoing complicated agreements in lieu of the rule of capture is a much simpler alternative. As with the contractual frameworks now permitted by the Mexican Constitutional amendments, it also remains to be seen how the 2012 US–Mexico Transboundary Hydrocarbons Agreement will be implemented in areas in which the ban on exploration and development of hydrocarbon reservoirs had been in place. That said, if the legislating bodies in Mexico continue to keep in mind the guiding principle of maximising revenues, in order to achieve the greatest benefit for long-term development, the Mexican energy reforms may achieve far-reaching impact on economic growth in Mexico, beginning with an infusion of private investment that it is hoped will boost oil and gas production, lower the cost of energy and create new jobs in Mexico. Saudi Arabia also announced a decision to publicly offer for purchase a portion of its state-owned oil company

NORTON ROSE FULBRIGHT

William D Wood **william.wood@nortonrosefulbright.com**
Neil Q Miller **neil.q.miller@nortonrosefulbright.com**
Lauren W Varnado **lauren.varnado@nortonrosefulbright.com**
Holly Stebbing **holly.stebbing@nortonrosefulbright.com**

1301 McKinney Street, Suite 5100
Houston
Texas 77010
United States
Tel: +1 713 651 5151
Fax: +1 713 651 5246

3 More London Riverside
London SE1 2AQ
United Kingdom
Tel: +44 20 7283 6000
Fax: +44 20 7283 6500

www.nortonrosefulbright.com

Aramco in an effort to diversify the Saudi economy. Saudi Arabia is one of the largest oil producers in the world, and Aramco's 5 per cent IPO could make massive waves in the energy industry. This move will likely lead to increased transparency of the world's largest oil company, and Aramaco's structure will probably reorganise to align the country's financial interests with private shareholders.

There is clear evidence of an uptick in domestic and cross-border litigation and international arbitration (including investor–state disputes). In addition, the number of regulatory investigations continues, many of which lead to related civil litigation cases. Like the Petrobras scandal that triggered investigations and civil litigation outside Brazil (most of which remain pending), 2018 will likely yield continued investigations and litigation related to alleged payments by mining company Rio Tinto to a consultant who helped acquire rights to mine the Simandou iron-ore deposit in West Africa, and bribery allegations against Unaoil for its activities in Iraq.

There is set to be a year of continued reinvention of revenue and cost models for participants in the industry during 2018. Energy litigation and arbitration seems a sure bet for increasing activity, resulting from a sustained lower-commodity price environment, increased appetite for strategic and opportunistic M&A activity, changing political landscapes on a global scale, and opportunistic shifts from higher-priced purchase, sale and exchange contracts to more market-sensitive arrangements.

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, due to (a now abandoned) market interference by governmental policies that stalled investments. Twenty-five per cent of the natural gas aggregate demand is supplied by natural gas imported by the government from Bolivia, and 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). The result of this was to contribute to the growing governmental deficit up until 2014, which has since started to be reduced because of the fall in international energy prices. Since 2013, crude oil production has been spared this interference (that had in previous years established an export withholding tax resulting in a price of US$42 per barrel for the domestic crude oil producer at times where the international price was at least double that), by the government deleting such export withholding, and sponsoring an 'agreement' between the downstream and the upstream oil industry ensuring US$67 per domestic barrel (though not entirely respected, as refineries reduced purchase price to lower values than those of the agreement, described below) until the end of 2016, passed through to a heavily taxed gasoline and gas oil price to consumers. In December 2016, convergence with international prices was sought by a renewal of such 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 (47 for the heavier kind) for 2017, under the supervision of the government acting as an 'umpire' by means of loosening the grip on imports and, on the other side, allowing gasoline quarterly increases (to keep pace with inflation) to align them with those upstream crude oil prices on a netback basis. As is evident, such crude oil higher-than-import parity prices were sustained through an import control limiting the highly concentrated, four-refineries procurement of imported crude oil. Taking the profit on international prices increase trend in 2017, the government has announced that no prior control on crude oil imports (and its by-products) will be made as from the end of 2017 onwards (Decree 962/17, superseded Decree 192/17 and Res E 47/17, that had established the pecking order for importers according to accrued data) that had made official the, until then, hushed crude oil imports' control policy. At current prices, no incentives for secondary or other enhancement recovery techniques on existing conventional, predominantly oil producing fields seem in sight, to counter the decline of oil aggregate Argentine production of 7 to 8 per cent through 2017.

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 tariffs, thus reducing the gap of historic natural gas production depressed prices, depending on the different destinations (residential or large customers). The Resolution was, however, based, while attempting to correct them partially, 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 passing through of such upstream costs to tariffs (details of the case are discussed below). The government swiftly followed the criterion set forth 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$3.5 per MMBtu (US$5.22 for the gas producer) with an increase price path (as from March 2017, US$4.72, and US$5.64 for the gas producer, as per Res E 74/17) for the next three years, up to US$6.8 per MMBtu to end-2019 (Res E 212/2016; now Res 474-E 2017). Both power and natural gas distribution tariffs continue to experiment increases to realign price subsidised values to market prices, and the gas upstream prices of conventional sources follow the same, while respecting the public hearings' procedures as per the Supreme Court guidelines that defused conflicts, while the value added feed-in tariff increases of distributors result from the Tariffs Reviews accomplished by the relevant governmental agencies, ENARGAS and ENRE.

The Gas Plans, 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, were kept for 2017. Resolution of the Minister of Energy E 46/17, complemented with Resolution 419/17 (and Res E 447/17 reaching the Austral basin) has 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, guaranteeing such floor (net of royalties) with respect to the median price of the aggregate natural gas (conventional or not) sales of the applicant. But such extension is now reserved for the incremental production of the fields (without computing the decline curve of the same), 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.

Gas exports, forbidden for more than 10 years, are now being allowed provided they include interruptible supply clauses, with no penalisation for interruption, though coexisting with seasonal, substantial LNG imports and of the contract gas from Bolivia (Resolution 407/17 MEyM regarding swaps, followed by Res MEyM 962/17 for interruptible supply exports). Long-range planning and stable rules are also necessary.

The government was considering reinstating the 1990s natural gas spot market as from the second half of 2018, later on subject to new postponements, while interim fixing supply quotas are to be allocated to distributors at set prices and dispatch priorities, as in former times. This is reminiscent of the overregulated market of segregated gas prices that led to a stall 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 and for gradual increase of well head prices. The transition to open market policies would demand a series of measures to make different priced gas sources (conventional/non-conventional/imported) to coexist, but that can only lead to 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. But this would require the leading role of a market of standardised

term contracts for distributors, large customers, and power generators, requiring as well similar reforms on the power sector, in order to avoid opportunistic behaviours that could jeopardise reliability of supply (which requires power capacity agreements and non-interruptible gas supply contracts to be put in place as well). Thus, the spot markets in both natural gas and power should be left to solve 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 current scenario anticipating a regulatory induced gradual increase of the renewables' share in the power generation matrix, to reach as from end-2017 8 per cent of the aggregate power supply, to increase in following years up to 20 per cent on a sliding scale (it is less than 3 per cent at present, excluding hydro, thus postponing in practice the target) has been attended by successive rows (the first one, later on extended, and a second one, by Resolution ME&N 275/17) of public bids by CAMMESA for 20 years supply agreements' offers (labelled as Joint Sales), at a price subject to escalation, to attempt to reach such targets in the supply side. The big consumers (industry, etc) over and above a capacity demand above 300 KW are forced to comply with the 8 per cent quota of renewables with respect to their own overall power demand. The regulation of the aggregate demand of renewables' sourced power allows some sort of competition with the power purchased by the government (the Joint Sales), with either the remaining renewables offers that may be installed for the industrial consumers, or renewables energy auto generated by large consumers. Such competition is subject to an iron fisted choice by the large customer, to be made once each five years, to decide if its 8 per cent renewables consumption quota will be filled either way, being unable to switch from one to the other source during such period.

In order to give some flexibility, it was further admitted that the large consumer might avoid making such a choice, thus both consuming renewables' sourced energy from the CAMMESA's Joint Sales pool and from other renewables' sourced energy, but then facing incremental costs for power reserve and other charges.

Thus a quota system segregating the renewables captive demand from the rest of the energy aggregate supply, and a forced choice between (i) government-backed (the Joint Sales) supply (at median price of all the bids referred 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 the large consumer's bet of opting out quite risky) that the already acquired future production by the government from the winning bidders (the Joint Sales) will effectively meet their captive demand. In effect, the individual default of the yearly quota of renewables' consumption by each large industrial consumer, and ensuing power consumption to match such deficit, from other sources than the renewables contracted out of the governmental offer mentioned in (i) above, will be heavily penalised.

The intermittency of renewables, which were allowed to bid with no capacity commitment, pretends to be solved by the government through offering capacity back-ups for the pass-through of such contracts to great 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 shortcomings, with a priority of dispatch adding to the uncertainty of making such choices in the medium to long term.

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 oscillating 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, thus freeing the government of the heavy burden for sustaining these programmes (as the price differential between the international price and the domestic market price would be substantially reduced). The import parity is the ironclad law of markets, washing away economically and technically wrong concepts of reference prices by computing Henry Hub prices plus transport costs into the country. The shale and tight gas projects expect a soft landing into market prices that, when freed from regulatory measures, would reach such import parity level, making them profitable. The significantly quick declining curve of shale fields' exploitation and the need for continuing, short term, investments, does not allow a forecast of long-term scenarios.

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

The prospect of further development can be expected despite the current low international energy prices 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 the domestic price agreement of the oil industry for crude oil referred to above; and
- the need to reduce the governmental budget deficit (also requiring a significant reduction to power and natural gas consumption subsidies) and the aggregate trade deficit caused by significant energy imports, which will lead to higher overall price increases for gas and power as well, while narrowing gas and power consumption subsidies to well-focused social tariffs for the disadvantaged.

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

Federal and provincial states have the eminent domain (and collect law-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 the 1990s energy growth was ensured through deregulation (and the ensuing privatisation of previously government-held entities) and market-oriented policies is expected to be enforced again, by dismantling the maze of regulations from the 2000s that made for 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 in detail. However, the path shown by the current government (by fixing a natural gas price increase path for the next few years to reach import parity prices) is still to be defined, as solutions are taken on a provisional basis with no long-range plans allowing the oil and gas industry to forecast a 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 privilege non-conventional oil and gas exploration and production, as a more stable substitute for the Gas Plans and for the crude oil 'agreement', now left aside (or perhaps suspended). 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 of prices described above is not sufficient to envisage a bold investment surge in the sector, which should be made on the basis of a forecast of stable rules. For more information on analysing 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 our '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 intended to show that a global approach on both is necessary,

closing the circle that had been initiated with two entirely separate legal frameworks, for natural gas and electric energy.

The present Minister of Energy and Mining eliminated Decree 1277/12, an all-encompassing framework that went far beyond the law that declared the expropriation of YPF's control. 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 the decrees under which the existing concessions were granted in former years). The government elected at the end of 2015 has therefore committed to a policy to return to the original legal framework.

It remains to be seen whether the significant effort by the federal government elected at the end of 2015 will restore market signals for attracting the needed investments, especially by: dismantling (and not merely by gradually increasing energy prices and tariffs) the price segmentation of natural gas and power generation prices, as well as the implied or express price caps; while building a market for medium and long-term contracts (both for power and for natural gas) allowing the passing-through of the resulting cost and the elimination of opportunistic behaviour, leaving the spot markets for the make-up of temporary supply deficits or producers themselves.

As regards natural gas, the current Resolutions of the Ministry of Energy and Mining, intending to positively respond to a gradual increase of natural gas upstream prices and tariffs, are, however, confusingly based on the resolutions of the former government that were issued in excess of powers and pretexted forced agreements with the industry, instead of clearly steering away from them and regulating in detail the effective transition steps towards the goals and principles set forth in the Gas Law. 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 to be achieved in the future, and 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 to government take and promises of standardisation of terms thereof, should be accompanied by a transparent market for the farm-ins that will be the basis of the market renaissance of new investments, especially due to the dominant position of YPF regarding shale resources.

Commercial/civil law – substantive

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

In the oil and gas upstream industry, the typical set of agreements is applicable, starting with the joint operating agreements ((JOAs), for which the choice is wide, as the AIPN models compete with AAPL, CAPL, AIPN (Australian version as well), OGUK, etc) that coexist in Argentina with its local version (Unión Transitoria), as a non-partnership, unincorporated agreement to be registered in the Public Registry of Commerce, updated under the new Civil and Commercial Law Code that has recently come into force. The extended exploitation concessions are still operated with JOAs as initially used during the 1990s, therefore as per the AIPN model of such time (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 offering or not 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 for participating in the existing exploitation concessions and those to be extended, the holder of title to the concessions being the other party: YPF; the provincial entities that have emulated 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. Term agreements between generators and large customers were banned in 2013 (Res SE 95/13), and must now be entered into exclusively with the dispatch centre, CAMMESA (the power dispatch centre and broker between supply and demand for power, described below), and for gas to be delivered to thermal power plants at subsidised 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 renewable energy long-term contracts under the Renovar plan, for new gas-fired power projects called in the second quarter of 2016, 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 through such energy acquisition costs to distributors and large customers, in a still-undefined energy matrix that instead should have to respect open market practices to find the economic equilibrium of aggregate supply and demand.

The regulations that have accumulated over the years are now being changed in order 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 contracts supply to large customers, eventually traded in a term contracts trade market.

Natural gas shipping agreements and power supply transmission agreements are of a more standard nature, though open access should be ensured to enable the grid's future expansion. This expansion will give new opportunities to sign contracts with third parties to make enhancements and ancillary extensions in order to optimise the current network of pipelines, gas distribution and power transmission. As seen in the answer to question 1, the until-now 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 the 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 be at least negligent in order to be subject to compensation for damages (article 160). As per article 1,743, an anticipated waiver is not valid if it is against good faith or if there is a deliberate attempt to cause prejudice to the other party (article 1,743).

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. A good practice should make for a careful forecasting of the effects of regulatory changes in the economic equilibrium of the parties, especially in areas prone to be hit through such changes, such as can be the case for 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 governments, etc)). The general question of who is to blame for 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, royalties determination, environmental standards and litigation, supply duties or price caps imposed through new laws, access restrictions, etc). Mitigation duties are also of the essence, and are seldom considered as a part of the contractual duties between parties of the variety of contracts and associations, while 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 so labelled as force majeure under common law coexist with the concept of force majeure that results from the Civil and Commercial Law Code provision, also identified as an unforeseeable event and will rule either expressly or by default (if there is no clause to the contrary, as the parties may shift the burden of such events between them) in any contract.

Under this section, both unforeseeable 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. In order to clarify the concept, the doctrine refers to comparative law, and thus includes acts of God, similar to those defined under English law precedents; acts of the enemy, such as war and blockade; and sovereign acts, meaning a governmental resolution prohibiting, for example, foreign trade.

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 typical matters for disagreement is if the impossibility or irresistibility of the force majeure case has to be 'absolute' rather than 'relative', barring any possibility of performing, excluding the application of force majeure if 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 able to be called in any case in which a fixed price has been destroyed by sudden hyperinflation or extreme devaluation. Article 1,091 of the Civil and Commercial Law Code rules the matter in a similar way, but now expressly grants the right to request a court's adjustment of the contract's balance.

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

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

Instead, floods, extraordinary rain and extreme winds have or have not been accepted according to the possibility of the parties to foresee such occurrences with due consideration of past statistics. Fire is generally accepted as a reason when it is started outside the premises, and 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) to bring a concessionaire to the renegotiation table through threats of rescission (paragraph 7.4.31, p. 215 of the award). In the case *Total SA v Argentina*, the lack of choice was evidenced 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 in order to satisfy local aggregate demand, relieving instead the signors from being subject to supply at lower prices.

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

How 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, 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. 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, always 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 due 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-signors is a much-discussed issue. In Argentina, the issue has been raised for the opposite purpose, as defence for lack of jurisdiction (the Argentine National Commercial Court of Appeals holds that a third-party guarantor may invoke an arbitration clause, 2 March 2011). In a decision rendered on 19 October 2010 and published on 10 February 2011, the National Commercial Court of Appeals, chamber C, seated in the city of Buenos Aires, confirmed that a guarantor could invoke and benefit from the negative effect of an arbitration agreement even though the guarantor is not a party to the underlying contract.

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

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

Two-tier dispute clauses are generally adopted in construction cases, 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 to augment the scope of the measure, its amendment or to extend such measure to other goods.
- They do not produce res judicata effects, nor, if denied, preclude the party from requesting the same measure again in the future before the same judge, nor should they directly affect the substance of the claims being decided in the main proceedings.
- They are urgent.

Conditions

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

Appearance of truth of petitioner's right

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

Danger that harm may result from the delay

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

Posting of bond

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 be started. Once the exequatur process is successfully approved, the foreign decision is equivalent to a local decision.

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

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

In *EN–Procuración del Tesoro v International Chamber of Commerce*, the Federal Contentious Administrative Law Appeals Court, panel IV (17 July 2008) ordered the suspension of the arbitral procedure, pending the challenge of one of the arbitrators by the Argentine Republic (on the basis that the rejection of the challenge by the International Court

of Arbitration, of the ICC, had not made the grounds for such decision public).

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

In the 2007 *National Grid* decision, the Argentine National Court of Appeals annulled a decision of the International Chamber of Commerce. The latter had rejected Argentina's challenge to the arbitral tribunal in the National Grid's arbitration against Argentina. The Court of Appeals ordered the arbitral tribunal to suspend the proceedings. In 2008, a new interim measure followed suit. The Court of Appeals quoted *Cartellone*. 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 the ones where public policy law (ie, antitrust, fair competition, administrative law – see CNCom, panel C, 5 October 2010, *CRI Holding Inc Sucursal Argentina v Compañía Argentina de Comodoro Rivadavia Explotación de Petróleo SA*) and if they can exercise a constitutional law control is applicable.

Nullity has also been declared of an international arbitration award in *EDF International SA v Endesa International (Spain)*, 12 December 2009, National Appeals Court in Commercial Matters (commented on by Julio César Rivera, *La Ley*, 1 December 2010), 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 Centro Empresarial de Mediación y Arbitraje, the Centro de Mediación y Arbitraje de la Cámara Argentina de Comercio (CEMARC), and the Arbitration Court of the Buenos Aires Stock Exchange (with permanent arbitrators), under their respective arbitration rules, but it cannot be said that they are specialised in energy disputes. The International Centre for Dispute Resolution (of the American Arbitration Association) has a list of specialised energy arbitrators. Section 1,657, CCC, does refer to arbitral institutions as suitable administrators of arbitration carried on under their respective rules, deemed incorporated in the arbitral agreement.

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

Arbitration is almost always chosen in the energy sector. The complexity and specificity of the disputes thereof, which require arbitrators with experience in such fields, are the reason for this. Moreover, if the arbitration clause requires the arbitrators to be chosen by the parties as well as the chairman of the arbitrators tribunal, 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 kept reserved for the exclusive scrutiny of the court, will not preclude such court from being in the knowledge of 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 its supporting documents), which may be ordered to be shown to the court-appointed expert in order to reach conclusions on the financial statements of such party or on transactions booked by the same. Law 26388 made it a crime to have undue access to electronic telephone communications.

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 7,c of Law 23187 sets forth such privilege. In the rare cases where there has been an attempt to make such counsel be a witness, the counsel has the right to refuse to answer based on the duty to maintain professional secrecy and the judge may not insist on such enquiry.

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

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

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

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

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

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

Under a stretched 'agreement' forced by the government under a Resolution SE 599/04, as from 2011 Resolution SE 1410/10 (afterwards complemented by Resolution 89/16 and resolution ENARGAS 3833/16 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 present Minister of Energy and Mines has anticipated that the many regulations distorting the legal framework still in force, though not respected, will be revoked in order to restore the articulate system set forth in Laws 24076 and 24065, which includes a non-distorted open access principle.

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

See questions 20 and 21. Challenges to the decisions of the energy regulator have been frequent, the most significant ones being the international investment arbitration cases under bilateral investment protection treaties, whereby the international standards of international rights are deemed to have been breached by the regulations implementing energy policies by the past government. This began with *Total v Argentina*, 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. The last development in ICSID has been the rejection of the annulment request by Argentina of the arbitral award issued in favour of claimant, Saur.

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

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

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

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

Update and trends

A threefold scenario should be considered.

As explained in questions 1 and 2, the current energy regulations are still in transition, because:

- as for crude oil price signals, both: the subsidies granted that dampen the downstream net back effect of international prices of the same and of its by-products; and the restrictions to import them, have been recently discontinued;
- as for natural gas, different prices coexist for new and old natural gas for some years to come, waiting for a free market of natural gas at import parity prices; and
- power also has different price signals, as renewables' offer and demand are made out of auctions of long-term contracts with a single purchaser, a governmental agency, for it to resell this contract power supply to a captive aggregate demand of large customers and distributors (forced to buy such renewable-sourced electric energy for increasing percentages of their overall power consumption, 8 per cent of it being the present target).

These regulations are kept to make for government-originated reference prices of energy while correcting blatant interferences, under the declared end of the state of emergency rules, yet to be enacted. The general view is that prices will converge into a single one based on a near future, import parity equivalent, leading to a reduction of the distortion of relative prices, and that successful fracking experiences will keep their attraction after the current price enhancement ceases to have continuing support.

Though being a sound purpose, the 'how to' seems full of pitfalls, still to be solved, which makes for investments to be cautious, and effected mainly by already-existing players in Argentina.

The second subject of concern is environmental claims, and the third one is native title.

There is a general trend to consider climate change prevention a matter exceeding state actions, and to make the soft-law commitments of the national governments under the Paris Agreement to be complied with through individual litigation and conflict.

The establishment of general objectives (that can only be achieved by the coordinated action at the level of sovereign states) as specific, enforceable commitments of any extractive or any industrial or commercial activity, to be the subject of individuals or group claims to be enforced by the judiciary (of every country, or by international courts to be created) does not only run counter to the basis of international law, but may in addition affect economic activity in ways that are not those that were expected to be achieved. The quest to ensure the judiciary (as a consequence of claims) may by itself influence economic incentives and penalties for choosing and discarding sources of energy, may end up aggravating the system dysfunctions to end up increasing levels of GHG (greenhouse gas) and affecting reliability of supply, altering the necessary mix of renewables and non-renewable sources of energy, and with it the entire economic system by making for global losses and abrupt changes in the value of the investments made and to be made.

The trend is also permeating to taxation: a CO_2 contribution tax is being considered in the tax reform in analysis, with economic effects yet to be calculated, posing a difficult allocation problem amidst the chain of CO_2 generation: producers (though apparently exempting natural gas), processors, consumers. The project seems to be completely ignorant of the contribution to pollution by each stage from upstream to the downstream, looking for a green footprint, and instead focuses on a direct tax on the fuels at the consumption stage.

At present, however, court cases are focused on soil and acquifer pollution, with land owners, users or occupants (whether alleging native title or not), going beyond the statutory relief granted by law for above-the-surface rights, with occasional abuse of the extent of damages claimed and causation stretched to the extremes.

As for native title, law 26160's stay period for the indigenous (recognised by the government as such before such law's enforcement date, through an enquiry process) eviction regarding provisional occupancy rights has been extended to end in 2021. These are traditional, sparsely populated, communities, but 'new' settlements are being added by land occupation and confrontation in, among others, zones adjacent to, or in, oilfields, as hierarchy tribal authority unifying the discussion is not present in those new cases, making the dialogue between parties difficult. The government is making a distinction between the former cases and their peaceful solution, with the new ones that are neither protected by the stay order of pre-2006 settlements nor have roots in the area.

In Argentina's legal system, owners have surface rights but under-the-surface resources are for the government to grant them in concession. Landowners may not oppose the granting of such concessions (article 49 of the Hydrocarbons Law (HCL)), and instead are entitled to statutory compensation (article 98 h, HCL, grants the Executive the right to fix them), or higher compensation damages if proven (article 100 HCL), while the concessionaire has the unrestricted rights to make all necessary infrastructure as per approved investment plans to meet its duty to exploit rationally the field under concession.

The territory where oil and gas exploration and exploitation is made is sparsely populated, and the conflicts regarding such activity should limit confrontation of land uses to issues on compensation, a subject that is however put in discussion by indigenous communities' de facto actions. In *Petrolera Piedra del Águila SA v Curruhuinca, Victorino et al*, of 17 February 2011, the Superior Court of Justice of the Neuquén Province rejected a writ of mandamus for the ceasing of actions by an indigenous community impeding the concessionaire to set up the infrastructure needed for the field development. The tribunal held that a prior consultation (not expressly referred to in the Argentine legislation) should have been made, by recalling the power of the Legislative to respect the individuality of indigenous communities and their communal property or possession, with a right of the latter to participate in decisions regarding natural resources.

The matter, however, is entirely different from environmental impact statements or licences for such activities, which frequently request at the provincial level for consultations to be made, an issue that was not at stake in the case here mentioned.

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

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

The 10-year extension will be granted at the end of the concession, if the investment plan is approved, and compliance with the concession duties is proven, plus a bond of 2 per cent of proven reserves remaining in the exploitation concession to be paid to the holder of the eminent domain (the relevant province or the federal state, depending in which territory the concession is granted) at an average two-year median price-basin price; to be reduced to 2 per cent if the exploitation concession is transformed into a non-conventional exploitation concession, calculated on proven reserves (applying conventional exploitation methods) together with an increase of up to an 18 per cent royalty. Rights of way are granted for performing the relevant activities, 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).

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, 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 of such concession holder, 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, 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. The current tax reform in analysis is partially addressing capital gains taxation by a one-shot tax to allow for assets revaluation to market levels, leaving aside the historic cost at nominal levels.

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 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 hydrocarbon exploration and exploitation offshore or in Argentine territory, specifically reaching the Falkland Islands, and imposing heavy penalties on companies developing such activities.

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

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

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

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

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

See question 18 on the Data Protection Law.

AG ABELEDO GOTTHEIL ABOGADOS
ERIZE - PINNEL - GALLO

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

Av Eduardo Madero 1020, 5th floor
C1106ACX Buenos Aires
Argentina

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

Austria

Thomas Starlinger
Starlinger Mayer Attorneys-at-Law

General

1 Describe the areas of energy development in the country.

The Austrian internal energy supply is based on a balanced mix of energy sources. The following numbers represent the energy consumption of 2016 which are in total: approximately 36.4 per cent oil, 21.1 per cent gas, 29.5 per cent renewable energies, 9.0 per cent coal and 2.2 per cent combustible waste. The remaining part, namely 1.8 per cent, comprises net import of energy from aboard. The production of nuclear energy has been banned since 1978 according to the Federal Law for a non-nuclear Austria.

Oil has been the most consumed energy in Austria so far. There are two Austrian companies in charge of the exploration and production of oil that cover about 8 per cent of the annual consumption. For the rest, Austria relies on the import of raw oil, whereby Kazakhstan, Saudi Arabia and Libya are listed as the most important delivering countries. The import of raw oil has stagnated in recent years and the import of petroleum products has decreased. The highest percentage of final consumption of oil is related to the transport sector at almost 80 per cent. During the past few years, there has not only been a decrease in the export of petroleum products, but also an ongoing decrease in the internal consumption of oil.

Among renewable energies, the internal consumption of hydropower is most prominent with about 34.7 per cent (among all energy sources about 10.2 per cent). Biomass is also traditionally exploited in high amounts – mostly for heating, but also increasingly for electricity production and combined heat and power (CHP) plants. Owing to political efforts and the promotion of renewable energy, there are several other renewable energy sources that have gained importance over the past few years. Next to hydropower, there has been an ongoing increase in the consumption of wind energy, geothermal energy and solar energy.

In addition to the oil and the renewable energy sectors, natural gas is another source that should be highlighted. Over 50 per cent of natural gas is imported from Russia, followed by Norway and Germany. The internal consumption has decreased compared with other energy sources in recent years, mainly owing to a reduction in the use of natural gas in thermal power generation.

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

Undertakings in the energy sector have largely been privatised, but the state still owns shares in some companies, such as 31.5 per cent of OMV, the largest producer and importer of oil and gas. In the electricity sector, Verbund AG, the leading electricity producer (mostly hydro energy) is still majority state-owned. Additionally, some nationwide and regional companies have to be at least 50 or 51 per cent owned by Austria (federal state or provinces) under the Federal Constitutional Act on ownership structure of electricity companies. The federal government is in charge of supervising and enforcing those requirements.

Austria must fulfil both the European energy policy-related objectives and its own energy strategy. The European Union initiated an energy policy in 2007. It is focused on: the promotion of energy efficiency; the security of supply; and the development of renewable energy and the reduction of carbon dioxide at the same time. All objectives are counted in percentages (eg, 34 per cent more renewable energy in Austria), so that a particular percentage must be reached by 2030. At irregular intervals, further thresholds are implemented.

In addition, Austria initiated an energy strategy in June 2009. It aims to secure supply, to reduce costs and promote efficiency, to be competitive as well as to be more compatible with the environment. The strategy's progress is constantly examined by evaluations, which can lead to adjustments to this strategy. Several amendments to the Green Electricity Act have been passed by parliament in 2017 to optimise further the development of the renewable energy sector. In addition to the expansion of green electricity, the possibility of financial support for private persons installing photovoltaics can be listed as one additional attempt to promote renewable energy.

Commercial/civil law – substantive

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

Most energy traders active in Austria are members of the European Federation of Energy Traders, which provides standard forms for wholesale energy transactions. Although these standards can be used, they must comply with the Austrian legal requirements for standard terms and conditions.

Electricity and gas suppliers are obliged to submit their standard terms and conditions for sales to private end-consumers and small businesses to the Austrian regulatory authority E-Control. E-Control assesses whether these standard terms and conditions violate Austrian law and prohibits non-compliant standard terms and conditions, if necessary. Any change of standard terms and conditions must also be submitted to E-Control.

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

Sections 914 and 915 of the Austrian Civil Code provide interpretation guidelines. In case the wording is unclear, according to these provisions, first and foremost, the intention of the parties must be taken into account. It is to be determined by interpretation how an objective third party would understand the wording. If no clear result is provided by such literal interpretation, business customs and general practice are taken into account. As a rule, if no interpretation leads to a clear result, the Austrian Civil Code states that indistinct statements are to be interpreted to the detriment of the party who declared them.

If the contract does not include clauses to regulate a certain situation, it is presumed that the parties agreed on what reasonable parties would have agreed on had they considered such circumstances would arise.

5 Describe any commonly recognised industry standards for establishing liability.

Unless specifically provided otherwise in the law for specific cases, liability is fault-based. Depending on the degree of recklessness, slight negligence, meaning the occurrence of such mistakes as even a careful and reasonable person might make sometimes, is distinguished from gross negligence, meaning a degree of carelessness that cannot possibly happen to a reasonable and prudent person. It is possible to agree

on different liability standards in contracts or in standard terms and conditions.

In general, liability for slight negligence can be excluded. Any other limitation of liability is prohibited in the B2C sector. In contracts between companies (B2B), excluding liability for gross negligence is not per se prohibited. In recent case law of the Austrian Supreme Court, a differentiation between simple and blatant gross negligence has been made. Liability cannot be excluded when it comes to blatant gross negligence, but liability tends to be excludable in at least some cases regarding simple gross negligence. Liability for personal injuries cannot be limited. Likewise, liability for wilful misconduct cannot be excluded either. In practice, liability in the case of slight negligence is usually excluded in contracts concluded between companies active in the energy business.

Besides, some laws provide for liability regardless of fault (strict liability). Such provisions can be found in product liability law, nuclear liability law or liability for owners of energy plants (according to the Imperial Act on Liability); see in more detail the answer to question 9.

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?

There are different concepts of excusing performance in Austria. First and foremost, if the parties agree on something completely impossible, the contract is void (section 878 Austrian Civil Code). The same applies if the performance of a contractual obligation becomes impossible after its conclusion through coincidence (section 1447 Austrian Civil Code). In such cases, no party must perform. On the contrary, if the contract is valid, the parties generally have a duty to perform.

However, the concept of 'change of circumstances' has been established in Austrian academic literature. This concept allows the parties to adapt or set aside the contract if the circumstances under which the contract had been concluded, changed or ceased. This claim cannot be brought when changes lie in a party's own sphere or when the changes are foreseeable. Available case law is very strict; almost any circumstance that is thinkable is deemed foreseeable.

Force majeure is also a recognised concept as subsequent impossibility. In addition, it can be contractually agreed that certain circumstances release a party from its obligation to perform.

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?

According to section 339 of the Austrian Civil Code, the owner is allowed to file a suit against anybody who interferes with his or her ownership. The claim seeks the restoration of the prior situation or omission of future interferences. Accordingly, operators may be subject to such claims.

8 How may parties limit remedies by agreement?

Parties usually agree that simple negligence will not lead to liability for damage as well as on a limitation of the amount of damages, but liability for wilful conduct can never be excluded and therefore cannot be limited either.

It is possible to agree on a lump-sum contractual penalty owing to inadequate performance, non-performance or delay according to section 1336 of the Austrian Civil Code. Unlike a normal contractual liability, this compensation does not depend on the actual amount of damage caused. It is to be paid in any case when the agreed event or conduct of the party occurs. With regard to consumer contracts, such contractual lump-sum compensations must be particularly negotiated and may not be part of standard contractual clauses. Nonetheless, in any case, damages beyond the contractual lump-sum can still be claimed.

On request of the obliged party, courts may mitigate the penalty if it is excessively high. Thereby, the degree of fault and the actual amount of damage incurred will be taken into account. Whether and by how much the penalty will be reduced is at the discretion of the judge. Any possible contributory negligence is also to be included in the judge's decision. The right of mitigation by courts cannot be excluded.

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

Strict liability is a common concept in Austrian jurisdiction. There are three laws in the energy sector that must be examined in more detail: the Nuclear Liability Act, the Imperial Act on Liability and the Mineral Resources Act.

The Nuclear Liability Act regulates liability for property damages and injuries on persons caused by nuclear material. Under this law, power plant operators, owners as well as transporters are liable for any damage while using, transporting or disposing of nuclear material. All of them must enter into liability insurance. The liability cannot be limited or excluded. However, the obligation to compensate does not exist if requisite diligence has been applied to prevent the damage and the damage was not caused by failure of material.

Under the Imperial Act on Liability, owners of a power plant are liable for death, accident, injuries on persons as well as property damages caused by electricity or gas. Owners are not responsible if the energy device is defective or damage is caused by force majeure.

The Mineral Resources Act is only applicable for exploration of mineral resources such as oil or gas or during extraction, treatment and storage. For mining, the licensee is responsible for any mining damage such as personal injury, damage to health or property. Liability is excluded if an inevitable event caused the damage.

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?

When interpreting competing choice of law clauses, it will be examined whether, upon agreement on the more recent clause, the parties wanted to change their previous arrangement or leave it untouched, and merely apply the new regime to the later contract, using the rules of contractual interpretation explained above.

Regarding choice of forum, once a claim has been brought before a court, that court will assess whether it has territorial jurisdiction and substantive competence to rule the case. Agreements on international or territorial jurisdiction are generally permissible according to section 104 of the Law on Jurisdiction, whereas a court's substantive competence is not subject to change by agreement. In an international context, courts apply Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in order to determine their jurisdiction.

With regard to choice of law, Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) is applicable. As a general rule, the parties can choose the governing law. They can change it at any time as long as all parties agree. Special rules must be applied to contracts of carriage, consumer contracts, some employment contracts and insurance contracts. The regulation may be applied to the whole or only a part of the contract.

Agreements to arbitrate are possible in all cases where ordinary courts may have competence and arbitration is not explicitly excluded by law. In case the competence of an arbitral tribunal is disputed, according to the Austrian Civil Procedure Code, the arbitral tribunal has the competence-competence, meaning that the arbitral tribunal decides on its competence.

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

Stepped dispute clauses are common. Parties are required to negotiate in advance of any mediation or dispute settlement procedure. On the contrary, split dispute clauses, where only one party can decide whether to go to arbitration or to litigation, are not commonly used. The enforceability of both dispute clauses depends on the specific wording used by the parties in the contract. In any event, dispute clauses must be clearly formulated. It must be clear when each step starts and ends. The party that chooses the jurisdiction in split dispute clauses must give notice to the other party. If the split dispute clause is part of standard terms and conditions of one party, the other party should have the right to choose the jurisdiction. The dispute clause might not be enforceable otherwise.

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

Experts are individual persons with special knowledge. They can only be appointed by court. However, parties are entitled to request and propose a particular expert, but the court is not bound by that request or proposal.

Experts usually provide their testimony in writing. To comply with the principle of immediacy, experts may present their testimony in a hearing on request. Expert testimony consists of findings, a description of the facts, opinion, and the expert's conclusion. Reasons must be given for both parts of the testimony.

Experts can be dismissed on request, like judges, when one party believes that the expert is impartial or biased. However, only courts may dismiss an expert. Experts are obliged to submit a testimony unless the court dismisses the expert. The party only has the right to request that an expert should not give a testimony before the court. Likewise, the court is free to appoint more than one expert. Usually, a second expert will be appointed if the previous expert or his or her testimony is viewed as inadequate.

The court only considers whether the findings and opinion of the expert are conclusive.

Parties also have the right to bring expert evidence. This evidence, however, is seen as part of the argument of the party, and not as an individual impartial expert testimony.

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

General rules for interim and emergency relief are applied in Austria also with regard to energy disputes.

In civil proceedings, interim relief like injunctions can be sought as optional content within a written submission of the applicant to the court or only the injunction itself can be sought according to section 585 of the Code of Civil Procedure. During a trial, an injunction can be sought at any time. The court will comply with a request for an injunction if the applicant's right is in jeopardy of no longer being exercised, if the enforcement of the claim would be defeated or significantly hindered or if irretrievable damage would be caused. Alternatively, if damage can be measured in money, courts may also demand a security.

Likewise, injunctions can be sought in an arbitral tribunal on request of a party according to section 593 of the Code of Civil Procedure. The district court of the applicant's residence will enforce the injunction.

The same is true for injunctions in administrative proceedings. The claim for granting an injunction is aimed at the suspension of enforcement. If the petitioner is in danger of being hurt by the enforcement of an act while the petitioner appeals, the administrative court may grant the injunction. On the other hand, if there is a risk that the obliged person resists the enforcement or hinders it, the administrative authority may also grant interim relief to ensure that the obliged person cannot do anything to render the enforcement useless. The decision is rendered in the form of a resolution.

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

There are no specific rules with regard to energy disputes in Austria.

Within the European Union, Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is applied. Foreign judgments given in a member state are fully recognised and enforceable in Austria, assuming that no reason to refuse a recognition is met. These rules also apply to judgments from Switzerland and within the EEA.

With regard to other countries, according to section 406 of the Execution Code, foreign judgments are only enforceable if that judgment is enforceable in the country where it was rendered and the reciprocity between Austria and that foreign country is granted by treaties or regulations. Furthermore, the judgment must comply with the Austrian public order. If these preconditions are met, the foreign judgment is to be declared enforceable.

Recognition and enforcement of foreign arbitral awards are determined by the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. More than 150 countries have now adopted this convention, under which every foreign arbitral award is enforceable unless reasons for its refusal are given. The reasons are exhaustively listed in article V of the Convention.

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

No, there are no specific arbitration institutions for energy disputes. The Vienna International Arbitral Centre also administers energy disputes.

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

Disputes between energy companies tend to be referred to arbitration. Disputes between energy companies and end consumers are mostly referred to state litigation.

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

Usually, the parties agree that the content of all written and oral correspondence, including settlement discussions and their results, are confidential and cannot be revealed by parties or counsel.

The concept of 'discovery of documents' is not part of Austrian law. Therefore, settlement discussions are usually not discoverable. However, in some rare cases the opposing party is under an obligation to submit evidence according to section 303 of the Code of Civil Procedure. The requesting party must specify and describe in detail the evidence to be revealed by the opponent party. The opponent party must submit its evidence when that evidence is common to both parties (section 304 of the Code of Civil Procedure). Written statements in contractual negotiations are also deemed to be common to the parties involved. The court instructs the opponent party to submit evidence with a decision that is not enforceable. Hence, not complying with the decision only has an influence on the free appraisal of evidence.

Under Annex 2 of the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters or under Annex 4 of the Protocol on Pollutant Release and Transfer Registers, documents and facts arising in the connection with arbitration are usually treated secretly by the parties and arbitrators. However, it is in any case possible to file a motion to declare documents confidential before an arbitration under the Vienna Rules for Arbitration.

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

There are no specific rules with regard to e-disclosure in Austrian law. Data protection is a very important issue and the high standards of the national Data Protection Act and European legislation concerning the protection of natural persons with regard to the processing of personal data are applicable. The EU General Data Protection Regulation stipulates exemptions of the prohibition of processing personal data in several specific cases such as for the processing of special categories of personal data if the processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity. Further, the EU Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, which must be implemented in the member states until June 2018, must be noted.

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

The concepts of 'attorney–client privilege' and 'work product privilege', like the concept of 'discovery', are not part of Austrian law. However, attorney–client communications, all documents, materials and facts that attorneys get from their client are treated secretly in Austria as a general principle. This European concept has been developed by the European Court of Justice and it is called 'legal privilege'. Under this concept, not only are the communications and documents secret, but also attorneys are allowed to refuse their testimony about facts arising out of their attorney–client relationship. Unlike the Anglo–American concept, in-house lawyers are not regarded as

Update and trends

Based on the global climate treaty to reduce greenhouse gas emissions agreed at the United Nations Climate Change Conference, COP21, in Paris, the European Commission presented its climate and energy policy in November 2016, under which all European member states would be required to further reduce greenhouse gas emission and to increase energy efficiency by 2030.

Austria passed a minor green electricity amendment package in 2017, which includes several amendments in various Austrian laws. This package simplifies administrative procedures and increases its efficiency. It also focuses on promotion of solar systems by adjusting rules and regulations enabling the joint construction and operation of solar system plants at apartment houses that represent an independent electricity power plant for the multiple households living in such buildings. Moreover, additional funds are made available for wind power plants, solar systems plants, small hydropower plants and biogas plants.

This amendment package does not aim at an overall adjustment to the guidelines of environmental state protection and energy aid nor at responding to structural problems. Therefore, a major amendment package establishing cost efficiency and competitiveness as crucial factors for getting funds is envisaged. However, due to federal elections in autumn 2017, this major amendment package will likely not be even proposed before 2018.

In order to further optimise the gas market for customers, the tasks of the market area manager have been integrated with those of the distribution area manager, combining these two functions in one administrative unit. The bundling of responsibilities creates synergies and a one-stop shop for market participants.

There has been a major conflict concerning restrictions to the electricity transmission capacity across the German–Austrian border. Germany and Austria have had a common bidding zone since 2001. In the past years, low wholesale prices in Germany resulting inter alia from increased electricity production (wind power North Sea) in the north of Germany triggered rising demand of transmission capacity to the south of the price zone to Austria and via Austria to neighbouring countries. Capacity restrictions within Germany from north to south led to diverse electricity flow via Poland and Czechia to Austria. That is why the Agency for the Cooperation of Energy Regulators published an opinion in favour of separating the common bidding zone. After Austria had unsuccessfully contested this opinion at the European courts, the regulatory authorities for energy of Germany and Austria came to the following agreement in May 2017.

The common price zone will be split up in October 2018. Nevertheless, free cross-border electricity trade will not come to a complete stop. A 4,900-MW long-term cross-border capacity will continue to be available without prior capacity booking. It is anticipated that, after construction of additional power lines planned between Austria and Germany, free available capacities will increase to up to 7,000MW. What is more, there will also be short-term capacities allocated in the region Central-West, which comprises Germany, the Netherlands, Belgium, Luxemburg, France and Austria, thereby further increasing cross-border transmission capacities. In return for these concessions, Austrian authorities agreed to supply German transmission system operators with redispatch capacities from Austrian power plants of up to 1,500MW.

The Austrian regulatory authority E-control is convinced that this agreement will preserve cross-border electricity trade between Germany and Austria. It is predicted that this measure will keep price increases resulting from the separation of the bidding zones to a minimum. The regulatory authority anticipates an increase of about 5 per cent for wholesale electricity and very little impact for private customers.

attorneys in the sense of legal privilege. As long as there is an employment relation, lawyers cannot be considered attorneys.

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

The energy regulatory authority in Vienna, E-Control, has exclusive jurisdiction on disputes concerning the lawfulness of the refusal of third-party access to the electricity and gas network as well as to gas storage and disputes between suppliers regarding the legality of refusal to transfer entry capacity in gas, unless the cartel court has jurisdiction over such claims. Ordinary courts are responsible for all other disputes concerning claims arising out of the contract between the network and storage operator and the eligible customers for network access, concerning claims between network and gas storage operators and parties entitled to network and gas storage access network owner as well as between network operator and energy companies and concerning claims arising out of the invoicing of balancing energy. However, in cases specified in detail in section 22, paragraph 2 of the Austrian Electricity Act and section 132, paragraph 2 of the Austrian Gas Act, an action by a party entitled to network access or storage access cannot be brought to court until the official decision of the regulatory authority in the dispute settlement procedure has been served.

Besides this, any other electricity and gas disputes can also be heard before E-Control in a facultative settlement procedure according to section 26 of the Energy Control Act.

Regulatory

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

The regulatory policy is determined by the Federal Ministry for Science, Research and Economy. The Minister issues permits required by the Austrian Gas Act for, for example, construction of pipelines unless they require permits under the Environmental Protection Act, under which the local province is the competent authority. It also issues permits under different administrative laws such as the Mineral Resources Act.

E-Control has been a public authority since 2011 under the Energy Control Act. It acts as a regulator in the field of energy, strengthens competition and ensures supply and sustainability. It now comprises three bodies: the regulatory commission as the judicial body, the executive board as the decision maker, and the supervisory board.

The regulatory commission consists of five members, including a judge. All members are appointed by the government for five-year terms. The regulatory commission is competent (among other things) to assess standard forms and conditions and to set tariffs. It decides in form of individual decisions or general ordinances. The executive board comprises two members appointed by the Federal Ministry for Science, Research and Economy for five-year terms.

The general responsibilities of E-Control are to issue licences for network operators. It also has the right to monitor the market and to supervise competition. Its main focus lies on the principle of non-discriminatory treatment of market participants. The Federal Competition Authority and E-Control jointly prosecute anticompetitive practices under the Cartel Act, such as price fixing or abuse of market dominance. The Cartel Court imposes fines up to 10 per cent of the sales revenues under the Cartel Act on request of the Federal Competition Authority or E-Control in order to make market participants refrain from anticompetitive practice. Moreover, also on request of E-Control, the district administrative authorities may prosecute violations of administrative laws such as the Austrian Gas Act or the Austrian Electricity Act and impose fines up to €150,000. E-Control itself can make market participants comply with the regulatory framework.

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

Both the Austrian Electricity Act and the Austrian Gas Act ensure new entrants free access to infrastructure. New entrants may not be discriminated against existing ones pursuant to section 9 of the Austrian Electricity Act and section 9 of the Austrian Gas Act. The access conditions may not be abusive or cover unjust limitation.

Under Austrian law, network operators have the obligation to provide access to new entrants, may they be either final consumers and producers (Austrian Electricity Act) or persons who are entitled to have network access (Austrian Gas Act). They can deny network access in the event of malfunctions, when obligations under Austrian law can no longer be met or technical specifications do not comply with each other. The rejection is to be justified in written form, so that

it may be assessed by the Austrian regulatory authority. If the rejection was unjustified, the network operator bears liability for the damage caused.

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?

Any decisions of administrative agencies such as E-Control and the Federal Ministry for Science, Research and Economy can be appealed. The procedures follow the general Austrian administrative laws. These administrative decisions can be challenged before the Federal Administrative Court. An appeal must be filed within four weeks after service. The appeal must meet formal requirements as well as the appellant must give reasons why the decision is challenged. Judgments of the administrative court can be appealed again to the Supreme Administrative Court or the Constitutional Court if violations of constitutional rights are claimed.

Ordinances from agencies can also be appealed. The appeal must be filed directly at the Constitutional Court, according to article 139 of the Federal Constitutional Law.

Decisions of the energy regulator cannot be challenged in a non-judicial procedure.

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

There is only one rule with regard to hydraulic fracturing in Austria. The Austrian province Vorarlberg unanimously decided on a fracking prohibition in its province constitution in 2014. This prohibition is designed as a state objective, so it would need to be implemented through a law or an ordinance in order to be enforceable. However, an implementation has not yet happened.

Fracking has been used for conventional deposits ever since, but unconventional deposits where the amounts of fracking fluid far exceed those in conventional deposits have never been used in Austria, as records according to the Drilling Borehole Order show.

Any fracking is subject to the supervision of the Austrian mining authority.

25 Describe any statutory or regulatory protection for indigenous groups.

There is no specific protection for indigenous groups.

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

In order to participate in the trade and supply of gas and electricity, companies with a registered seat outside Austria must appoint an Austrian natural or legal person that is authorised to accept service of documents. Companies must be part of a balancing group or registered as a balance group coordinator. The foreign companies must ensure within the registration procedure that technical and personal requirements are met. Detailed instructions are provided on the websites of E-Control, APG, Gas Connect, APCS and AGCS.

The Austrian regulatory authority is required to notify to the European Commission when transmission system owners or operators controlled by a person or company from a third country, needs to apply for a certificate from E-Control. The same is true when an investor from a non-EU country wishes to take control of an Austrian transmission system operator.

However, undertakings from third countries must also consider the Federal Act on Foreign Trade. Permits to trade within Austria for such undertakings are issued (among other things) if there is no risk that goods such as energy were illegally obtained, if trading with those goods from third countries is not a national security concern and if the Austrian energy development will not be compromised.

The acquisition of shares of more than 25 per cent of or the obtaining of control in an Austrian company active in a sector affecting the public security and order including defence, security, energy, water, telecom, traffic and health industries has to be approved by the Federal Ministry for Science, Research and Economy. Licences will not be issued when national security or public interests are endangered.

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

Non-compliance with various statutory provisions and regulations contained in different material laws can lead to administrative fines for companies or individuals as well as to criminal liability, where responsibility for actions of managers and employees can be extended to the company. Typical infringements include failure to register certain activities with the relevant authority or exercising a business without a valid permit. The Austrian Electricity Act includes administrative and criminal law obligations specifically tailored to electricity undertakings and network operators, which also include the misuse of insider information under Regulation (EU) 1227/2011 of 25 October 2011 on wholesale energy market integrity and transparency; the Austrian Gas Act includes similar provisions for undertakings in that sector. The Austrian Criminal Code also includes offences against the environment such as pollution of waters, soil or air, environmentally dangerous disposal of waste or operation of facilities without permission, thereby gravely endangering the environment, be it intentionally or out of negligence.

As regulations that can result in imposing fines on undertakings are spread out over a variety of different laws, it is recommended that a case-by-case analysis is conducted in order to ensure compliance with all relevant legislation.

STARLINGER.MAYER

Rechtsanwälte . Attorneys at Law

Thomas Starlinger **t.starlinger@starlinger-mayer.at**

Am Heumarkt 10
A-1030 Vienna
Austria

Tel: +43 1 383 60
Fax: +43 1 383 60 60
www.starlinger-mayer.at

Other

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

There are no sovereign boundary disputes in Austria that could affect the energy sector.

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

Yes, the Energy Charter Treaty entered into force in Austria in 1998. Austria is also a member of the Energy Community Secretariat.

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

Domestic and foreign investors are protected by the fundamental rights guaranteed in the European Convention on Human Rights, which has constitutional rank in Austria along with the Austrian Constitution and the European Charter of Fundamental Rights and Freedoms. These laws include the right to property, a fair trial and the state's obligation to act in accordance with the law. Additionally, several bilateral investment protection treaties are in place, protecting investors depending on their nationality. A list of treaties can be found on the homepage of the Ministry of Science, Research and Economy.

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.

The main legislative act on data protection is the Cyber Security Act of 2000, which guarantees individuals the right to data protection according to EU standards. It requires every data processor to adhere to certain safety standards and only allows the processing of data with permission of the data subject or under specific circumstances. The new Cyber Security Act implements the European Data Protection Directive (EU) 2016/680 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data into national law, and also brings Austrian law in line with Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC. This new Act has already been passed by the Parliament and will come into force on 25 May 2018. It will include an obligation for operators of 'critical infrastructure' – such as power plants or electricity grids – to notify the authorities of any cyberattacks or of security leaks in their data systems. Fines due to violations will increase significantly and amount to about two per cent of an undertaking's annual turnover. Regulations concerning smart metering are contained in the Austrian Electricity Act.

Belgium

Xavier Taton
Linklaters LLP

General

1 Describe the areas of energy development in the country.

The main areas of energy development in Belgium are the import and supply of oil and natural gas and the generation and supply of power. The Zeebrugge terminal also offers LNG storage and transhipment services. Belgium has no indigenous oil or gas production and closed its last remaining coal mines in the early 1990s. Since then, coal has been imported for industry purposes and the operation of coal-fired power plants.

Furthermore, network development and interconnection capacity remain key to diversifying the fuel and electricity supply, and benefiting from lower prices. Increasingly, energy suppliers are becoming service providers focusing on a broad range of energy-related services, including energy efficiency, demand-side response and home heating.

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

Belgium is a federal state with several levels of government. The federal responsibilities include security of supply, the nuclear fuel cycle, production and federal supply licences, consumer protection and the tariffs for the transmission of electricity and natural gas. The federal state is also the sole owner of the public law company APETRA, which holds the country's strategic reserves of oil. The three regions (Flanders, Wallonia and Brussels) are principally responsible for energy efficiency, renewables, regional supply licences and the tariffs for the distribution of electricity and natural gas. While most energy operators in Belgium are private companies, the municipalities still control the transmission and distribution system operators of electricity and natural gas throughout the country.

Belgium has been heavily dependent on imported energy since the ending of the domestic production of coal. Security of supply is therefore a key objective of the Belgian energy policy. Other objectives include energy efficiency, transparent and competitive energy pricing, and environmental protection. Driven by the EU efforts to deal with the energy and climate challenges, the Belgian authorities support the development of capacities of power generation based on renewable sources of energy. Because of the impact of support schemes on network tariffs and energy bills, the Belgian authorities tend to reduce the support given to new renewable energy installations.

Commercial/civil law – substantive

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

In the sectors of electricity and natural gas, the law obliges the energy undertakings to enter into several regulated contracts, which govern the access to and use of the transmission and distribution systems. The provisions of these contracts are approved by the federal or regional regulatory authorities. In the electricity sector, the main regulated contracts are the connection contracts, the access contracts and the access responsible party contracts. In the sector of natural gas, these are the connection contracts, the transmission contracts, the storage contracts and the standard contracts for liquefied natural gas.

Standard agreements for wholesale trading of electricity and natural gas have been developed by the European Federation of Energy Traders.

In the oil sector, programme contracts are entered into between the Minister of Economy and associations of oil undertakings in order to set limits on prices charged to end-consumers for various oil products including automotive fuel.

The public law company APETRA, responsible for managing the strategic oil supplies of Belgium, can enter into different types of standard agreements with energy market players to conduct its operations. These agreements include contracts for the sale and purchase of oil, storage contracts, crude against products contracts and ticket contracts (ie, call options for end products).

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

Under Belgian law, contractual interpretation aims to find the common intention of the contracting parties (article 1156 of the Civil Code) on the basis of the intrinsic and external circumstances surrounding the conclusion and the performance of the contract by the parties. If it is not possible to discover the common intention of the parties, articles 1157–1164 of the Civil Code provide guidelines on how to ascertain the hypothetical intention of the parties. One of these main guidelines states that in case of doubt, an agreement shall be interpreted against the one who has stipulated, and in favour of the one who has contracted the obligation. The draft bill modifying the Civil Code, which was published in December 2017, does not change the rules governing contractual interpretation.

The same rules apply to energy contracts.

5 Describe any commonly recognised industry standards for establishing liability.

The liability clauses in regulated energy contracts vary. They may exclude liability in specific circumstances, limit liability to specific contractual caps (which usually vary according to the nature of the breach) or limit liability to the cases of wilful misconduct and gross negligence. The liability clauses often combine several of these mechanisms. Indirect or consequential damages are usually excluded.

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?

Under Belgian law, the concept of force majeure refers to events or circumstances beyond the control of a party that causes a failure by this party to fulfil its obligations. Mere price or supply volatility will not be sufficient to establish a case of force majeure. Non-performance of an agreed supply of energy will only be excused if an event beyond the control of the supplier has made it impossible for it to perform its obligation.

To date, Belgian law generally does not recognise commercial impracticability or frustration as valid reasons to excuse non-performance of contracts. Hardship clauses are, however, sometimes enforced by the Belgian courts. Such clauses allow for the renegotiation of an agreement if a change of economic or regulatory conditions

outside the control of the parties fundamentally alters the equilibrium of the agreement.

Belgian law might change in the coming years on this issue. A draft bill of December 2017 indeed aims at modifying the Civil Code in order to accept the doctrine of frustration. If this bill turns into law, Belgian courts will be entitled to modify the content of a contract or to terminate the contract, if there have been radical and unforeseen changes of economic circumstances in such a way that performance of the contract cannot be reasonably demanded.

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?

Claims of nuisance can be lodged against energy projects through two kinds of proceedings.

First, third parties and more specifically neighbours of an energy project can submit complaints to prevent the project from obtaining the required administrative authorisations to build the project. They can also request the judicial review of these authorisations by the administrative courts.

Even if the administrative approvals are valid, third parties are entitled to lodge damages claims against the operators of the project in case of tortious negligence or on the basis of the theory of excessive neighbourhood disturbance.

In Belgium, wind farm projects and electricity transmission lines have been confronted with a substantial amount of nuisance claims from neighbours.

8 How may parties limit remedies by agreement?

Belgian law accepts various contractual clauses aiming at limiting remedies, such as liquidated damages, limitation of liability, capped liability, exclusions of specific damages, or contractual deadlines to claim remedies.

The only requirements imposed by Belgian law are that such clauses cannot exclude liability for wilful misconduct and cannot deprive the contractual obligation of its substance, in such a way that the commitment loses any practical meaning.

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

In accordance with international standards, strict liability is applicable for damage resulting from nuclear accidents. Belgium is a party to the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy. Pursuant to that Convention, the Act of 22 July 1985 lays down the principles of strict liability, capped liability and liability channelled to the operator of a nuclear installation.

The theory of neighbourhood disturbance mentioned in the answer to question 7 is also based on strict liability.

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?

In case of competing clauses in multiple contracts relating to a single project, Belgian courts usually give effect to each contract with respect to choice of forum, choice of law and mode of dispute resolution. This means that claims between certain parties under a contract may be subject to another mode, forum and law than disputes between other parties under another contract.

If it is impossible to give effect to all clauses, for example, because competing clauses are provided in related contracts between the same parties, courts should consider this issue as a case for contractual interpretation of the dispute resolution clauses. They will therefore search for the common intention of the contracting parties as to the forum, law and mode of resolution of their dispute.

Pathological dispute resolution clauses in related contracts can in practice give rise to issues that are so intricate that they make it significantly harder to enforce rights under the contracts. Parties should therefore pay attention to their overall dispute resolution strategy and make sure they insert consistent clauses in multiple contracts relating to a single project.

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

Stepped dispute resolution clauses, which provide for tiered modes of dispute resolution (eg, negotiation, mediation and then litigation or arbitration), are becoming more common. They are enforceable under Belgian law. For example, Belgian courts will stay proceedings if mediation has not previously been used as provided by the stepped clause. The drafting of such clauses is very important in practice. Poor drafting can increase complexity, lengthen the resolution process and, at worst, leave parties without proper and efficient recourse.

Split dispute resolution clauses, which provide for both court jurisdiction and arbitration or for several forums with a mechanism allowing one party to determine the applicable procedure, tend to be used when one party has a superior bargaining position. Such clauses are increasingly appearing in financing agreements. Provided that these clauses are properly drafted and the circumstances in which the option may be exercised are set out clearly, they should be enforceable under Belgian law.

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

Parties can stipulate in their contracts that their disputes will be settled by binding expert opinions.

Belgian courts can also appoint experts and request them to deliver opinions on technical issues. The opinions of experts do not bind the courts that appoint them.

Experts are appointed by the courts. Parties can suggest or even agree on the names of the experts to be appointed. In case of agreement between the parties, the court can only appoint another expert with a reasoned decision.

There is no standard of admissibility of experts in Belgian law that would correspond to the *Daubert* standard used in the United States. Each party can, however, submit objections to the appointed expert, request that another expert be nominated or that the expert's report be declared null and void, for various reasons accepted by the case law, including lack of independence or impartiality, failure to give reasons and answer observations of the parties, or incompetence.

Belgian courts are also entitled to hear expert witnesses, although it does not happen often in practice.

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

The same interim and emergency relief may be granted by the Belgian courts for energy disputes as for any other dispute. Two kinds of proceedings are available in Belgium for interim and emergency reliefs.

Interim relief can be requested from the competent court at the beginning or at any stage of the proceedings. The court can order any interim relief that is required to provisionally settle the situation between the parties. Before granting such interim relief, the court will weigh up the interests at stake and will make sure that the relief will be reversible in the event the final judgment to be rendered dismisses the claim of the party to the benefit of which the interim relief is granted.

Emergency relief can be requested from the president of the court in separate expeditious proceedings, or even in ex parte proceedings in case of extreme urgency. Emergency relief can only be ordered if the claim is urgent and if a provisional measure is requested. There is a controversy about the standards to be applied by the president before ordering provisional measures in summary proceedings. It is clear that summary judgments do not bind the courts that will rule on the merits of the case and that the provisional measures must therefore be reversible. In addition, it is the majority view that only protective measures can be ordered if the rights claimed are merely apparent, while anticipatory measures can be ordered in case of obvious rights.

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

The enforcement processes for foreign judgments and foreign arbitral awards in Belgium are the same for energy disputes as for any other dispute.

Pursuant to EU Regulation No. 1215/2012, foreign judgments from courts of other EU member states can be immediately enforced in Belgium provided that certain documentary requirements are met and the judgment is served on the person against whom enforcement is

sought. The debtor can file objections to oppose the enforcement of the foreign judgment in Belgium, but such objections can only be based on limited grounds such as public policy, rights of defence or conflicts with certain jurisdictional provisions.

The enforcement of foreign judgments from courts outside the European Union as well as of domestic arbitral awards is governed by the Belgian Code of Private International Law. With regard to the enforcement of foreign arbitral awards, Belgium is party to the New York Convention of 10 June 1958. These foreign judgments and arbitral awards can only be enforced in Belgium after the filing of an ex parte application before the competent court whereby the party seeking enforcement will have to submit certain documentation. The foreign judgment and the arbitral award can then be served and enforced only if this application is allowed by the court. The party against which enforcement is sought can then challenge the enforcement by way of separate, subsequent, appeal. Only limited grounds for refusal of enforcement are available. These grounds are similar to the ones mentioned above for EU judgments.

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

There is no specific arbitration institution for energy disputes in Belgium.

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

No statistics are available to comment on a general preference for litigation over arbitration or vice versa in the Belgian energy sector.

The potential advantages of arbitration are that the procedure will be more confidential, the parties will be able to choose one or several arbitrators of good technical quality and acquainted with the energy sector, and the duration of the procedure will be much shorter than before the courts. Witnesses and parties are also likely to be heard by the arbitration panel, while the courts tend to rely exclusively on written evidence.

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

Oral and written statements made in settlement discussions are confidential if confidentiality has been agreed between the parties, which is usually the case. Confidential statements are not discoverable in subsequent proceedings.

Documents and statements made in the course of mediation are always confidential and cannot be discovered in subsequent court proceedings, unless all parties agree to lift the obligation of secrecy.

Parties are always free to make statements, while providing that they are made without prejudice to any of their rights or remedies.

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

There is no e-disclosure or e-discovery in Belgian court proceedings.

There is currently no clear rule on the protection of trade secrets in court proceedings, except for certain intellectual property and competition law disputes. Even outside these legal areas, Belgian courts refrain from ordering disclosure of documents in cases between competitors when such documents would contain trade secrets or other commercially sensitive information. A more precise legal framework on the preservation of the confidentiality of trade secrets in the course of legal proceedings shall be implemented soon, as the directive (EU) 2016/943 on the protection of trade secrets shall be transposed into domestic law by 9 June 2018.

Data protection issues may arise when companies conduct internal investigations in the wake of a dispute or an investigation by public authorities.

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

Attorney–client privilege covers only the non-public information that clients communicate to their lawyers. The professional secrecy of lawyers is sanctioned by criminal law and by disciplinary measures by the Bar authorities.

While Belgian lawyers' deontology imposes an absolute secrecy obligation, Belgian law provides for some restrictions to this general obligation of confidentiality. Lawyers will not be criminally sanctioned if they reveal a secret when a law requires them to do so (eg, the Act on the Prevention of Money Laundering) or when they are called before court to testify. Lawyers may also reveal secrets in order to defend themselves against unjustified accusations.

In principle, correspondence between Belgian lawyers is also considered confidential and therefore not discoverable.

There are no explicit rules on work product privilege in Belgium. This is because there is no procedure of discovery, so that procedural documents are only submitted to courts in their final non-confidential versions. Lawyers' notes containing non-public information communicated by their clients will be covered by the attorney–client privilege.

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

No energy dispute (other than permitting issues) must first be heard, as a matter of jurisdiction, before an administrative agency in Belgium.

Undertakings can choose to submit certain complaints, specifically against electricity and natural gas system operators, for ruling to the regulatory authorities that have been established in these sectors. The rulings of regulatory authorities on such complaints are subject to judicial review, as explained in the answer to question 23.

Regulatory

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

In Belgium, the responsibilities for energy policy are split between the competent ministers and the relevant administrations of the federal state on the one hand, and the three regions on the other. At the federal level, the Minister for Energy, Environment and Sustainable Development is currently responsible for energy and climate issues. The Directorate-General for Energy, part of the Federal Public Service for Economy, SMEs, Self-employed and Energy is the key administration that develops and implements energy policy at the federal level.

In the oil sector, the National Oil Board is charged, within the Federal Directorate-General for Energy, with the constant monitoring of the supply and demand for oil products, the prevention of risks of supply disruption and the implementation of emergency response measures in case of supply disruption.

Several agencies independent from the federal and regional governments also regulate parts of the sectors of electricity and natural gas. There is one federal regulator, which is the Electricity and Gas Regulatory Commission (CREG). There are also three regional regulators, which are the Flemish Regulator for Electricity and Gas (VREG), the Walloon Commission for Energy (CWaPE), and the Commission for Energy Regulation in the Brussels-Capital Region (BRUGEL). The main competences of the CREG are the approval of transmission tariffs, the regulation of transmission system operators, the monitoring of the national market and a broad advisory role. The regional regulators are principally responsible for the approval of distribution tariffs, the regulation of distribution system operators, the monitoring of the regional markets and the renewable support schemes. The regional regulators also advise the regional governments.

The Federal Agency for Nuclear Control and the National Agency for Radioactive Waste and Enriched Fissile Materials supervise the nuclear activities in Belgium, including the seven nuclear reactors and the treatment of nuclear waste.

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

Subject to the conclusion of regulated contracts, to the payment of regulated tariffs and to certain conditions that are imposed by legislation and monitored by the competent regulators, new entrants have access to the transmission and distribution systems for electricity and natural gas on non-discriminatory conditions ('third-party access'). In case of a dispute on the conditions for access, the entrants can lodge a complaint before the competent federal or regional regulator or before the courts.

In other energy sectors, refusal to access infrastructure can be considered an abuse of a dominant position if this infrastructure constitutes

Update and trends

The future of the Belgian energy mix remains uncertain as there is still debate about the nuclear phase-out planned in 2025. If this phase-out is confirmed, additional capacities of power generation will be needed, probably in the form of new gas-fired power plants. Increasing interconnection capacities will also be key in ensuring the security of electric supply in Belgium.

The federal minister and the three regional ministers for energy proposed an 'Energy Pact' in December 2017. This pact aims at coordinating policies at federal and regional levels in order to drive the Belgian energy sector through the current challenges and to reach the objectives of security of supply, low-carbon systems and affordable energy prices. It remains to be seen whether this recent development will lead to better coordination and increased predictability in the design and implementation of the energy policy in Belgium.

In the sector of natural gas, the conversion of the gas transmission and distribution systems from low-calorific (L-) to high-calorific (H-) gas will start in the summer of 2018.

On climate change regulations, the Belgian authorities will devise an integrated national energy and climate plan for 2030 implementing Belgium's EU-imposed targets.

an essential facility. Complaints of new entrants on such basis can be submitted to the competition authorities or to the courts.

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?

As a general rule, the decisions of administrative agencies and public bodies are subject to judicial review before the Council of State, which is the highest administrative court in Belgium. The Council of State reviews the lawfulness of the disputed decision. It can quash a decision for lack of competence of the authority, formal failures, illegality or misuse of its legal powers by the authority. The Council of State is entitled to review the facts of the case but it will only sanction the disputed decision when it is grounded on facts that do not exist, that have been wrongly qualified or that have been subject to a manifest error of assessment by the authority. If the Council of State quashes a decision of an administrative agency, it can grant a compensatory relief to the applicant on certain conditions.

By derogation to this general rule, the decisions of the CREG and the tariff decisions of the VREG and BRUGEL can be appealed in a de novo review before the 'Market Court', which is a specialised section of the Court of Appeal of Brussels. For the decisions of the CWaPE, such appeal must be lodged before the Court of Appeal of Liège. There is a legal controversy as to the exact scope of such review by both courts of Brussels and Liège. One can derive from the available case law that these courts are entitled to review all factual, legal and policy issues relating to the appealed decisions. However, all issues for which the regulator benefits from a margin of discretion are only subject to a marginal review by the courts. Moreover, the courts can only substitute invalidated appealed decisions by their own judgments in a few cases. In most cases, the courts only quash the appealed decisions.

Any party that is affected by a decision of one of these four regulatory authorities may also submit a request for review to these authorities. This is the only non-judicial challenge available.

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

There is no specific legislation on hydraulic fracturing in Belgium. Up to now, no licence has been granted to any project for extracting shale gas in Belgium.

25 Describe any statutory or regulatory protection for indigenous groups.

There is no statutory or regulatory protection for indigenous groups in Belgium.

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

Most energy activities are subject to licensing requirements. As a general rule, these licences require a (registered) seat in the EU or the EEA.

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

Energy law and environmental law are intimately connected. First, various activities in the energy sector such as generation, transport and storage of energy are subject to compliance with environmental rules, imposing constraints such as prior environmental impact assessments, prior authorisations, remediation of soil contamination and compliance with emission values. Conversely, energy law takes into account the ecological impact and sustainable character of energy-related activities, by imposing energy efficiency, encouraging the use of renewable energy sources and aiming to reduce greenhouse gases. Apart from environmental law, land planning rules also play an important role in determining where energy-related activities can be performed.

The three Belgian regions have provided for a specific enforcement regime with respect to environmental infringements, consisting of a criminal sanction system enforced by the criminal courts for the more serious environmental offences and an administrative sanction system for the less serious infringements.

Energy companies are also required to comply with health and safety regulations especially to the benefit of their workforce. Nuclear power plants are subject to sector-specific regulations aimed at protecting the population and the environment against radiation effects, managing radioactive waste and financing the future decommissioning of nuclear facilities.

Other

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

There is no actual or anticipated sovereign boundary dispute involving Belgium that could affect the energy sector.

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

Belgium is party to the Energy Charter Treaty. Belgium is not concerned by Annex ID to the Treaty, which means that an investor can resort to international arbitration even if this investor previously invoked the application of the Treaty before the Belgian courts.

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

Apart from the Energy Charter Treaty mentioned in question 29, there are no specific sector-wide measures protecting investors in the energy industry in Belgium.

Investors will, however, benefit from the protecting measures that are provided by the general principles of Belgian law as well as by the provisions of EU and international law that are immediately enforceable before the Belgian courts. The most relevant rules in this regard are the constitutional principles of equality and non-discrimination, the protection of the right to property granted by Protocol No. 1 to the European Convention for Human Rights, and some rules of EU law such as the fundamental freedoms of movement within the Union and the prohibition of state aid granted to competitors.

Specific legislation can apply in certain cases to protect the legitimate expectations of investors in the energy sector. As an example, the federal and the Flemish legislators have promulgated specific provisions according to which electricity production facilities using renewable energy will be compensated if support schemes are abolished or no longer applicable to them following a change in law or policy of the public authorities.

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.

Belgium has implemented specific legislation on the safety and protection of critical infrastructure including in the energy industry (Act of 1 July 2011). This infrastructure must elaborate safety plans aimed to prevent, mitigate and neutralise risks of interruption of the functioning or destruction of the critical infrastructure. Specific regulations are applicable to nuclear power plants (Act of 15 April 1994 and Royal Decrees of 17 October 2011). Cybersecurity measures have to be developed by energy companies within this legal framework.

Although there are currently no established standards or guidelines regarding cybersecurity in Belgium, a group of experts from the academic world, the public authorities and the private sector has published brochures addressed to businesses explaining how to protect their valuable information from cybercrime.

A more precise legal framework on cybersecurity requirements shall be implemented soon, as the Directive (EU) 2016/1148 on the security of network and information systems shall be transposed into domestic law by 9 May 2018. This Directive provides that national competent authorities must ensure that operators of essential services (including electricity and gas suppliers and system operators, as well as operators of oil facilities and transmission pipelines) take appropriate measures to manage the risks posed to the security of their network and information systems.

Linklaters

Xavier Taton **xavier.taton@linklaters.com**

Rue Brederode 13
B-1000 Brussels
Belgium

Tel: +32 2 501 9411
Fax: +32 2 501 9494
www.linklaters.com

Bolivia

Enrique Barrios and Alejandra Guevara

Guevara & Gutierrez

General

1 Describe the areas of energy development in the country.

Bolivia has vast resources of natural gas. Consequently, Bolivia produces natural gas at an average of about 60 million cubic metres per day. As such, Bolivia exports natural gas to Argentina and Brazil. In addition, Bolivia produces liquid hydrocarbons (condensed oil and gasoline), at an average of 63,000–65,000 barrels per day. Bolivia does not export liquid hydrocarbons.

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

Currently, the government is the sole owner of the entire production chain of both natural gas and oil. The current energy policy provides that the Bolivian state is the owner of every non-renewable resource in Bolivia and that no contract or concession shall be granted over such resources. In addition, the hydrocarbons law provides that the government – through the state-owned company Yacimientos Petrolíferos Fiscales Bolivianos (YPFB) – is in charge of producing and exploiting all of Bolivia's hydrocarbon resources.

Likewise, any other energy source must also be exploited by a state-owned company.

Commercial/civil law – substantive

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

The contracts used in the energy sector are format contracts. In the case of hydrocarbons, they are executed with YPFB, the state entity in charge of the entire production chain. Such contracts only allow for private companies to produce and support YPFB in the production of hydrocarbons, as applicable legislation prohibits the transmission of property over natural resources.

Every format contract executed by YPFB has the same provisions regarding dispute resolutions, applicable legislation and the conditions applicable to the counterparty.

In the case of other energy sources, there are no industry-standard form contracts.

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

The rules that govern contractual interpretation both for non-consumers and energy contracts are those included in the Bolivian Civil Code. The main rules are as follows:

- The contract must portray the common intention of the contracting parties and not limit itself to the words in the contract. The actions of the contracting parties must determine their intent.
- In case of ambiguous clauses, the interpretation must be that which gives meaning to the words, and not the opposite.
- When having terms that could be interpreted in two different ways, the chosen interpretation must be the one that follows the general intent of the contract.
- In addition, the Bolivian Civil Code provides that 'boiler plate' clauses must be included in every contract, even when they are not agreed upon by the contracting parties.
- Clauses must be interpreted as a whole, and not separately.
- Even if the terms in the contract are general, they must be interpreted under the scope of the contract.
- In case of doubt, gratuitous contracts must be interpreted in the least burdensome sense for the obligor and in onerous contracts, in the sense that imposes harmonisation of equal benefits or greater reciprocity of interests.
- In case of format contracts, its clauses must be interpreted in favour of the party entering into them.

5 Describe any commonly recognised industry standards for establishing liability.

'Reasonable' and 'prudent' operator and 'wilful misconduct' are terms that are used in common law contracts. Under Bolivian legislation, the terms that are applicable are 'culpa' and 'dolo', which could be translated into 'negligence' and 'gross negligence'.

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?

Force majeure is a concept that is included in the form contracts executed with YPFB. However, commercial impracticability and frustration are not applicable, as prices for the sale of liquid hydrocarbons within the internal market are set by Bolivian state entities (Bolivia does not export liquid hydrocarbons); and the prices for natural oil to be exported to countries such as Brazil or Argentina are set by agreements between state agencies in both the importer and the exporter countries.

In addition, commercial impracticability could be applicable in case the commodity price or supply volatility changes in a manner that disturbs the equilibrium of the contract. The mandatory condition for this event is that such price change or supply volatility must have been unpredictable for both parties and beyond the control of either of them. Moreover, in order to be applicable, the change in prices must make the fulfilment of the main obligation considerably more expensive and cause the debtor serious injury.

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?

Given that the format contracts are always executed with the state entity (YPFB), there are no nuisance claim rules.

In case of the electric sector, given that a state company (ENDE) controls the entire electric chain, there are no contracts with private operators.

8 How may parties limit remedies by agreement?

Liquidated damages are allowed under common civil and commercial contracts. However, and given their administrative nature, format energy contracts must be executed with the state entity YPFB and consequently, in order to claim damages, parties must follow the usual judicial procedure for damage assessment.

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

Strict liability is a term that is used in common law contracts and Bolivian legislation does not include any provision on the subject. However, as was stated above, the liability standards applicable to damages resulting from activities in the energy sector are 'culpa' and 'dolo'.

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?

Due to the fact that contracts in the energy sector are format contracts executed with a state entity, there are no competing clauses regarding choice of forum, choice of law or mode of dispute resolution. In any event, a Bolivian judge or court will 'always' apply Bolivian law to any agreement that is to be performed in Bolivia (even those entered into abroad). Arbitration clauses are also allowed in energy contracts. Note however that international arbitration is explicitly prohibited in the case of hydrocarbons disputes.

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

Stepped dispute clauses are frequently used in Bolivia, the most common being those including negotiation, conciliation and finally arbitration steps to address a dispute. Regarding split dispute clauses, they are not commonly used under Bolivian law. This is because the fact that the parties have agreed to arbitrate a dispute excludes (by law) the possibility of filing the controversy before a judge or a court. Having said that, Bolivian arbitration law does provide for 'courts' help' in specific and limited scenarios.

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

Expert evidence is admissible when the assessments of the facts that concern the process require specialised advice in any science, art, industry or technical knowledge.

The party requesting an expert opinion must provide the points that will be covered by the test. The counterparty may challenge this request, or add new items.

The judge must decide, at the preliminary hearing, about the merits of the expert opinion, appoint the expert, based on his or her own criteria and determine the points on which the expert shall focus, according to the proposals of the parties and those he or she deems necessary.

In the same court decision, the judge must provide a reasonable period for the presentation of the expert opinion, which may be extended, only once, in case of probable cause.

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

In energy disputes, general civil law interim measures may be applicable. Such measures include:

- preventive embargo;
- lien;
- judicial sequestration;
- judicial intervention; and
- injunction.

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

Article 54 (II) of the Bolivian Arbitration Law provides that if the parties choose a forum other than Bolivia, the arbitration shall be considered as international. In addition, article 120 provides that any arbitral award that is issued outside of Bolivia shall be considered as an international award.

Consequently, international awards shall be enforced in accordance with standards of international judicial cooperation provided for civil procedural law, as well as any international treaty on the execution and enforcement of foreign awards in force at the moment of the execution or enforcement.

The request for recognition and enforcement of foreign awards must be filed before the Bolivian Supreme Court. The party seeking enforcement must additionally file copies of the arbitral agreement and the award. Said documents must be duly legalised before the Bolivian consulate in the country where they were issued, and afterwards legalised before the Bolivian Ministry of Foreign Affairs.

Once the request is filed, the Supreme Court submits the documents to the other party so that they may respond and offer evidence, if it were the case.

Once the evidence has been reviewed, the Supreme Court issues a resolution approving or denying the execution of the foreign award.

This enforcement procedure is applicable for every type of foreign judgment, including energy disputes.

Judicial sentences

In order to be enforceable, foreign judicial judgments and other judicial decisions taken abroad need to be recognised and accepted by a competent court in the Plurinational State of Bolivia. According to article 505 of the New Civil Procedure Code, currently in force, foreign judgments need to comply with the following requirements:

(i) they need to have been duly legalised before the corresponding Bolivian Consulate, following the procedure provided for any document issued abroad;
(ii) the sentence and additional documentation needs to be properly legalised under Bolivian law, except in the case that it was forwarded via competent diplomatic or consular authorities;
(iii) the documents have been duly translated into Spanish;
(iv) the judicial authority who issued the sentence needs to have been duly competent and have jurisdiction over international matters, in accordance with his or her own law, unless the matter is outside his or her jurisdiction and should have been reviewed by competent Bolivian judicial authorities;
(v) the defendant shall have been legally summoned or located according to the rules of the foreign court;
(vi) principles of due process need to have been complied with;
(vii) the judgment has the status of res judicata under the laws of the foreign court; and
(viii) the sentence is not contrary to international public policy.

The following documents are necessary to begin the execution of a foreign sentence: legalised or authenticated copy of the judgment; legalised or authenticated necessary parts of the process demonstrating compliance with (v) and (vi) above; and certification flanked by a competent authority attesting the enforcement of the judgment.

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

Yes. The Bolivian Chamber of Hydrocarbons created the Arbitration Centre for the Bolivian Chamber of Hydrocarbons with the purpose of becoming a national and international reference in dispute settlement of energy issues in the region.

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

The Bolivian Constitution provides that disputes between foreign companies and the state, involving the entire hydrocarbons chain, shall be subject to Bolivian laws, and may not be subject to international arbitrations.

In addition, the current arbitration law provides that, in contractual and non-contractual disputes involving the state, arbitrations shall be subject to Bolivian law and forum.

Consequently, the general preference for litigation in the energy sector is arbitration, in Bolivia and under Bolivian law.

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

Format contracts executed between state agencies and private companies, both national and international, provide that statements made in settlement discussions are confidential.

Update and trends

On 20 November 2017, a new regulation for the procurement of operations within oil service contracts was issued by means of Supreme Decree 3398.

The purpose of such regulation was the need to centralise the procurement process as well as the governmental entities participating in the provision of goods and services within the state-owned hydrocarbons sector.

In order to do so, and among other important provisions of Supreme Decree 3398, the executive branch has created the Evaluation and Approvals Committee for Procurement Processes (CEAC) and the National Procurement System for Oil Operations (SINCOP).

The CEAC's faculties include the power to:

- stop and annul any procurement process within the state-owned hydrocarbons sector;
- approve and reject the lists of qualified services and goods providers;
- approve or reject the procurement process or any adjudicated services and goods providers;
- authorise or reject direct procurement processes for specific procedures; and
- prioritise specific procurement cases, among others.

As to SINCOP, Supreme Decree 3398 has created a system to register suppliers, procurement processes and contracts, and in general allow a permanent, effective and timely manner in which to transfer data from the parties to oil service contracts and providers, and Yacimientos Petrolíferos Fiscales Bolivianos (YPFB), the state entity in charge of the entire hydrocarbons' production chain.

In light of the above, and in order to be able to fulfil its purpose, Supreme Decree 3398 provides that from the moment it enters into force, every services and goods provider within the hydrocarbons sector must be duly registered in SINCOP in order to be able to take part in any type of procurement process being carried out by YPFB.

Given the importance and the many attributions granted to the individuals who will be part of the Evaluation and Approvals Committee for Procurement Processes (which shall be formed by managers of YPFB), as well as the complexity of creating the system that will manage SINCOP, the transitory provisions of Supreme Decree 3398 provide that this regulation shall enter into force within 90 days of its issuance, which means it should become binding around the first days of February, 2018; and that YPFB shall have the obligation to create SINCOP within 60 days from the date of issuance, which means at the end of January 2018.

Suppliers of goods and services hope that Supreme Decree 3398 will have a positive effect within the energy sector during the next 6 to 12 months. Hopefully said positive effect will mean an improvement of the quality of the system created for SINCOP and the way in which energy projects will be assessed by the CEAC. Likewise, the new system will allow oil services and goods providers a more equal and objective means to have access to projects and opportunities to take part in state biddings.

Regarding environmental regulations, the legislative branch has announced that it is analysing a proposal for a new Criminal Code, which will include jail sanctions of up to 10 years for any individual who causes 'irreversible or irreparable environmental damage, without possibility of restitution, recovery or environmental remediation, determined in accordance with current environmental regulations, with serious effect on water, air, soil, fauna or flora, the ecological balance or natural cycles'. This future criminal code is still in the pipeline, but, if issued, it will have very important and measureable effects on services and goods providers within the hydrocarbons sector, given that, if something within the framework described above were to take place, their corresponding legal representatives, agents and even shareholders, could be deemed responsible and be incarcerated in Bolivia.

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

There is no regulation regarding e-disclosure and e-discovery under Bolivian legislation.

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

Legislation applicable to the practise of law provides that lawyers must keep professional secrecy, except in cases where they must protect their own safety, defend the truth, or if the sponsored individual, or a court order, expressly authorises its disclosure.

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

Due to the fact that energy providers must execute a form contract with state entities, dispute resolution clauses emerge from that. Currently, the format contract does not require for energy disputes to be first heard by an administrative agency.

Regulatory

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

The principal agencies that regulate the energy sector are the Ministry of Hydrocarbons and Energy and the National Agency of Hydrocarbons (under the supervision of the Ministry of Hydrocarbons). With regard to energy, the agency under the tuition of this Ministry is the Agency for the Control and Supervision of Energy.

The faculties of both of these agencies range from the setting up of prices for liquid hydrocarbons and natural gas, to the final review and sentence in administrative cases involving hydrocarbons and energy in Bolivia.

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

The open access principle applies to the midstream and downstream industries (subject to availability and granting preference to the internal market procurement).

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?

The judicial review and control of decisions taken by administrative bodies, in every sector, takes place at its last stage, when the aggravated party takes up his or her claim before the Bolivian Supreme Tribunal.

The non-judicial procedure to challenge the decisions of the energy regulator is brought up before the Ministry of Hydrocarbons and Energy.

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

Currently fracking is not regulated but is, however, heavily opposed. At the moment, hydraulic fracturing cannot be conducted in Bolivia.

25 Describe any statutory or regulatory protection for indigenous groups.

Currently, the Bolivian Constitution includes various protections for indigenous groups. Among them, the constitution provides that the exploitation of natural resources in indigenous territories shall be subject to a process of prior consultation brought before the affected population, convened by the state, that will be free, prior to the exploitation and informed.

This meeting ensures citizen participation in the process of environmental management and conservation of ecosystems, subject to the Constitution and the law. In the case of indigenous nations and native people, consultation shall take place respecting their own rules and procedures.

In addition, the current law on hydrocarbons provides that the Executive Power must allocate the balance from the Direct Tax on Hydrocarbons, in favour of the national treasury, indigenous and native peoples, peasant communities, municipalities, universities, armed forces, national police and others.

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

The first regulatory barrier to entry for foreign companies is the fact that no private individual or company may hold a title over natural resources and that state entities are in charge of the entire hydrocarbons chain.

In addition, there is no international arbitration in the hydrocarbons sector, and for every sector foreign individuals and companies must register every investment received or carried out in Bolivia before the Bolivian Central Bank.

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

Companies in the energy sector are most commonly charged with criminal charges such as crimes against public health (for polluting rivers, land, etc). These crimes carry a charge of a jail term for their legal representatives, from one to 10 years.

In addition, companies in the energy sector face environmental charges, mostly related to the pollution of land and water, that are sanctioned with the removal of their corresponding environmental licence, without which they cannot operate.

Other

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

There are none.

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

No.

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

There are very few available measures for protecting investors in the energy industry, especially for foreign investors. Currently, the government has issued Law 767, which provides incentives for investors in the upstream industry.

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.

There are no legal standards or best practices regarding cybersecurity in Bolivia. It is not regulated.

Enrique Barrios **ebarrios@gg-lex.com**
Alejandra Guevara **aguevara@gg-lex.com**

Calle 15 de Calacoto
Edificio Torre Ketal, Piso 4
Oficina 402
Bolivia

Tel: +591 2 2770808
Fax: +591 2 2796462
www.gg-lex.com

Brazil

Rodrigo Fux
Fux Advogados

General

1 Describe the areas of energy development in the country.

Brazil is an incredibly diverse country with abundant energy sources, such as oil and natural gas, hydropower, coal, nuclear, solar and wind power. The most developed sectors in the energy industry in general are: oil and natural gas, hydropower and coal. These energy sources' development (and the technology related thereto) may vary depending on special circumstances (such as long periods of drought) and the inducing policies issued by the Brazilian federal government, represented by the Ministry of Mines and Energy (MME).

The federal government, through the MME, is the one establishing the energy development policy to be put in place by the federal regulatory agencies for each specific industry – the National Agency of Petroleum, Natural Gas and Biofuels (ANP) for oil and natural gas, and the National Agency for Electric Energy (ANEEL) for power generation. The exploration and exploitation of coal is regulated by a third entity, the Brazilian Department of Mineral Production (DNPM), but ultimately the use or not of coal as an energy source depends on the government allowing coal-fired power plants into the system and this is regulated by ANEEL.

Regulatory agencies in Brazil have the role of promoting each industry by understanding their specific requirements and responding through proposals that achieve within their competence affirmative economic and social results.

During 2017, the federal government enacted a three-year schedule of bid rounds under the concession and production sharing regimes for exploration and production of oil and gas onshore and offshore in Brazil until 2019. In December of 2017 the Brazilian government also scheduled two bid rounds related to the construction of new power plants that may be triggered by hydro, gas, coal or wind sources. Another two bids for the construction of new power sources are expected to take place in 2018, although with no further details yet being disclosed.

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

The Brazilian Federal Constitution in articles 20 and 21 provides that the Brazilian federal government has exclusive ownership, and may explore through certain granting regimes, concession, authorisation or permission, all mineral resources, including those underground, and those lying over the continental platform and the exclusive economic zone.

Accordingly, the exploration or exploitation of a mineral resource in Brazil requires a grant of concession by the Brazilian federal government, represented by the MME or the DNPM depending on the nature of the resource. Certain types of resources (ie, sand, gravel or uranium) are exceptions to that general rule and have specific exploration regimes not relevant for the purpose of this material.

Coal is considered a mineral for legal purposes in Brazil. To harvest this energy source it is necessary to follow a series of procedures to finally obtain a mining concession with the DNPM. The DNPM enjoys general discretion to reject any application failing to meet the relevant geographical, geological, technical or procedural criteria, and an application may be refused should it be determined that the exploration or mining activities involved are harmful to the public good or to interests that outweigh the usefulness of exploration or exploitation of the deposit.

For the purposes of exploring oil and natural gas, there are two main systems in Brazil: the concession and production sharing regimes, and the direct contracting regime, which is exclusively celebrated between the federal government and Petróleo Brasileiro SA (Petrobras).

Under the concession regime, through an organised bidding process or assignment of rights, the concessionaires are granted with the ownership of the oil and gas (O&G) arising out of the authorised exploitation of those deposits. The ownership of the O&G is transferred by the Brazilian federal government – the owner of the O&G reserves – to the concessionaire at the production measurement point, which is a physical mark proposed by the concessionaire and agreed to by ANP.

On a similar bidding process, the sharing production regime determines that the federal government keeps the ownership of the O&G produced even after the physical mark point and, in case of commercial discovery, it repays the companies for the costs incurred with exploration and production activities (known as the 'oil cost') and shares the remaining oil (profit oil), as determined in the Production Sharing Agreement. As mentioned above, the MME and the ANP have launched a schedule of bid rounds to take place between the years 2017 and 2019. Between the months of September and October of 2017 ANP held three different bid rounds, being the first of them the 14th concession bid round and the other two the third and fourth pre-salt or production-sharing bid rounds. In positive return, these bid rounds have accrued approximately 10 billion reais in signature bonuses.

All in all, Brazil is currently a self-sufficient country for power and oil, although it still depends upon imports from Bolivia to attend to its internal natural gas demand. Offshore oil and gas exploration and production increased substantially over the years and some offshore gas discoveries may reduce the dependence on Bolivian gas if Brazil is capable of putting together the infrastructure to flow the gas inland to the interested consumers.

Commercial/civil law – substantive

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

Generally speaking, except for the model concession contracts and production sharing contracts for oil and gas exploratory areas, there are no industry-standard form contracts in Brazil. In their private dealings local industry players typically use certain model contracts prepared by the Association of International Petroleum Negotiators (AIPN) adjusted to civil law principles. The standard form contracts for concession and production sharing agreements are updated and improved in every new bid round by the regulator (ANP) to adjust the draft to the current policies in place by the Brazilian federal government, for instance to adapt it to local content requirements. ANP supplies English versions of these contracts online at www.brasil-rounds.gov.br/ingles/contratos_e_editais.asp.

Under the model concession contracts for exploratory oil and gas areas, concessionaires have to pay a signing bonus and submit financial and performance guarantees as per the ANP's requirements.

The concessionaire undertakes all costs and risks in connection with the operations and its consequences, as well as several obligations to be complied with in order to keep the concession over the area. The

concession is divided into two different phases – the exploration phase and the production phase.

The exploration phase commences on the execution of the concession contract and usually lasts from two to eight years, commonly divided into two different periods, each of them with specific obligations under the concession contract. During the exploration phase, the concessionaire has to, among other obligations:

- attend the minimum exploration programme (PEM) agreed for both periods, as the case may be;
- drill the well or wells agreed under the PEM at least to the depth agreed;
- submit the annual work programme and budget plans;
- pay the occupation fee; and
- submit reports quarterly regarding local investments and expenditures.

In case there is a discovery in the area, the concessionaire has to notify ANP about the discovery, submit an evaluation plan for the prospect and if it is commercially feasible and submit a development plan for such prospect to be approved by ANP.

If the prospect is not economically interesting for the concessionaire, it can return the area.

Production phase starts with the declaration of commerciality of the prospect and in general lasts for 27 years. The concessionaire must carry out all operations in accordance with the development plan approved by the ANP for the area, which may be amended from time to time with the ANP's acknowledgment. The concessionaire is obliged to notify the ANP prior to the beginning of the production of oil and gas as per the annual production plan submitted by the concessionaire to the ANP. During the production phase the concessionaire has to, among other obligations:

- conduct the operations in accordance with the Development Plan and Annual Production Plan;
- annually submit the Annual Production Plan for the following year;
- submit monthly production reports and annual reserve report;
- submit well status and completion reports; and
- pay the occupation fee, royalties and special participation (if applicable).

The production sharing contract model provides for two phases: exploration phase, which includes the discovery and evaluation of commercial feasibility; and production phase, which includes the development phase; and will set forth, among other provisions:

- the financial guarantees required to contractors;
- limitations, terms, criteria of payment of cost oil and profit oil;
- accounting rules and procedures for the ANP to follow and control the activities of exploration, evaluation, development and production;
- minimum exploration programme (PEM);
- criteria for the preparation of exploration and development plans, as well as work programme;
- information, reports and data that have to be submitted to the ANP;
- term of the agreement, which will not be longer than 35 years; and
- Health, safety, Security and environment policies and contingency plans.

As in the concession regime, under the production sharing regime the contractor will undertake all costs and risks in connection with the operations and their consequences.

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

Contractual interpretation is not thoroughly ruled under the Brazilian Civil Code, which basically sets forth that:

- the statements of the contracting parties should be interpreted in accordance with their real intention and not solely based on the literal wording;
- waiver of rights should be interpreted restrictively;
- contract provisions should be interpreted in light of the principle of good faith and in accordance with the practice and customs of the place where the contract is entered into; and
- contradictory or ambiguous provisions should be interpreted in favour of the party who has not participated in the drafting of the contract, but has solely adhered to the conditions put forward by the other party.

As Brazilian legislation is not detailed in what regards contract interpretation, the doctrine has room to contribute on the matter. The majority of scholars in Brazil agree that contract interpretation needs to take into account the intention of the parties, but also understand that this should not be transformed into a way to allow the parties to change the original provisions under the argument that they do not accurately reflect the contracting parties' intention. In other words, where the provision is clear and there is no room for doubt, the statement should be taken literally, with no innovations whatsoever.

Such rules generally apply to energy contracts.

5 Describe any commonly recognised industry standards for establishing liability.

Liability towards third parties is subject to the applicable law and therefore the operator shall be strictly liable for any damages to which it gives cause. Under agreements dealing with energy operations, however, the parties should be free to make their own arrangements, provided that they do not violate public order or any statutory legal provisions.

In such context, operations agreements in Brazil usually adopt the same standards as established in the AIPN model contracts and provide for the liability of the operators in case of wilful misconduct or gross negligence. It should be noted that this may change on a case-by-case basis as there are no specific rules preventing the parties from agreeing otherwise.

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?

Brazilian legislation does recognise some concepts that may release the contracting party from the obligation to perform under the contract in certain specific situations, such as in case of force majeure, which is defined under the Brazilian Civil Code as a necessary fact whose effects the party could not avoid nor prevent from taking place. It is worth noting that the party shall in principle not be discharged from its original obligations even in case this becomes an impossible obligation to comply with due to a force majeure event where such event takes place when the party is already in breach under a contract.

Brazilian legislation also provides for the right of the contracting party to the rebalancing of the rights and obligations under the contract in the event it becomes excessively onerous to one of them due to an unpredictable and unavoidable supervening event that triggers demonstrably substantial unbalance to one of the parties. According to the Brazilian Civil Code, this would grant the impacted party with the right to terminate the agreement, which is similar to commercial impracticability as defined under English law, but Brazilian doctrine and jurisprudence has evolved to understand that the contract should ideally be maintained, as an expression of the principle that determines that contracts should ideally be conserved in force.

As for the concept of frustration (as defined under English law), despite some controversy, Brazilian scholars tend to affirm that this is similar to our unpredictability theory, which is treated under the Brazilian Civil Code, as mentioned above. However, such theory should only apply in cases where the party can demonstrate the occurrence of extraordinary and unpredictable facts (albeit it is admitted also that facts with unpredictable consequences trigger the consequences set out in the Brazilian Civil Code).

Finally, it is worth noting that the loss of the contractual object also allows the termination of an agreement under Brazilian legislation and thus releases the parties from complying with the original contractual provisions.

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?

Nuisance is not a concept found under Brazilian law. However, under the Brazilian Civil Code, any party that cause damages to another party shall be liable to indemnify said party for the damages caused. In that

sense, operators may be liable for negligence claims as long as the affected parties are capable of proving the existence of damages and negligence by the operator.

8 How may parties limit remedies by agreement?

Although widely adopted in several contracts governed by Brazilian law, contractual provisions that limit the liabilities of the parties are still the object of certain discussions among the Brazilian doctrine. However, the majority of Brazilian scholars understand that our legislation does not prevent parties from agreeing on such limitations provided that they do not offend public order or morals standards.

Brazilian legislation contains several provisions that confirm that limitations on liability are valid and available to the parties when negotiating a contract and this often serves as support to defend the validity and effectiveness of such provisions. It is also crucial to assess the nature of the contract, as such limitations shall probably be disregarded in courts if the parties are not negotiating in equal conditions.

This type of clause is particularly common for energy contracts, and is accepted as valid and enforceable as it deals with disposable interests and has a strong economic nature. Therefore, any provision for the limitation of remedies should always be considered and interpreted in line with the economic rationality of the contract and the rules contained in the Brazilian Civil Code.

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

According to article 927 of the Brazilian Civil Code, one shall be liable for the damages resulting from a risky activity even if there is no fault attributable to such person (ie, strict liability). There is no legal definition of risky activities and therefore this shall ultimately be decided by courts. However, considering its peculiarities, activities in the energy industry should be deemed as risky.

In a scenario where article 927 applies (ie, environmental damages), strict liability would be there in case of damages caused to third parties but this would not change the liability regime defined in an energy contract. This means that the parties to a contract may agree that the contractual liability shall be fault-based even in case of risky activities such as the activities inherent to the energy industry. Liability towards third parties shall, however, be strict.

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?

Courts typically tend to try to identify elements of connection among the contracts, particularly economic function nexus, and then indicate which is to be considered the main contract, the one containing the nuclear provisions of the deal. Identification of the main contracts follows the principles set in the Brazilian Civil Code and essentially calls for the intention of the parties when entering into those contracts. The provisions contained in the identified main contract do prevail over the others.

Regarding choice of forum, it is important to mention that article 25 of the Brazilian Civil Procedural Code states that courts in Brazil do not have jurisdiction to preside over and try actions when, in an international agreement, the parties agree on an exclusive foreign jurisdiction.

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

Stepped and split dispute clauses are more common in highly complex contracts, including certain types of contracts (ie, concession of services) entered with public entities (ie, federal and state governments).

Brazilian courts recognise the validity of stepped and split dispute clauses as long as the deal originating the dispute is entered into between two parties with the same level of sophistication and autonomy to decide which matters shall be decide by courts and which shall be decided in an arbitration and whether certain matters shall, prior to their submission to courts or arbitrators, be subject to another dispute resolution mechanism such as mediation or dispute boards.

As a matter of fact, stepped and split dispute clauses are particularly relevant for contracts entered with public entities (ie, federal and state governments) as in Brazil there are limitations as to the kind of matters public entities (ie, federal and state governments) can submit to arbitration and exclude from the appreciation of local courts.

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

A court judge may authorise or request the provision of expert evidence by the parties if the judge feels it is necessary for a technical or scientific opinion to be included in order to make a decision in any lawsuit. The judge is not obliged to decide in accordance with the expert evidence as it can use other elements of proof (ie, documentary, depositions). When a judge appoints an expert, each of the parties is allowed to appoint a technical assistant, an expert that is allowed to provide their vision of the matter once the judge-appointed expert issues their opinion.

If the judge is convinced by any technical opinions or other documents presented by the parties in the course of the process, the judge is not obliged to request expert evidence. The judge may also deny any requests for expert evidence if the judge feels that the expert evidence is not necessary for the due conclusion of the process.

The appointment of an expert is typically done by the judge. However, the Brazilian Code of Civil Procedure provides that the parties may jointly appoint the expert if all parties freely agree about it. In addition to expert individuals, the Brazilian Code of Civil Procedure allows legal entities to act as experts as well. The costs associated with the expert evidence shall be borne by the parties of the lawsuit. The judge may require a new expert opinion if the matter is not clarified by the first expert evidence.

The expert opinion may contain:

- a definition of the scope of the expert determination;
- the technical or scientific review carried out by the expert;
- indication of the method used by the expert clarifying it and demonstrating it is widely accepted by the experts in the field; and
- conclusive answer to all questions made by the judge, the parties and any public attorney as the case may require.

During the expert-related proceedings (ie, expert appointment until the homologation of the expert opinion) due process must be observed and the parties must be heard (ie, presentation of the opinions prepared by the technical assistants, hearing of the expert for purposes of clarifications).

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

There are two types of interim and emergency relief available in Brazilian courts for energy and disputes of other natures: provisional remedies based on urgency or evidence.

Courts may grant emergency relief in every case where a party can argue that there are elements evidencing the probability of the right, the peril of damage or the risk to the useful result of the process; and evidence relief where there is no need of a party arguing the existence of peril of damage or the risk to the useful result of the process in the main following hypothesis provided in the law:

- upon characterisation of abuse to defence rights;
- where the courts identify the obvious purposes of postponing a court decision; and
- when a claim can be verified only based on documentary evidence and there are case law-based decisions taken by the high courts in Brazil.

Emergency relief in Brazil can be granted by courts as independent measures in anticipation or not of a main claim (ie, preparatory measures to a lawsuit or arbitration process) or incidental measures claimed upon filing or in the course of a main lawsuit.

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

The Brazilian Civil Procedure Code in article 961 provides that any foreign ruling made final and unappealing or arbitral award shall only be effective in Brazil after its admission and statement of enforceability by the Brazilian Superior Court of Justice (STJ), or through the concession of an exequatur to a rogatory letter.

These rulings and arbitral awards are considered judicial enforcement instruments and, in this sense, the Brazilian Superior Court is the competent court to review any requests to recognise and enforce foreign rulings and arbitral awards, as provided in article 105, item I, 'i' of the Brazilian Federal Constitution.

Articles 216-A to 216-N of the Brazilian Superior Court's procedural rules, therefore, appoint the minimum requirements to be met by a foreign ruling and arbitral award in order for these to be enforceable in Brazil.

Article 216-D of STJ's procedural rules list the requirements, which are:

- the ruling or award must be rendered by a competent authority;
- the parties in the procedure have received service of process;
- the ruling or award needs to be final and unappealable;
- the ruling or award needs to be notarised and consularised by the Brazilian consul and accompanied by a sworn translation made by a sworn translator in Brazil; and
- the ruling or award must not be contrary to the principle of law and order, sovereignty and good moral conduct.

Article 963 of the Brazilian Civil Procedure Code also includes two other requisites to the list: the ruling or award needs to be effective in the country where it was issued, and it cannot go against res judicata.

Upon presentation of the ruling or award, accompanied by the enforcement request to the Superior Court of Justice, and any other document necessary in connection with the above, the STJ shall be able to analyse the request and complete the regular proceeding to issue the writ of execution allowing or not the execution of the ruling or award in Brazil.

The STJ does not make any material analysis of the content of the ruling or award, considering that Brazilian law recognises foreign judicial rulings and arbitral awards as judicial enforcement instruments, as described above. The STJ shall solely be responsible for confirming that all procedural matters were duly completed, including that the parties were given the opportunity to confront each other (thus the need of service of process).

Once the writ of execution is granted by the STJ, the parties are allowed to take the ruling or award to the competent federal courts for enforcement purposes.

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

No, there is not. However, progressively, Brazilian dispute resolution centres are panelling energy experts as arbitrators.

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

For matters involving high technical complexity and relevant amounts such as those related to the energy sector, there is a general preference in Brazil for arbitration over litigation. This is because court judges, particularly first level judges, have very little specialisation and exposure dealing with highly technical and complex material disputes such as those involving the energy sector.

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

Law No. 1.340/2015 that establishes and regulates mediation in Brazil expressly provides that the entire mediation process including documents and discussions integrating the procedure are confidential. The same confidentiality feature applies to arbitral proceedings and any settlement discussions arising from those proceedings.

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

No, there is not. There is nothing similar to discovery as it is understood under common law in court processes in Brazil, only in arbitrations.

Generally speaking, all court proceedings in Brazil are public, except for the following:

- where confidentiality is necessary to protect the social or public interest;
- family matters such as divorces;
- where data is protected by intimacy and privacy principles under the Brazilian Federal Constitution; and
- arbitrations, including the execution of arbitral awards.

In arbitration proceedings, where e-disclosure or e-discovery may take place, data and privacy protection relies on the confidentially obligations agreed between the parties. The applicable statutory laws do not deal with those issues at this point in time.

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

Advocacy in Brazil has its own federal law regulating the rights, duties and privileges of everyone registered as a lawyer with the states' bar councils. Law No. 8.906/94 expressly provides in its article 7 that lawyers are guaranteed the inviolability of their offices or workspace as well as their work tools, their written correspondence, including electronic, telephonic or telematic exchanges as long as those are related to the practice of law. The only exception to that principle is when lawyers are themselves the target of some law enforcement investigation.

Thus, all communications between lawyers and their clients, as well as the work product, are protected and should be confidential as per Law No. 8.906/94.

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

No. The Brazilian Federal Constitution and the Brazilian Civil Procedure Code provide for the general principle that jurisdiction cannot be put away and that any potential or actual damage or threat to a right can be taken directly to local courts. The general exceptions are matters where the parties agree that arbitration shall prevail and no recourse to courts is admitted.

Regulatory

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

The Brazilian Constitution determines in article 22 that the federal government (as opposed to the states and municipalities) holds the right to rule over matters such as energy, water and mineral resources (where oil, natural gas and coal are included). In the second half of the 1990s, the Brazilian federal government enacted laws that created federal regulatory agencies, which are independent and autonomous regarding action but must follow the energy policy principles formulated by the Brazilian federal government through the MME and the National Energy Council.

In 1996, ANEEL was created through Law No. 9.427/1996 with the purpose of promoting and regulating the power sector in Brazil in accordance with the guidelines provided by the MME. ANEEL is primarily responsible for regulating the sector and reviewing compliance by private players of the terms of the authorisations and concessions granted by the Brazilian federal government and local regulation.

Similarly, in 1997, through the enactment of Law No. 9.478/1997, the ANP was constituted with the purpose of regulating the petroleum industry. The agency (the ANP) is also responsible for sponsoring bids for acreage to be conceded to private players and ruling on third-party access to existing infrastructure, among other things.

Law No. 9.478/1997 also instituted the National Council of Energy Policies in Brazil, with the purpose of ensuring compliance with the principles of rational exploitation of the energy resources of Brazil, among other things.

Both regulators (ANEEL and the ANP) have jurisdiction over all Brazilian territory.

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

Both new entrants and those players already doing business in Brazil may have access to existing infrastructure.

Third-party access to oil and gas pipelines is regulated by Law No. 11.909/2009, Decree 7.382/2012, and certain ordinances issued by the regulator (the ANP). The regulation is divided into 'gas pipelines' regulations and 'oil pipelines' regulations with certain particularities to each

Update and trends

The Brazilian federal government is sponsoring the 'Gas to Grow' initiative that is meant to boost the national gas sector. As a result of that initiative a legislative bill was presented to the Brazilian Congress in 2017 trying to reshape the regulatory landscape for industrial gas utilisation in Brazil and to warrant a special regime for gas transportation in Brazil.

of them, but in general terms both assure third-party access to available capacity or unused hired capacity subject to certain conditions.

For gas pipelines, access to such available or unused hired capacity is made through transportation contracts executed with the owner of the pipeline, being certain that the unused hired capacity may only be negotiated after the available capacity is fully contracted. The transportation may be firm or extraordinary for available capacity or interruptive for unused capacity. 'Available capacity' is the share of gas transportation capacity not hired under a firm contract and 'unused hired' capacity is the share of gas transportation capacity already hired but temporarily unused. The ANP is responsible for setting the main rules, conditions and regulations regarding the access to gas pipelines. Access to firm transportation is made through public auctions organised by ANP in accordance with the MME's indications and access to interruptive and extraordinary transportations of gas is to be regulated by the ANP.

Regarding oil pipelines, third parties may be granted access to available capacity, unused hired capacity or available operational capacity. 'Available operational' capacity is the share of oil transportation capacity not hired considering the current operation facilities; 'unused hired' capacity is the difference between the hired capacity and the actual volume transported or scheduled; and 'available capacity' is the share of oil transportation capacity not hired considering the current operation facilities and possible expansions or developments on the facilities. Oil transportation services are hired through contracts entered into between transporter and owner of the oil transported, which will contain transportation fees as well as any additional services.

In summary, in having existing available capacity, an oil and gas producer could force a pipeline carrier to accept and transport its commodities following the existing regulation in Brazil.

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?

Any decisions taken by regulators that involve administrative agencies are subject to appeal to local courts or arbitration and the regulator must be considered a party like all others.

An appeal to the MME against certain decisions taken by the regulators or administrative agencies is allowed. Such an appeal is known as hierarchical recourse and allows the party recourse to the MME trying to revise the decisions taken by the executive board of any agency.

There is a great deal of controversy around which kind of matter one can appeal, and no consensus about it has transpired. Notwithstanding the controversy, this is the only non-judicial procedure available to challenge decisions of the energy regulator prior to advancing the discussion into local courts.

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

There are no federal laws prohibiting the use of fracking in Brazil. In 2014, the local agency (the ANP) issued Resolution No. 21 regulating the use of hydraulic fracturing in Brazil and establishing the applicable requisites and reporting mechanisms. However, since 2013 there have been court decisions prohibiting the use of hydraulic fracturing in several Brazilian states (ie, Bahia, Acre, Alagoas, Sergipe, Paraná, Amazonas), precisely those where the potential for use of that technique is higher. Also, late in 2016, the State of Pará passed a law banning the use of hydraulic fracturing in its territory until December 2026.

25 Describe any statutory or regulatory protection for indigenous groups.

The Brazilian Constitution provides that indigenous peoples' lands are destined permanently for their possession, and they have the right to its exclusive usufruct, including in relation to soil, rivers and lakes therein. The recovery of water resources, including any potential energy resources, the exploration for oil, gas or coal can only occur with authorisation from the Brazilian National Congress and, in cases such as in mining activities (ie, coal exploration), the indigenous communities shall have the right to receive royalties from the exploitation of any mineral deposits located in those regions. To date, none of those activities has ever been submitted for approval before the Brazilian National Congress. Although there have been discussions at the Brazilian National Congress to amend the approval regime for mining activities in indigenous lands, including through the suggestion of legislative bills, said discussions have never really evolved into something concrete.

Thus, indigenous lands are delimited by the Brazilian federal government and then submitted for approval of the Brazilian National Congress through a wide public process, which also has to include consultation with the indigenous community in relation to the development of said mining projects on their lands. In other words, it is relatively easy to identify if a piece of land is or is not located within indigenous land.

Additionally, there are also traditional communities called *quilombolas* in Brazil, comprising descendants of slaves who escaped from slave owners before the abolition of slavery in Brazil in 1888. According to the Brazilian Federal Constitution, *quilombolas* are essentially entitled to obtain title deeds and ultimate ownership of the land they historically occupied, which may generate disputes over royalties and compensations in connection with projects developed in those areas. Verifying the existence of those communities in an area to develop a project is essential for purposes of identifying and calculating the potential disputes and cost increases that such reality may bring to a project.

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

The Petroleum and Pre-Salt Laws establish that only companies incorporated under Brazilian Law, with management and head offices in Brazil, can perform exploration and production activities in Brazil and be granted with oil and gas rights.

Although, from a formalistic standpoint, only domestic companies may perform exploration and production activities, there is no limitation or requirement for ownership or control by local residents. In that sense, foreign parties may hold 100 per cent of a company participating in a bid round, as long as such company is duly incorporated and headquartered in Brazil and has Brazilian resident management. In fact, the regulator (the ANP) even allows foreign companies to participate directly in the bid rounds as long as they assume the obligation to, in case of winning the bid, incorporate a Brazilian company with headquarters and management in Brazil.

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

The Brazilian Environmental Policy provides that operation of potentially pollutant activities and operation of activities that use natural resources are subject to environmental licensing. Environmental licensing is an administrative procedure that aims to assess and prevent potential environmental risks caused by those activities.

The licensing procedure of offshore and onshore O&G activities is conducted by the federal and state environmental protection agencies (EPAs). Each and every phase requires specific licensing: seismic, drilling and production/offloading.

The environmental liabilities that may arise in connection with the operation of those activities are from three different natures: civil, administrative and criminal.

In the civil sphere of liability, the purpose is to remediate or compensate the environment if the licensee or its related parties cause any damages. Environmental civil liability is joint, several and strict. In

other words, regardless of fault, negligence or wilful misconduct, those who cause or contribute to environmental damage are jointly liable.

Complexity is added by the fact that the legal definition of polluter encompasses individuals or entities directly or indirectly responsible for the activity that is harmful to the environment.

In the administrative sphere of liability, the legal framework is composed of Law No. 6.514/2008, which sets forth the environmental administrative infractions, Law No. 9.966/2000 and Decree No. 4.136/2002, which set forth and regulate the oil pollution prevention, control and inspection rules. State laws concerning the same matter also exist and must be in line with the federal laws.

Those laws set forth the conducts deemed as administrative violations and establish the correspondent penalties, which may be warnings, fines, vessel seizure, staying of tax benefits, restrictions of rights and suspension of operations. The fines may range from 1,000 reais to 50 million reais.

In the criminal sphere of liability, the Brazilian Environmental Crimes Act provides that actions or omissions expressly described therein and committed with negligence or wilful misconduct are environmental crimes.

Individuals involved directly or indirectly in crimes carried out against the environment, to the extent of their culpability, are liable for criminal purposes. Officers, board members, auditors, managers, agents and legal representatives of an entity, who were aware of the potential environmental crime, but, when possible, failed to prevent it, are also liable for criminal purposes.

Under Brazilian law, legal entities may commit environmental crimes. Penalties to individuals may be monetary and equivalent to the damages caused, render of services and imprisonment. Penalties to legal entities may be monetary penalties, restrictions of rights and rendering of services.

The ANP is also responsible for health, safety and security regulations regarding exploration and production activities in Brazil. The ANP Resolutions 43/07, 44/09, 2/10, 41/15 and 46/16 set forth the main obligations and parameters to be followed by companies for the implementation of a health, safety and security environment to offshore and onshore facilities.

Other

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

Brazil has not been involved in any boundary disputes since 1907, when the Brazilian borders were finally established.

However, based on the UNCLOS (the United Nations Convention on the Law of the Sea) from 1982, Brazil presented a claim, which is still been processed and discussed, to a United Nations commission for the limits of the continental shelf, currently claiming for the extension of the Brazilian continental shelf from the current 200 to 350 nautical miles.

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

Brazil is not a signatory or participant of the Energy Charter Treaty. As a matter of fact, Brazil is not a signatory of relevant energy treaties, except for the bilateral Itaipu Treaty of 1973 along with the Republic of Paraguay, in relation to the hydroelectric economic recovery of the water resources of the Paraná River and certain treaties entered with other South American countries for energy supplementation and assistance in case of electric power needs.

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

The general protections for investors contained in the Brazilian Federal Constitution and infra-constitutional normative system (ie, due process, autonomy of contracts, access to state jurisdiction) apply indistinctly to investments in the energy or other industries, and investors regardless of being domestic or foreign. In other words, there are no specific measures applicable exclusively to energy investors.

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.

Brazil has no cybersecurity law and cybersecurity is not on the top of the corporate agenda in Brazil. Each company follows their own standards and multinational companies typically import the standards and best practices they use abroad to their Brazilian operations.

Rodrigo Fux **fux@fux.com.br**

Avenida Rio Branco, 177, 18th floor
Rio de Janeiro
Brazil

Tel: +55 21 3520 5900
Fax: +55 21 3553 5900
www.fux.com.br

Canada

KayLynn Litton*
Norton Rose Fulbright Canada LLP

General

1 Describe the areas of energy development in the country.

Canada has the world's third-largest proven reserves of crude oil, and is currently the fifth-largest producer of both oil and natural gas in the world. The majority of reserves are held in oil sands located in Alberta, but substantial quantities of oil and gas are also produced in British Columbia, Saskatchewan, New Brunswick, Nova Scotia, and Newfoundland and Labrador. While production of conventional oil and natural gas has been declining in recent years, production of unconventional oil and gas (eg, tight gas, coalbed methane and shale gas) has been rising.

Canada has significant coal reserves, with coal mines located primarily in British Columbia, Alberta, Saskatchewan and Nova Scotia. Canada is the world's second-largest uranium producer, with production mainly originating in northern Saskatchewan, and is also the world's second-largest producer of hydroelectricity, with large quantities of hydroelectricity produced in Quebec, British Columbia, Newfoundland and Labrador, Manitoba, and Ontario.

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

In Canada, natural resources are held by a mix of federal and provincial governments, private persons, First Nations groups, and corporate entities. First Nations owned oil and gas resources are managed on behalf of First Nations groups by the federal government through Indian Oil and Gas Canada.

Each province administers oil and gas ownership and development independently. Neither the provincial nor federal governments participate as working interest owners in oil and gas development; instead, governments enter into standard lease or licence arrangements with resource developers. Such arrangements grant resource developers the right to produce oil and gas resources in exchange for a rental on the lands leased and a royalty on the production obtained from the lands.

In addition to natural resource ownership, the federal government has jurisdiction over interprovincial, national and international matters – including pipeline development across provincial and international borders and development of offshore resources. Similarly, and in addition to natural resource ownership, provincial governments have jurisdiction over local works and undertakings – including control of regulatory requirements for upstream development and management of midstream development within the province's borders.

Commercial/civil law – substantive

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

In western Canada, the Canadian Association of Petroleum Landmen (CAPL) publishes operating, farmout and royalty procedures, which are very broadly used in conventional oil and gas development. In addition, the Petroleum Accountants Society of Canada publishes standard form accounting procedures that are used in conjunction with operating agreements.

CAPL has also published a property transfer procedure for the sale of oil and gas assets that is less broadly used than other CAPL publications.

In regard to oilfield services, the Petroleum Services Association of Canada has developed a standard master service agreement. Agreements for drilling services may use the standard-form drilling contracts published jointly by the Canadian Association of Oilwell Drilling Contractors and the Canadian Association of Petroleum Producers.

Standard forms published by the Petroleum Joint Venture Association are also commonly used and include, for example, contract well operating agreements, construction ownership and operating agreements, and gas handling, transportation or purchase agreements.

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

Canada's well-developed body of case law regarding the interpretation of contracts applies to the interpretation of energy contracts.

In interpreting a contract, a court first examines the specific words in the contract in order to ascertain the intentions of the parties, which can be gleaned from the words of the contract, at the time they entered into the contract. However, beyond analysing the language of a contract, the court must also apply a 'contextual' approach, meaning that it must pay attention to the factual context within which contractual words are used. Such purposive analysis is done on an objective basis, whereby the court looks only to what a reasonable person would conclude in viewing the behaviour of the parties, rather than any subjective understandings that the parties may have actually had. Where an industry standard form contract is at issue, the court also relies on industry customs to interpret such contract, so long as the customs are certain, reasonable and well known.

5 Describe any commonly recognised industry standards for establishing liability.

In oil and gas in joint drilling operations, the usual standard of care expected of an operator imposes liability above the operator's working interest only in instances of gross negligence or wilful misconduct. In service contracts, there is no standard for establishing liability and parties may apportion liability as they see fit. As an example, in the standard-form drilling contracts published jointly by the Canadian Association of Oilwell Drilling Contractors and the Canadian Association of Petroleum Producers, the parties agree to a 'knock-for-knock' indemnity scheme, with specific exceptions carved out, including, for example, for blowouts and loss of, damage to or destruction of the reservoir, downhole equipment and the wellbore.

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?

Canadian common law recognises the doctrine of frustration, which provides that the occurrence of an unforeseeable event subsequent to the making of the contract, which makes performance impossible, impracticable or fundamentally different from what the parties

expected, will provide an excuse for non-performance. Although not a principle of common law, parties can choose to include a force majeure clause in their contracts (and often do). Force majeure clauses include specific events beyond the parties' reasonable control and foresight that excuse non-performance. Examples of events that can be covered by force majeure clauses include civil commotion, 'acts of God' (such as earthquakes, fires, floods), war and third-party strikes.

However, these concepts generally do not excuse parties from non-performance due to commodity price or supply volatility. Courts have stated that the fact that a contract has become more expensive to perform is not a ground to relieve a party by force majeure or frustration, and that a force majeure clause is not to be resorted to where an event makes performance of the obligations 'commercially impractical', unless the parties have expressly agreed otherwise: see, for example, *Domtar Inc v Univar Canada Ltd*, 2011 BCSC 1776 at paragraph 90.

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?

Operators may be liable both in nuisance and in negligence where energy development causes adverse effects on neighbouring properties that materially interfere with an occupier's right to enjoy the land. Private law actions in nuisance can exist irrespective of whether the activities of the operator were authorised by statute. A distinction exists between private nuisance, involving an infringement of a plaintiff's right to occupancy of property, and public nuisance involving claims that an operator's actions interfere with public welfare. However, no private right of action in public nuisance exists unless the plaintiff suffers a special or particular injury not common to the public.

In addition, an action in negligence may lie against an operator whose negligent actions cause environmental damage, injury or property damage.

A plaintiff may also obtain an injunction to halt development or other activity where that activity has caused or will cause a nuisance, if the plaintiff establishes he or she has a reasonable argument for liability, a substantial risk of imminent harm that will not be compensable by an award of monetary damages, and that the balance of convenience favours an injunction. The plaintiff must also usually provide an undertaking to be responsible for any damages caused by the injunction if it is ultimately found to have been unjustified.

8 How may parties limit remedies by agreement?

In Canada, courts are more inclined to enforce limitations of liability provisions as opposed to outright exclusions of liability. Canadian courts will uphold a limitation of liability clause if it is clearly drafted and unambiguous, brought to the attention of the party against whom the limitation will be exercised and negotiated by parties of equal bargaining power. The exclusion of liability for consequential or indirect losses is often included in Canadian contracts.

In addition, parties may limit available remedies through a liquidated damages clause; however, the courts will not enforce such a clause if it is found to be a penalty. Such clause will be considered a penalty if it is extravagant and unconscionable relative to the loss that could have flowed from a related breach of contract.

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

The rule in the English case *Rylands v Fletcher* (1868), LR 3 HL 330 (UK HL) is followed in Canada, holding that strict liability applies for damages caused by the escape of a dangerous substance onto a neighbouring property, where that substance is not naturally occurring, and does not result from a natural or ordinary use of the lands.

However, the rule in *Rylands v Fletcher* has been limited in Canada to circumstances where the defendant's use of the land is special or extremely hazardous. The rule is applicable only where the escaped substance was known to be dangerous, or likely to cause mischief if it escaped, at the time that it was brought onto the defendant's land. Furthermore, the rule in *Rylands v Fletcher* applies only to an escape of a dangerous substance that results from an accidental or unintended mishap or accident, and does not apply to gradual seepage that is a normal and intended consequence of the defendant's activities on the neighbouring property.

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?

Competing system of law clauses are resolved by selecting the law with which the instruments have their closest and most real connection. Although parties can expressly agree – pursuant to the concept of *dépeçage* – that particular terms or issues of their contract will be governed by different laws, where the parties have not done so, the court will objectively ascertain which system of law applies to the issues in dispute. Subject to an express or implied agreement to the contrary, the obligations of both parties will be governed by the same system of law.

Competing choice of forum clauses will be resolved by a court making a determination on whether there is strong cause for not enforcing one choice of forum clause over the other. Where one party seeks to avoid a choice of forum clause that it previously agreed to, the courts have consistently held that there is a heavy onus on that party to prove why the clause should not be enforced.

Competing mode of dispute resolution clauses will be resolved by the rules of the chosen system of law and in accordance the chosen system of law's rules of contractual interpretation. If the parties do not nominate a law for the interpretation of the terms of their contract disputes, the contract will be referred to the rules of contractual interpretation of the objectively ascertained proper system of law of the contract.

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

Arbitration clauses are authorised by statute. Agreements to arbitrate are thus enforceable, subject to certain restrictions set out in provincial legislation.

Stepped, or multi-tiered dispute clauses are common in Canada, and the 2007 CAPL Operating Procedures contain an optional form of dispute resolution clause requiring negotiation prior to the reference of a dispute to arbitration. In principle, the terms of an agreement to arbitrate are enforceable, though it is not clear whether an agreement to negotiate or mediate prior to arbitration is itself enforceable as a standalone term; the issue has not been judicially considered.

Split dispute resolution clauses, providing for some disputes to be resolved through different means, are somewhat less common; however, a split dispute clause will be enforceable if it otherwise complies with the statutory requirements, including that it provide for a process that is fair and equitable as between the parties.

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

Expert evidence is admitted on technical matters where it is necessary to assist the court in drawing the appropriate inference from the facts in evidence. It is admitted where the evidence is necessary, relevant to a matter in issue, and where its probative value outweighs any potential prejudicial effects. Additionally, expert evidence must be proffered by a well-qualified expert. Expert opinion evidence is not admitted on certain subject matters where the assistance of an expert would not be required, such as on matters of domestic law.

In addition, the value of expert evidence is dependent on the independent evidentiary basis of any facts relied on by the expert.

Different jurisdictions in Canada have distinct rules of civil procedure governing the engagement of experts; generally, the rules are designed to ensure that experts, and the counsel that retain them, are mindful of the expert's duty to provide assistance to the court, and not to be an advocate for either party.

To that end, the Canadian Advocates' Society has summarised what it calls the 'Principles Governing Communications With Testifying Experts' (available online at http://www.advocates.ca/new/advocacy-and-practice/communications-with-experts.html). These principles, which include a requirement that counsel fully inform the expert of his or her duty of independence and objectivity, have been endorsed by the Ontario Court of Appeal in *Moore v Getahun* as a 'thorough and thoughtful statement of the professional standards pertaining to the preparation of expert witnesses'. The Ontario Court of

Appeal's endorsement of the Advocates' Society's principles is likely to be highly persuasive in the courts of other provinces in Canada.

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

General interim injunction powers exist allowing courts to compel or prevent any action by a party. The categories of injunction that exist are: mandatory injunction (to compel action), preventative injunction (to prohibit action), *Mareva* injunction (to freeze liquid assets and prevent evasive removal from jurisdiction) and *Anton Piller* order (to seize documentary evidence on an emergency basis).

To obtain injunctive relief an applicant must satisfy a three-part test by demonstrating that there is a serious issue to be tried, irreparable harm if the injunction is not granted, and that the balance of convenience favours granting the injunction. The applicant must usually also provide an undertaking to be responsible for any damages caused by the injunction if it is ultimately found to have been unjustified.

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

Foreign judgments are subject to a defined process under the rules of civil procedure applicable to each jurisdiction in Canada. Generally, a foreign judgment awarded by a court of competent jurisdiction is enforceable in Canada and gives rise to a binding obligation that will be recognised by Canadian courts, provided that the foreign proceeding was not conducted in a manner that was contrary to natural justice, and the facts proved would constitute a cause of action in the jurisdiction.

Foreign arbitral awards are similarly enforceable in Canada subject to the terms of the International Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in Canadian jurisdictions by statute.

A foreign judgment may be enforced on the application of the judgment creditor, in any jurisdiction where the court has jurisdiction over the subject matter of the judgment, in the place of residence of the judgment debtor.

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

Government arbitration institutions do not exist in Canada at the federal or provincial level, but Canada does possess a rich network of arbitration organisations that provide expert arbitrators in various fields, including energy.

Pursuant to arbitration legislation throughout Canada, arbitral awards are enforceable through the court system.

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

No particular bias exists with respect to the choice of dispute resolution method, however, arbitration is generally used when an arbitration clause exists within a governing contractual agreement. Additionally, arbitration is typically sought by disputing parties to allow flexibility of time and place, potentially reduced costs, increased confidentiality through private proceedings, and where disputed issues require adjudicators that have subject matter expertise.

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

Statements made in settlement discussions and mediation are without prejudice. Accordingly, they are non-discoverable for the purposes of production in a litigation proceeding as well as non-admissible as evidence before a court.

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

E-disclosure is protected in Canada by the common law developed Implied Undertaking Rule, which applies to all litigation proceedings and mandates that any document produced within litigation cannot be used for collateral or ulterior purposes by the party who receives the document.

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

Solicitor–client privilege applies to any and all communications between clients and their lawyers made during the seeking and giving of legal advice. Solicitor–client privilege is lost if the privileged information is disclosed to a third party, unless that third party shares a common interest with the disclosing party. If, however, third-party disclosure is required pursuant to a statutory obligation, the disclosure is treated as a limited waiver and solicitor–client privilege is not lost. Solicitor–client privilege applies to in-house lawyers.

Litigation privilege applies to any and all documents that are made for the dominant purpose of contemplated litigation and that come into existence after legal proceedings commence. Litigation privilege applies to communications between a lawyer and their client and to communications of a confidential nature between a lawyer and third parties. Litigation privilege terminates once the related litigation has ended.

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

Canadian energy regulators, such as the National Energy Board, the British Columbia Oil and Gas Commission, the Alberta Energy Regulator and the Ontario Utilities Board, have exclusive jurisdiction over all matters falling within their statutory authority. Disputes that touch upon the exclusive jurisdiction of these energy regulators must be heard before the given administrative agency.

Canadian energy regulators do not, however, hear contractual disputes between private parties.

Regulatory

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

Projects in the energy sector are regulated by both provincial and federal agencies.

In most provinces, the exploration for development and production of energy is regulated provincially. Provincial agencies conduct environmental assessments; manage surface rights; issue approvals, permits, licences and leases; monitor for compliance; oversee intra-provincial transportation; enforce safety procedures; and oversee abandonment, reclamation and remediation.

Where energy projects involve inter-provincial, national, international or offshore matters, federal agencies also have authority. For example, the National Energy Board (NEB) regulates inter-provincial and international energy imports and exports and the construction and operation of interprovincial and international pipelines, and the Canadian Environmental Assessment Agency requires assessments for projects that are considered to be federal in nature.

The provincial governments and federal government jointly regulate offshore oil and gas development in Newfoundland and Labrador and Nova Scotia. The NEB has authority over all oil and gas exploration activities in Nunavut, while authority in the Northwest Territories (NWT) is split between the NEB and the government of the NWT.

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

In each province, the relevant regulators have the authority to issue common carrier orders for a particular pipeline upon application by an interested party. Such orders mandate that the applicant must be given access to a certain capacity in such pipeline.

In Alberta, for example, an application by an interested party for a common carrier order must demonstrate that the proposed access entitlement is the only economically feasible way to exploit the resource, the most practical way to transport the substance in question, or a clearly superior option in regard to the environment: see Alberta Energy Regulator, Directive 065: Resources Applications for Oil and Gas Reservoirs. Further, applicants must also demonstrate that they have made all reasonable efforts to obtain access to the subject pipeline on a market basis but have been obstructed by the pipeline's owner.

Federally regulated oil pipelines in Canada operate as common carriers under the National Energy Board Act (NEBA). The NEBA imposes a duty on oil pipeline operators to receive, transport and deliver all oil

offered by means of its pipeline. Natural gas pipelines are contract carriers and are not required to accept all gas offered by a supplier; but the NEB has authority to direct a pipeline operator to offer capacity to a supplier.

Oil and gas developers also utilise Canadian railways to transport crude oil to market. In Canada, the federally regulated railways are common carriers and are required to accept crude oil for transport.

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?

An administrative decision can be overturned by the courts if such decision was made beyond the agency's jurisdiction. If the agency was acting within its jurisdiction, the court can review the decision based on either reasonableness or correctness. The reasonableness standard is used for decisions in which the agency was required to exercise its discretion. Under this standard, the court shows deference to the agency, and is concerned with whether the decision was justified, transparent and intelligible, and fell within a range of possible, acceptable outcomes defensible in respect of the facts and law. The correctness standard is used for decisions that involve an interpretation of the law. Under such standard, the court determines the matter as if it was the first decision maker. For all decisions, courts examine whether the agency met the requirements of procedural fairness, independence and impartiality.

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

In British Columbia, Alberta, Saskatchewan and Manitoba, hydraulic fracturing operations are permitted and are regulated by the relevant provincial regulator. Regulations regarding safety and casing requirements differ in each jurisdiction.

There is a moratorium on hydraulic fracturing in Newfoundland, New Brunswick and Nova Scotia. Other provinces indicate that projects involving hydraulic fracturing will be considered on a case-by-case basis.

25 Describe any statutory or regulatory protection for indigenous groups.

First Nations' rights are entrenched within Canada's Constitution, which prohibits the government from taking actions that would adversely impact First Nations' rights, unless such action can be justified. The government has a duty of consultation and accommodation, which is triggered whenever aboriginal rights are reasonably expected to be adversely impacted by a proposed government action or a proposed project.

As noted above, natural resources underlying First Nation reserve lands are managed and regulated on behalf of First Nations by the federal government.

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

Foreign investment is regulated by the Investment Canada Act. The acquisition of a Canadian business that has an enterprise value in excess of a specified amount must be reviewed by the federal government. Investment approval will be granted if the foreign investment is found to be a 'net benefit to Canada', taking into consideration the impact of the investment on various economic factors.

Investments by foreign state-owned enterprises are subject to lower threshold triggers and additional review requirements. Such reviews examine corporate governance and the reporting structure of the state-owned enterprise against Canadian standards for governance. Other considerations include whether the business will continue to operate on a commercial basis and whether there are reasonable grounds to believe the transaction 'could be injurious to national security'.

Although not specific to foreign investment, certain transactions that exceed the threshold set forth in Part 9 of the Competition Act need to be approved by the Canadian Competition Bureau prior to closing.

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

Occupational health and safety is regulated provincially. As an example, in Alberta, penalties range from C$10,000 to C$1 million, or more for continuing contraventions or offences, or imprisonment of up to 12 months: see Occupational Health and Safety Act, RSA 2000, Chapter O-2 (Alberta) at sections 40.3 and 41. However, charges can also be laid under the Criminal Code, which imposes criminal liability on persons, including corporations, who direct the work of others, and whose failure to take reasonable steps to prevent bodily harm to those persons arising in the course of that work results in injuries or death: see Criminal Code RSC 1985, Chapter C-46 at section 217.1.

The environment is regulated both provincially and federally. Environmental liabilities range from administrative penalties (with no charge) to fines (with the charge of an offence) of tens of thousands of dollars to millions of dollars or imprisonment or both. Most environmental legislation provides for the liability of directors and officers where a corporation commits an offence and the director or officer authorised, assented to, acquiesced in or participated in the commission of the offence: see Environmental Protection and Enhancement Act, RSA 2000, Chapter E-12 at sections 232 and 237.

Companies may also face civil actions based in contract or tort, as a result of health, safety or environmental incidents.

Other

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

Canada's principal relevant boundary dispute is with the United States in the Beaufort Sea, which is located between the Canadian territory of Yukon and the US state of Alaska. The dispute is over a wedge-shaped slice on the international boundary. The Beaufort Sea holds reserves of natural gas, liquid natural gas and crude oil.

The Northwest Passage international waters dispute also exists, wherein Canada claims that waters of the Canadian Artic Archipelago are internal to Canada and give Canada the power to bar transit in these waters. Several maritime nations dispute Canada's characterisation of the Northwest Passage and claim that these waters are an international strait that allows a right of passage. Access through the Northwest Passage by large tankers and other similar vessels during the ice-free summer months is potentially more favourable than the alternate route of circumnavigating the tip of South America.

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

Canada is a signatory to the European Energy Charter, which is a concise expression of the principles that underpin international energy cooperation, based on a shared interest in a secure energy supply and sustainable economic development. By virtue of its membership to the European Energy Charter, Canada has observer status, but not member status, to the Energy Charter Treaty.

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

The federal government and all of the Canadian provinces, except the Province of Ontario, have implemented the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The Province of Ontario has only implemented the Model Law. Therefore, Canadian courts are required to recognise and enforce foreign arbitral awards. Furthermore, Canada ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in 2013.

Canada is also a party to several investment treaties that provide foreign investors in Canada with substantive legal protection and a direct right of action against the federal government before an independent arbitral tribunal. For example, Canada is a party to the North American Free Trade Agreement (NAFTA) with the United States and Mexico; Chapter 11 of NAFTA provides foreign investors with both investment protection and avenues for recourse against the government.

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.

Public Safety Canada, a federal department responsible for national security, has established a Canadian Cyber Incident Response Centre (CCIRC). The CCIRC has recommended the following main mitigation strategies to prevent cyberattacks: use application whitelisting to prevent malicious software and unapproved programs from running; patch applications and patch operating system vulnerabilities to reduce the number of entry points available to an attacker; and restrict administrative privileges to operating systems and applications based on user duties to limit the ability of malware to spread through the network.

The CCIRC also provides technical advice and support to industry partners, by issuing cybersecurity bulletins, best practices, reference documents and research reports, and by providing security workshops and training. The CCIRC has also established a Cyber Incident Management Framework for Canada that specifies the role of private sector organisations and the assistance they may obtain.

* *The author wishes to thank Clarke Hunter QC, senior partner at Norton Rose Fulbright in Calgary for his contribution to the chapter. Clarke can be contacted via email: clarke.hunter@nortonrosefulbright.com*

NORTON ROSE FULBRIGHT

KayLynn Litton **kaylynn.litton@nortonrosefulbright.com**

Suite 3700, 400 – 3rd Avenue SW
Calgary
Alberta T2P 4H2
Canada

Tel: +1 403 267 8222
Fax: +1 403 264 5973
www.nortonrosefulbright.com

Chile

Juan Luis Castellón
Núñez, Muñoz y Cía Ltda Abogados

General

1 Describe the areas of energy development in the country.

The development of the fossil fuel industry in Chile is very limited. The country has a few oil and natural gas fields in the Magallanes region (southern Chile), operated by ENAP (a state-owned oil company). However, production from those fields provides for only a small portion of the national consumption. Regarding electricity, 57 per cent of all generation capacity is powered from fossil fuel, mainly oil and coal.

Chile does not have any nuclear energy generation. As to renewable energy resources, hydropower (including both reservoir and run-of-the-river generation) is the largest source, accounting for 32 per cent of total installed capacity. Wind farm generation, for its part, represents almost 5 per cent of the renewable energy generation capacity, solar photovoltaic 4.6 per cent and biomass 2.2 per cent.

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

According to article 19, No. 24 of the Chilean Constitution, liquid and gaseous hydrocarbons are owned by the state and can only be exploited directly by the state, by state-owned companies or by administrative concessions or through production sharing contracts.

The energy policy developed by the Chilean government, through the Ministry of Energy, focuses mainly on public policies and the regulatory framework for the electricity sector. In June 2014, the government released its 'Energy Agenda', a comprehensive document seeking to achieve the following goals:

- to cut down the marginal cost of electricity by 30 per cent before March 2018;
- to reduce by 20 per cent during the next decade the auction prices for residential, businesses and small industries power supply, as compared with the prices of the last public auction supply;
- to boost investment and development of non-conventional renewable energy sources to comply with the 20 per cent target of renewable generation by 2025;
- to encourage and develop the efficient use of energy in order to reduce the foreseen demand for 2025 by 20 per cent;
- to strengthen the role of the national oil company (ENAP) in the country's energy challenges by providing the company with a solid corporate government; and
- to develop, with the participation of all social sectors, an energy development strategy for 2035 and 2050, in order to achieve a sustainable development of the energy industry.

Commercial/civil law – substantive

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

Regarding the electricity sector in Chile, contracts are governed by different rules according to the specific segment of the market in which companies operate. The regulatory framework offers three markets in which energy companies are allowed to participate.

The spot market

Generating companies can trade electricity and capacity with other generating companies through the system operator, which operates the power grid based on the marginal cost of producing electricity. The electricity wholesale market is formed by generation companies that trade energy and capacity between them, based on supply contracts they have entered into. If a company's electricity generation exceeds the volume of energy they have committed in contracts, those companies, called 'surplus companies', can sell to other companies, called 'deficitaries companies', whose electricity generation is below what they have contracted with their customers. In the spot market, transactions between generators are mandatory by law based on the marginal cost of electricity determined by the system operator.

The market of contracts

Generators can enter into an agreement with consumers who are not subject to price-regulation by the authority, through private contracts freely agreed between the parties. Consumers with a connected capacity above 5,000kW (typically large industrial facilities) are considered by the law as 'non-price-regulated' consumers, therefore they can freely negotiate prices and conditions for the supply of electricity with generators or distribution companies through a Power Purchase Agreement (PPA). The law also provides the same option for price-regulated consumers (consumers with connected capacity below 5,000kW) located within the concession area of a distribution company, whose connected capacity is between 500kW and 5,000kW, to choose to become non-price-regulated customers.

Public auctions

Finally, public auctions for supplying electricity to price-regulated consumers. For consumers with connected capacity equal to or less than 5,000kW (typically residential consumers and small businesses), the law treats them as 'price-regulated' consumers. In this case, for those consumers electricity is provided by distribution companies whose electricity supply is contracted with generation companies through public auctions in which the distributor auctions off different blocks of electricity to be supplied by generators, usually for periods of 20 years. In this case the National Energy Commission, the regulatory body in charge of conducting the auction process, determines the terms and conditions of the respective contracts.

Another specific form of contract used in the Liquefied Natural Gas (LNG) industry in Chile are 'take-or-pay' contracts, consisting of the obligation assumed by the buyer to purchase a minimum volume of natural gas during a particular period and pay the agreed price whether it takes that volume or not. The purpose of the deal is to guarantee the seller with a revenue ensuring an adequate return on the significant investment and risks taken.

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

Our civil law system embraces the 'subjective method of contractual interpretation' based on the principle of subjective good faith, by which, the intention or real will of the parties has to be preferred over the literal meaning of the words used to express it or what has been declared. The key principle is given in article 1560 of the Chilean Civil Code, which

reads, 'When the intention of the contracting parties is clearly known, this intention shall prevail over the literal expressions or words used to convey it'. If, when executing the contract it is not possible to clearly establish this intention, either because the parties have not foreseen a particular situation (silence) or because the written expressions used are unclear, the interpretation must be done using 'objective good faith' parameters, looking for the parties' intentions in their conduct, the average man standard and the law.

5 Describe any commonly recognised industry standards for establishing liability.

In the Chilean civil law system, fault is the main element for the existence of civil liability whether for contracts or torts.

In contracts, our law recognises three degrees of fault or negligence a party can be liable for: slight fault, ordinary fault and serious fault (a concept akin to gross negligence). The legal degree applicable to a particular breach will depend on the benefit the non-compliant party derives from the contract (an application of the Roman principle *utilitas contrahentium*). Nevertheless, the principle has proven to be difficult to apply in practice and our courts have instead adopted the principle of average diligence. In order for fault to be proven, there is no need to look into the non-compliant party's state of mind, it is enough to contrast the actual conduct of the party at fault with the expected conduct of a 'reasonable and prudent man' (objective test), unless the parties themselves or the law have provided a different standard. Thus, in Chile, the establishment of contractual fault is based on the abstract method.

Regarding proof of fault, our law presumes fault if breach of contract has been proven; the burden of proof is on the non-compliant party to rebut that presumption.

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 only true legal excuse – unless parties have provided otherwise – for fulfilment of a contractual obligation under Chilean law is the principle of force majeure, understood as an unforeseeable event impossible to resist or avoid. In general, damage caused by an unforeseeable event does free the party from its contractual obligations. For a fact to constitute force majeure and free the obliged party from all liability it is necessary, first of all, for the event to be totally unforeseeable and unexpected; secondly, for the obliged party to have used all means at his or her disposal in order to avoid the unforeseeable event and to diminish its consequences (ie, to have used all due diligence (this is why there can be no force majeure if the party was in arrears)); thirdly, it is necessary that the event takes place under circumstances absolutely independent from the debtor's will.

Even if all the above premises are met, it is always necessary for the party asserting the force majeure to have acted with all due diligence, without fault, because in Chile liability (save in cases of obligations of result) is subjective, which means even a force majeure event will not free the party from liability if there has been negligence. So it is not enough for a causal link to a force majeure event to exist, the lack of fault or negligence is also required to exempt from liability.

In the cases in point, like an excuse of performance during periods of commodity price or supply volatility, these events will not constitute a true force majeure under Chilean law as both events can be regarded as expected occurrences in the industry and part of the underlying risks of trade, and even if they were to be construed as true force majeure events, due diligence must be established before the principle can be invoked successfully to avoid liability.

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?

Within Chilean civil law tradition, nuisance is not recognised as an action to obstruct development of projects or other activities. Public agencies may apply sanctions indirectly if the activity that is causing the nuisance constitutes a violation to specific regulations or permits.

Notwithstanding the above, there is an institution called 'preliminary injunction for new construction' that may be used by third parties as a nuisance claim. This institution was created to protect the possessor of a certain land or easement from third parties that may affect their domain or possession by starting a construction within their property or easement. Moreover, if the new construction takes place over a public land, any individual from the local community may file the injunction. The purpose of the injunction is to temporarily stop the construction and to compensate the plaintiff for any damages caused. In order to prevent the misuse of the injunction by land owners or mining rights owners in such land, the Electric Services Act has been recently amended by providing that in cases where the plaintiff obtains the temporary delay of the construction, the court may suspend such decision subject to an escrow deposit performed by the energy project developer (who may be the owner of an electric concession or a non-conventional renewable energy developer). This escrow deposit must cover the eventual expenses of the eventual demolition of the works already made on the land, or the amount of damages that the court may impose to the developer in the final decision of the injunction.

8 How may parties limit remedies by agreement?

As mentioned in question 5, it is usual practice for the parties to anticipate the consequences of a breach of contract by agreeing to the payment of a fixed or determinable amount of money in case of actual breach, regardless of its causes. These clauses are, in fact, an anticipated liquidation of damages, which will avoid the need to prove them (the damages) as a requirement to obtain compensation for breach of contract.

Likewise, parties can choose a lesser standard of liability than the one the law affords them. Such clauses are perfectly legal as our civil law system recognises the principle of contractual freedom where the parties can choose the terms and conditions, with the only limitation being respect for the law applicable to the particular contract.

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

Strict liability for damages in the energy sector is, of course, the exception and there are only two instances in which there can be liability regardless of fault. Firstly, in the nuclear energy sector and secondly when dealing with hydrocarbon pollution. We will briefly explain both situations.

Strict civil liability for nuclear accidents

The national regime is established in Law No. 18.302 published in 1984 and by the 1963 Vienna Convention on Civil Liability for Nuclear Damage, ratified by Chile in 1990. Both legal bodies provide that operators of nuclear power plants are liable for any damage caused by them, regardless of fault and even in cases of force majeure. This norm simplifies and speeds up any eventual civil liability claim for damages, which is a significant benefit to potential victims, who will have certainty about whom to claim against. Also in order to benefit any potential victims, the law defines the expression 'nuclear accident' as 'any event or succession of events that, having the same origin or cause, have caused nuclear damage'.

The operator's liability is limited in time and amount. Although the Vienna convention allows each nation to determine for the pecuniary liability limit (although not below US$5 million), Chilean law has fixed this amount to not less than US$75 million. The time bar to demand for damages is 10 years following the nuclear accident.

Strict civil liability for hydrocarbon pollution damage to the sea

The national regime is established in Law Decree No. 2,222 published in 1978 and by the 1969 International Convention on Civil Liability for Oil Pollution Damage, ratified by Chile in 1977. Both protect against pollution caused to seawaters subject to Chilean jurisdiction.

The Civil Liability Convention was adopted to ensure that adequate compensation is available to persons who suffer oil pollution damage resulting from maritime casualties involving oil-carrying ships. The Convention places the liability for such damage on the owner of the ship from which the polluting oil escaped or was discharged and as such, it is restricted to pollution from hydrocarbons. Subject to a number of specific exceptions, this liability is strict.

Law Decree No. 2,222 makes clear the same strict civil liability regime regarding pollution from any toxic substances or residues, not only hydrocarbons, occurring within the territorial waters, whether this pollution comes from ships or naval artifacts and regardless of the activity that was being performed at the time of the incident.

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 issue of conflict of laws or choice of forum can only arise in Chile if there is an international element surrounding the contract. In fact, although there is no constitutional prohibition for the contractual parties to elect the forum (exceptionally, the choice of a foreign forum is forbidden on matters relating to the extinction or forfeiture of mining property), article 5 of the Courts Organisation Code provides that any judicial matter arising within the Chilean territory shall be referred to the ordinary Chilean courts. It contains no provision regarding the election of a foreign forum when there is an international aspect involved.

Regarding international contracts agreed by public entities (the Chilean state or its organs, institutions or companies), Decree Law No. 2,349 recognises the validity of contract clauses extending jurisdiction to foreign courts if these contracts have been agreed with international institutions, organisations or foreign companies whose principal business seat is abroad.

Likewise, for private contracts with an international element the general rule regarding validity of contractual clauses extending jurisdiction is in article 318 of the Private International Law Code, ratified by Chile in 1934, which establishes that the competent court for all civil and commercial matters arising out of an international contract is that one the parties have expressly chosen, provided always that at least one of them is a national of the court's country or has its domicile there, unless there is a national provision against it. Thus, our legal system recognises the parties' autonomy to decide on the forum.

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

In Chile, tiered or stepped escalation clauses are not uncommon in commercial contracts in general and energy contracts in particular, being just an expression of the legal principle in contract law of party autonomy or free will. As a general rule, parties will include in their contracts a more or less formal negotiation stage phase as a necessary step before recourse to any formal dispute resolution. Nevertheless, the enforceability of such clauses is largely left to the parties' good faith, as there is not a legal mechanism to compel them to follow the process if one of the parties chooses to immediately trigger the dispute resolution mechanism of last resort, whether arbitration or ordinary courts, because any such contractual breach will in fact create a dispute that will in turn need to be resolved.

As for split dispute clauses, these are rather less common in Chile, although not unseen, particularly as 'unilateral hybrid jurisdiction clauses' granting the right to choose jurisdiction to one of the parties while the other contracting party only retains the ability to bring an action before a single jurisdiction.

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

Expert evidence may be mandatory by law in some cases; it can be freely requested by the parties in others; or it can also be ordered by the court when it believes it to be convenient.

Courts can order for expert evidence to be provided at any stage during proceedings or even after proceedings have finished and before a decision has been made. The parties, on the contrary, must request any expert evidence they wish to provide at the appropriate opportunity prescribed by the law (evidence stage of trial or at a preliminary stage). Usually, expert evidence will be admitted by court when the correct and accurate appreciation of the facts at stake depends on knowledge of a particular art or science, which can only be provided to the court by an expert or a professional.

Chilean courts shall weigh expert evidence according to the rules of the 'reasoned judgment' standard, understood as a set of common sense and logic rules the judge must use to assess and ponder the evidence. It is a non-legal criterion that the judge shall use from the perspective of the average person with a prudent and objective attitude.

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

The Chilean Civil Procedure Code enables parties to apply for interim reliefs in any stage of trial, or even before the filing of the complaint. In order to grant interim reliefs, two requisites are always needed: the demonstrated plausibility of the relief sought and the existence of the emergency.

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

For a foreign judgment or arbitral award to be enforceable in Chile, it is necessary to gain prior authorisation from the Chilean Supreme Court. This process is called 'exequatur'.

The general rule regarding exequatur is reciprocity, meaning that in the absence of treaties governing the matter, foreign judicial decisions shall have in Chile the same enforceability afforded to Chilean judicial decisions in the corresponding jurisdictions.

In all other cases, foreign judicial decisions will have in Chile the same enforceability as if they would have been pronounced in Chile as long as the following conditions are met:

- that they do not contain anything against Chilean laws, although the procedural rules to which the case would have had to comply under Chilean law will not be taken into account;
- that they are not contrary to national jurisdiction;
- that the party against whom the judicial decision is being invoked has been properly notified of the proceedings. Even so, evidence that such party was unable to defend himself or herself will be allowed; and
- for such judicial decisions to be final according to the laws of the issuing country.

Regarding arbitral awards in particular, article 246 of the Chilean Procedural Code provides that the abovementioned rules are applicable to final judicial decisions issued by arbitral tribunals as long as the authenticity and efficacy of the award has been vetted or approved by a superior ordinary court of the country where the award was granted.

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

Since 2004, Chile has had a specialised court called Panel of Experts, devoted to resolving disputes in the energy sector. The panel exercises its jurisdictions over three areas:

- disputes arisen between the CDEC (the operator of electric systems) and the energy companies subject to the coordination of the operator;
- matters in which the law requires the Panel of Experts to intervene, such as disputes resulting from the approval of the expansion plan for transmission infrastructure (high voltage power lines and substations); and
- any conflict that energy companies decide to submit before the Panel of Experts regarding the application and interpretation of the electric law and its regulations.

On that basis, in the first two fields, the Panel of Experts acts as an ordinary court established by law for resolving energy disputes, whereas in the latter case, the Panel of Experts plays the role of an arbitration court.

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

As we previously explained, energy disputes in the Chilean energy sector are resolved by the Panel of Experts, which plays the role of an ordinary court or arbitration entity, depending on the type of conflict.

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

Statements made in settlement discussions, as well as the settlements themselves, reached outside a courthouse or arbitration procedure, are treated as a regular contract between the parties. Therefore, they are admissible as evidence in court, notwithstanding the breach of the contract if a confidentiality clause was violated.

Moreover, if the statements are made within trial or within an arbitration, or if the settlement agreements are filed in front of a courthouse or an arbitrator, they are understood to be public.

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

Within a civil trial, parties are not entitled to request e-disclosure or e-discovery. During a Civil Procedure, parties may request the judge to order the exhibition of certain written or signed (including advance electronic signature) instruments in possession of the other party or of a third party. The approval of the exhibition request is subject to the decision of the court based on their direct relation and relevance for the resolution of the controversy and the judgment by the court that they are not considered private or secret.

Moreover, during a civil trial, parties may also request the exhibition of accounting books in possession of the other party. For this purpose, courts may grant the exhibition provided it is considered relevant for the preparation of the lawsuit or its direct relation and relevance with the resolution of the controversy, limited to the specific sections of the books that are considered relevant by the court.

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

There are legal and ethical obligations for lawyers regarding attorney–client privilege. According to our Civil Procedure Code, lawyers are exempt from the obligation to testify during a civil trial. This exemption covers only confidential facts that were communicated to the lawyer under consideration of his or her profession. There is no special protection under Chilean law to work product privileges.

The ethical obligation of confidentiality for attorneys is broader, and covers all the information that was provided to the lawyer by the client. It also includes a prohibition of disclosure to any third party and a duty to protect the information provided by his or her client, including the information revealed to her or his collaborators. Notwithstanding this, ethical obligations are only applicable to the members of the Chilean Bar Association and affiliation is not mandatory.

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

The different sanctions that the Superintendence of Electricity and Fuel (SEC) may issue to any of the companies under its supervision may be appealed before the SEC. Notwithstanding, this administrative appeal is not mandatory, giving the sanctioned party the right to appeal directly before the corresponding Court of Appeals. The administrative appeal, however, interrupts the statute of limitation of the jurisdictional appeal and its decision is also subject to appeal.

Regulatory

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

There are four institutions responsible for governing the energy sector in Chile.

National Energy Commission

In 1978, the National Energy Commission was established in order to perform four main functions:

- to carry out technical analyses of prices and tariffs on energy-related goods and services, according to formulas mandated by law;
- to set technical standards for the operation of electrical facilities and the power grid;
- to monitor and prepare forecasts regarding the current and future functioning of the energy sector, making policy recommendations based on those analyses; and
- to be in charge of advising the government on all matters relating to the energy sector.

Economic Dispatch Load Centers

The Economic Dispatch Load Centres (CDEC) are entities responsible for coordinating and operating the electric systems with more than 200MW of installed capacity. Chile's power grid is divided into four main electric systems with a CDEC for the first two. The CDEC's main role is to bring together power generation to consumers, determining which power plants must start operating at a particular moment based on their marginal costs, thus instantaneously matching generation with demand.

Electricity and Fuels Superintendence

The Electricity and Fuels Superintendence (known as the SEC) is the main entity responsible for ensuring companies' compliance with electricity law and technical regulations regarding the generation, production, storage and distribution of all fuels and electricity. Law 19,613 strengthened the SEC's supervisory authority by allowing it to impose companies with fines and penalties for non-compliance with legal and technical obligations. It can also suspend licences temporarily or permanently.

Ministry of Energy

Finally, the Ministry of Energy is the primary public institution in the energy sector, working directly with the President of the Republic. Its main objective is to draft and implement plans, policies and regulations for the functioning and development of the energy sector, coordinating its actions with all other energy institutions, ensuring the observance of these policies, and advising the government on all issues relating to the energy sector.

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

Chile has two LNG terminals: LNG Quinteros and LNG Mejillones, which import natural gas from international markets in order to supply mining operations in northern Chile and residential and industrial costumers throughout the country. Natural gas infrastructure is governed by an 'open access regime', which means that gas transport companies must provide access to third parties to pipelines based on equal financial and technical terms.

In the power sector, transmission infrastructure is also subject to an 'open-access regime' based on non-discriminatory technical and financial terms upon payment of transmission fees.

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?

Decisions taken by administrative agencies are subject to two types of review.

Administrative review

When an administrative agency issues an order, the affected party can challenge such decision before the same agency through an administrative appeal.

Judicial review

If the administrative challenge is dismissed, the affected party can request judicial review before the Court of Appeals in order to overturn the order issued by the administrative agency.

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

As explained in question 1, the development of Chile's oil and gas industry is very limited, therefore the country does not have any regulatory instrument regarding hydraulic fracturing.

25 Describe any statutory or regulatory protection for indigenous groups.

International Labour Organization Convention No. 169 (ILO 169) has been in effect in Chile since 15 September 2009, and grants the right to free, prior and informed consent regarding actions taken by the Chilean government that affect rights.

In 2013 the government decided to address the indigenous consultation during the drafting of the new regulation of the environmental impact assessment system. The idea behind the approach taken by the government was to cover the indigenous consultation within the process of citizen participation of the environmental impact assessment system

in order to assure effective participation from indigenous groups. In this way, the new regulation was enacted on 12 August 2013, requiring the Environmental Assessment Agency to adopt specific measures to consult the indigenous communities affected by the execution of a project subject to environmental approval. However, the regulation stated that if no agreement is reached between the holder of the project and the indigenous communities, or no consent is obtained from them, the consultation process would not be voided.

In 2014, Decree No. 66 established a second regulation in order to address the indigenous consultation process in the implementation of administrative or legislative measures by the Chilean government that undermine indigenous rights. In this case, the regulation established that the indigenous consultation process was a means to guarantee the right to free, prior and informed consent regarding actions taken by the Chilean government, in order to enable public participation from indigenous groups. Nonetheless, Decree No. 66 also declared that the opinions expressed by indigenous communities through the consultation process were not legally binding for governmental agencies.

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

There are no legal barriers for foreign companies in order to enter the Chilean energy market. The only restrictions are those related to the specific nature of the regulatory regime of the generation, transmission and distribution segments of the energy industry. In this regard, the generation sector is a competitive market with no legal barriers to the entry of new actors. The transmission sector is regulated as a 'natural monopoly' and the construction and development of new infrastructure is based on public auctions where there is no restriction for foreign companies to participate. Finally, the distribution segment is also recognised by the legislation as a 'natural monopoly', where distribution companies must obtain an electric concession from the Ministry of Energy in order to supply electricity in an exclusive geographic area.

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

There are no specific criminal offences set for the energy industry in Chilean legislation. Moreover, environmental crimes are not specifically regulated, which is a deficiency of our environmental regulation according to an OECD report issued in 2016.

Regarding health and safety liabilities, companies under the control of SEC may face different penalties depending on the severity of the violation of the law and on the severity of the damages caused. The determination of the penalties ranges from written reprehensions to the termination of the concession or closure of the plant. For reparation purposes, there are no specific provisions for damages caused to third parties during operations.

Moreover, there are no specific environmental liabilities set for energy companies. Therefore, energy companies may face the generally applicable sanctions for environmental damages. The system is similar to the previously described for the SEC, where the Environmental Superintendence may apply a sanction based on the severity of the violation of the environmental regulation. Sanctions go from fines to the revocation of environmental permits. Also, public action is granted for the recovery of the environment that suffered the damages and individuals may sue for the compensation of any damages directly suffered.

Other

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

Currently, Chile and Bolivia are facing a boundary dispute before the Hague tribunal. The conflict hinges over the right of Bolivia to obtain sovereign access to the Pacific Ocean. However, there is no specification to the territory that may be affected by the decision. In light of the above, it is very hard to estimate how a decision in favour of Bolivia may affect the energy sector in Chile.

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

On 20 May 2015, Chile signed the International Energy Charter as an Observer of the treaty. Since 1991, Chile as also been part of a bilateral agreement with Argentina for cross-border gas trade.

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

Regarding domestic investors, there are no specific regulations for the energy sector.

For foreign investors in any industry, in 1991 Chile ratified the Washington Convention of 1965, establishing the International Center for Settlement of Investment Disputes (ICSID), which is an international arbitration institution for resolving disputes that may arise between states and foreign investors. As of 2016, Chile has signed 54 bilateral investment treaties, of which 37 are in force. Most treaties provide an alternative dispute resolution mechanism whereby investors have the right to recourse to the ICSID, rather than suing the host state in its own courts.

In 2016 Congress enacted Law No. 20,848, which established a new foreign investment regime that included the creation of a new national investment promotion agency, called Promotion Agency for Foreign Investment, which provides assistance to overseas companies in the establishment, development and ongoing operation of their businesses in Chile and also promotes engagement of foreign companies in the Chilean regulatory environment.

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.

There are no currently relevant legal standards or best practices regarding cybersecurity relevant to the energy industry in Chile.

Núñez
Muñoz
ABOGADOS

Juan Luis Castellón **jcastellon@nam.cl**

3000 Isidora Goyenechea Avenue, 21st Floor
Las Condes, Santiago
Chile

Tel: +56 2 2954 7000
Fax: +56 2 2954 7090
www.nam.cl

Colombia

David Ricardo Araque Quijano, Natalia Castellanos Casas and Juan Camilo Alba Botero
Gómez Pinzón Abogados

General

1 Describe the areas of energy development in the country.

Colombia is a growing economy that has had one of the higher rates of economic growth in Latin America in the midst of a decade of deceleration and recession. The country has grown at an average rate of 4.8 per cent according to the Mining and Energetic Planning Unit (UPME) for the period 2010 to 2014, having an average increase of 1.6 times compared with the 1990s. This rate of growth can be explained by multiple factors, including the steady growth of the energy sectors of the economy. Indeed, the primary and secondary sectors present a robust increase in energy activities: mining has been the most volatile sector ranging from a tremendous rate of growth of 22 per cent in 1999 to a contraction of -9 per cent in 2000. In the 2000s the mining sector increased steadily, having four years of sound economic growth (10 per cent in 2008, 12 per cent in 2009, 11 per cent in 2010 and 15 per cent in 2011). During the period 2010 to 2014 the sector has grown alongside the economy: the electric industry has a very similar pattern of growth compared to the general growth of the economy, ranging from 3.5 per cent increase in 2011 to 4.7 per cent in 2014. It is important to note that the tertiary sector, including transportation, construction and finance has developed at a higher rate than the primary and secondary sectors.

The UPME has enacted a document pursuant to which certain objectives and principles must be accomplished by the energy sector by 2050. The 2050 Plan includes the following objectives for the development of the sector:

- an increase of two-thirds of the global energy demand makes having a policy of environmental responsibility of paramount importance. In line with this, the government supported the drafting of Law 1715 of 2014 by which the non-conventional sources of electricity generation (particularly renewable energy sources) are stimulated;
- the infrastructure of the territory, especially in the sector of transportation, needs to be rethought and reconstructed in order to be a cornerstone of efficiency for the sector. This involves the development of public–private associations and the simplification of legal and regulatory standards for transportation, among others; and
- the development of the sector must bear in mind the principle of affordable energy, which involves mapping the social and economic situation of specific communities in order to achieve full interconnection as soon as possible.

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

Colombia is a unitary republic with administrative autonomy of its territorial entities (departments and municipalities). The Constitution of Colombia, as per article 332, provides that the state is the owner of the subsoil and all the resources that are contained within. However, the same disposition clarifies that acquired rights of property upon natural resources (before 7 July 1991) are respected in accordance with pre-existing norms. Furthermore, article 360 of the Constitution states that the exploitation of non-renewable resources is permitted, in accordance with laws or decrees that regulate the matter. This activity must, however, involve a royalty in favour of the state (which in accordance with article 361, as amended by the Legislative Act 5 of 2011, purports for the social development of the territorial entities of Colombia).

Regarding oil and other hydrocarbons, article 28 of Law 1753 of 2015 (by virtue of which the National Development Plan is adopted for the term 2014 to 2018) provides that the National Agency of Hydrocarbons (ANH) is responsible for the general administration of the oil reserves and must conduct its duty in order to mitigate the negative effects of the decrease in the world's oil prices. Additionally, the ANH, pursuant to article 2 of Decree 714 of 2012, is responsible for ensuring the energetic auto-sufficiency of the state and administering the oil reserves in accordance with sustainable development.

The mineral exploitation objectives in Colombia are defined in article 1 of Law 685 of 2001 (Code of Mines). Pursuant to this provision, the extraction of minerals in Colombia is intended to cope with both internal and external demand, taking into consideration that the activity must be consistent with the policy of sustainable exploitation of non-renewable resources. It is important to note that Law 1753 of 2015 provides an incentive for the activity of extraction of minerals through the creation of Mining and Energetic Reserve Areas in the territory. These areas purport to be for the usage of non-renewable minerals in the generation of energy according to international best practices.

Electricity generation in Colombia is regarded as an essential public service according to article 5 of Law 143 of 1994. The state, as ultimately responsible for the service (article 334 of the Constitution) must: ensure the efficiency of the service, prevent cartelisation and other antitrust conducts, and ensure the expansion of the service towards vulnerable populations, among others. In Colombia the generation, commercialisation and distribution of electricity is not restricted to public companies.

It is important to note, however, that Colombia is permanently faced with the El Niño and La Niña weather phenomena, resulting in electricity generation becoming unstable. Indeed, according to the UPME (agency responsible for the planning of electricity demand and offer) in 2015 (and this result is unlikely to vary for 2017) Colombia relied for its electricity generation mostly upon: hydroelectric plants (accounting for 70 per cent of the total generation) and natural gas (24.8 per cent). Colombia is therefore providing incentives to develop renewable energy sources, by means mainly of tax cuts. These incentives are disciplined by Law 1715 of 2014. One important statement that this law makes is that it conceives the production and utilisation of non-conventional energies, especially renewable ones, as being of public utility.

Commercial/civil law – substantive

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

The ANH was vested with the authority of providing the general terms and conditions with respect to the contracts for the exploration and production of oil and other conventional hydrocarbons in accordance with article 76 of Law 80 of 1993 (Public Procurement Statute). Pursuant to this faculty, the ANH enacted Agreement 4 of 2012 pursuant to which the standard contract of Exploration and Production (E&P) was regulated. By means of the E&P contract the ANH, as the agency representing the Colombian state, concedes the right to explore the contracted area to the contractor, which bears all the risk of the enterprise in this phase. As consideration, the ANH receives a price from the contractor for the surface that comprehends the contracted area.

If the contractor succeeds in finding significant oil reserves, the second phase starts, namely the production phase. This phase entitles the contractor to extract hydrocarbons for a period of up to 24 years, extendable by petition of the interested party. The ANH receives a mutually convened price proportional to the production of the field.

Midstream services depend on the destination of the oil. Colombia is an oil-exporting country and some of its production is sold abroad; the part of the production that is not exported is generally sold to ECOPETROL (the partly state-owned oil producer and refiner in Colombia) for its refinery.

With respect to mining standard contracts, article 14 of Law 685 of 2001 (Mining Code) provides that the only title for appropriation of mineral resources is the mining concession. Article 45 of the same law provides that this contract is different to that of public construction and public service concession. Indeed, by means of this contract, the National Mining Agency (ANM) concedes the right to explore and extract, in an exclusive manner, the area described in the contract. The duration of the contract cannot exceed the term of 30 years (article 70 of the Law), except for a unique extension of two years. The person or company must pay the mining title (the negotiable title that constitutes proof of the right that the bearer has upon the extraction of the mineral in the conceded area).

In the electricity sector, the wholesale electricity market is highly liberalised and hence the agents can celebrate one or many of the following contracts, according to their needs: firm energy auctions (disciplined by resolution 056 of 2011 of the Regulatory Commission of Energy and Gas (CREG)); bilateral contracts between generators and commercialisation companies (in the form usually of distribution contracts); and energy spot market transactions according to the price and offer set forth on the energy exchange on an hourly basis.

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

The general rules that govern contractual interpretation are contained mainly in the Civil Code. There are multiple canons for interpretation:

- subjective interpretation (articles 1618 of the Civil Code) by which the interpreter must establish the real will of the parties above all other indications;
- authentic interpretation, in which the interpreter must establish the subsequent practices and acts of the parties so as to determine the sense of a primal assertion;
- systematic interpretation (article 1622 of the Civil Code) in which a determinate clause must be given the interpretation that would best fit the totality of the contractual rights and obligations;
- effective interpretation, in a disjunctive between two interpretations, the one that provides an *effet utile* to the clause must be preferred to the one that renders the same clause redundant or useless; and
- interpretation against the drafter of the clause (article 1624, last subparagraph), as a subsidiary interpretation rule (which in fact constitutes a sanction) the clause that is obscure or ambiguous will be interpreted against the drafter of the clause.

There are no special rules of interpretation for any of the contracts regarding energy, even though many of these contracts interact within highly regulated industries. It is important to note, however, that E&P and mining concession contracts are public in nature and hence article 28 of the Public Procurement Statute provides that contractual clauses must be interpreted in good faith in accordance with the ends and objectives of public procurement and bearing in mind the equality and equilibrium between the rights and obligations of the parties.

5 Describe any commonly recognised industry standards for establishing liability.

In Colombia, liability is established ab initio by analysing whether the activity involves private or public parties. In the first scenario liability is analysed from a private law perspective, while in the latter liability will be established based upon public law standards.

Regarding activities that involve private individuals or companies, furthermore it is important to remark that liability can be either contractual or tort, depending on whether the operator had a pre-existing legal relationship that is also singular and concrete in nature (decision dated 18 September 2005 by the Supreme Court of Justice).

In tort law, industry standards are defined mainly by decisions of the Civil Cassation Chamber of the Supreme Court of Justice, in the absence of a list of activities with a predetermined standard of liability. However, the tendency is to define activities concerning energy as 'hazardous activities'. This legal category provides that when a third party suffers injury or losses resulting from one of these activities, the victim must only establish: the loss or harm and the causation of the harm with the activity; in other words the standard of liability is, for practical purposes, objective (Supreme Court of Justice decision dated 26 August 2010). An activity will be hazardous when, due to the handling of certain objects or to the exercise of a specific conduct that is intrinsically apt to produce harm, there is a possibility that the forces multiply and the result becomes concrete (Supreme Court of Justice decision dated 23 October 2001). There are several activities that have been described as hazardous by the Supreme Court of Justice, including the transport and carrying of oil (decision dated 13 August 2001) and the generation of electricity (decision dated 13 August 2015). In the case that harm is caused by the operator, it is important to note that in Colombia the Supreme Court of Justice has adopted the theory of 'shared guardianship' (decision dated 13 May 2008) so long as, respective of third parties, both the owner of the assets and the operator will be liable.

In cases were the Supreme Court of Justice has not defined an activity as hazardous, the standard will be usually determined on the basis of professional responsibility (as a subsidiary regime), which in turn will point to the conclusion that the standard is that of a reasonable and prudent operator so long as this regime is subjective (negligence or other title of fault must be established).

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?

Force majeure and the theory of unforeseen events (similar to that of commercial impracticability) are recognised in Colombia as legal concepts that excuse performance of contractual obligations. In this sense, the general theory is plainly applicable (Council of State, Third Chamber, Decision dated 29 May 2003).

Notwithstanding the previous assertion, in Colombia E&P contracts have a special clause that enables the parties to face price volatility; this clause is used in a standard form by the ANH and is known as the 'high price' clause. Pursuant to this clause, when the oil barrel reference price is higher than the one established by the ANH, and a certain goal of production is achieved, the ANH recognises a prime for that production. This clause enables the producer to be in a financially better off position, in situations when oil prices are low.

Additionally, the ANH has enacted Agreement 003 of 2015 pursuant to which, provided the collapse of global oil prices, E&P contractors are given certain benefits, for instance they are excused from of the breach of certain obligations or are given extendable terms to perform them.

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 majority of activities in the energy sector are of public interest:

- Oil: the Petroleum Code (Decree 1056 of 1953) provides as per article 4 that the petroleum industry in the phases of exploration, exploitation, refining, transportation and distribution is of public utility.
- Electricity generation: article 5 of Law 143 of 1994 provides that the generation, interconnection, transmission, distribution and commercialisation are activities of public utility.
- Mining: article 13 of Law 685 of 2001 declares of public utility the mining activity in all its phases and modalities.

The previous statements are important as, according to article 58 of the Colombian Constitution, when private interest collides with activities of public interest, the latter shall prevail. Thus, claims on nuisance have to be analysed from this perspective.

One example of nuisance to the enjoyment of land rights is the legal easement for the exploration, exploitation and transportation of

oil. Law 1274 of 2009 provides that the interested party shall negotiate directly with the owner of land rights about the duration and compensation for the easement (article 2). If no direct arrangement is achieved, the municipal civil judge of the territory where the land is located has the authority to valuate and decide upon the controversy (article 4). The easements must be registered in the registry that the Office of Public Instruments holds for transactions upon immovable property (article 7).

Claims of third parties can obstruct energy development. In Colombia a significant issue regarding this is the protection of the right of previous consultation that indigenous and African-descendant groups bear upon the activities and decisions that will affect their ancestral territories (see question 25).

8 How may parties limit remedies by agreement?

In Colombia, two institutions are of significant importance when limiting remedies: liquidated damages clauses and liability limitation or exoneration clauses.

A liquidated damages clause is defined as the contractual agreement pursuant to which parties convene to do or give something in the event of a breach of their contractual obligations, both in event of imperfect performance or retardation in its compliance (article 1592 of the Civil Code). There is unanimous doctrinal consent that the liquidated damages clause can serve these two purposes: dissuasive, inasmuch as the debtor is fully aware of the consequence of a breach of contract; and indemnifying, because parties agree in an anticipated manner the quantum of remedies. Pursuant to this function, the debtor cannot defend his or her case arguing that the breach did not result in effective loss or harm (article 1599 of the Civil Code), and it can serve the purpose of a security, especially in those cases were assets guarantee the performance (in the form of a mortgage for instance).

Liability limitation or exoneration clauses are, on the other hand, perfectly legitimate in the Colombian legal system provided that the last subparagraph of article 1604 of the Civil Code enable parties to modify the rules of liability, with some limitations. Indeed, parties can aggravate, exonerate or limit their liability if no public policy norms are contravened. The settled opinion among doctrine agrees that examples of public policy norms that cannot be modified or contravened by the clause are:

- the anticipated exoneration of wilful misconduct or gross negligence is not valid (article 63 and 1522 of the Civil Code);
- those that go against a constitutionally protected right (article 4 of the Constitution of Colombia);
- those that limit or are contrary to good faith principles; and
- those that alter the essence of the contract or are contrary to the nature of the structure of obligations (ie, those that state that an absolute breach of the essential contractual obligations will not result in any damages in favour of the creditor).

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

The general description of liability applicable to activities in the energy sector depends upon the qualification of the activity as hazardous or not. If the activity is determined as hazardous, for practical purposes, the liability regime is strict. If activities are non-hazardous the general regime of liability is applicable. In many cases, however, activities in the energy sector have been described as hazardous (see question 5).

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?

Courts in Colombia will, as a general rule, with very few exceptions, apply the procedural and substantial rules set out in the General Code of Procedure (CGP) and the laws vis-à-vis the contract and the controversy, respectively. Indeed, Colombian courts have to apply the domestic procedural rules as they constitute public policy rules (article 13 of the CGP). Regarding substantial rules, article 869 of the Code of Commerce provides that when a contract shall be performed in Colombia, the applicable law is Colombian law. In this sense, the courts will apply the norms of conflict and determine whether the dispute is to be adjudicated following domestic or foreign rules. There is a discussion whether parties can modify domestic norms of conflict by means of introducing a choice of law clause. Clients should be wary of engaging in this discussion as many judges will give effects to conflict of norm rules alleging that they constitute public policy rules.

Choice of forum and choice of law rules are, hence, usually introduced in international arbitration proceedings (article 93 and 101 of the Arbitration Statute) and not in contracts that are to be adjudicated by national courts. As per article 62 of the Arbitration Statute, the arbitration will be international if:

- the parties in an arbitration agreement have, at the moment of the conclusion of that agreement, their domiciles in different states;
- the place of the performance of a substantial part of the contractual obligations or the place where the controversy has closer links is located outside the state where the parties have their domicile; or
- the controversy affects the interests of international trade.

If no arbitration is agreed upon the parties, courts:

- with respect to competing clauses of choice of forum are likely to give no effect whatsoever to any of them. It is important to bear in mind that in Colombia exclusive jurisdiction clauses are likely to be unenforceable because there is a Constitutional right (article 29) to the access to the administration of justice. The Constitutional Court has understood that the access to the administration of justice cannot be limited by private individuals (decision C-222 of 2013). As a matter of forum choice, domestic courts have to decide upon jurisdiction based on the factors of competence (territorial, objective, subjective, functional) described in the CGP;
- with respect to conflicting choice of law: courts are likely to disregard the fact that multiple contracts pertain a single transaction since usually the conflict of norms rules will be applied; and
- with respect to mode of dispute resolution, court will enforce arbitration clauses within the contracts that contain it, unless both parties renounce the arbitration clause, whether explicit or tacitly (article 21 of the Arbitration Statute).

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

Stepped clauses are common, especially in E&P contracts. Indeed, in E&P contracts when a controversy arises between the parties, as a first instance the individuals authorised to negotiate must, in good faith endeavour to settle it. If this settlement intention fails, the parties must communicate the controversy to the chief executives of each entity (ANH and the contractor). If no settlement is reached within 30 days of the communication of the controversy, the parties shall initiate proceedings, in accordance with the nature of the dispute:

- if the controversy is technical in nature, an expert named by the parties (or by the professional association that best relates to the topic of dispute) will proffer its concept after 30 days of the initiation of the proceeding;
- if the controversy regards accounting issues, a panel of three experts will decide upon the controversy; and
- if the controversy does not regard a technical or accounting issue, the controversy shall be settled by arbitration following the rules of arbitration usually of the Chamber of Commerce of Bogota and having Colombian law as applicable law. Arbitration tribunals are composed of three arbitrators.

In mining concession contracts (standard contract adopted by Resolution 18728 of the Ministry of Mining and Energy), controversies of a technical nature shall be settled by an expert, while controversies of a legal or economic nature shall be solved by the domestic courts. If no agreement upon the nature of the dispute, they shall be regarded as legal.

However, it is important to bear in mind that even if stepped clauses are theoretically permitted under Colombian contract law, they may not be enforceable under judicial or arbitral proceedings. Article 13 of the CGP allows any party to initiate judicial or arbitral proceedings in disregard of the procedures set forth in stepped clauses, as well as stating that such disregard cannot be considered as a breach of contract. Thus, following the procedures set forth in such clauses, it becomes a matter of cordiality and good faith between the parties to the contract.

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

As a general summary, expert evidence is used in Colombia in order to clarify facts that require special knowledge, whether scientific, technical or artistic (article 226 of the CGP); only one expert opinion is admissible per fact. No expert evidence is permissible when legal points are the core of the opinion, albeit they can be admitted by the courts when foreign law or customary rules must be proven (article 177 and 179 of the CGP).

The expert opinion must contain a positive statement given by the expert where he or she declares that his or her opinion is independent and corresponds to his or her real professional conviction. The opinion must be accompanied by all of the documents that reflect the methodology used and that support the opinion (subparagraph 4 of article 226 of the CGP). Note that the Supreme Court of Justice has concluded that an opinion without a proper methodology has little probative value (decision dated 23 November 2010).

Expert opinions can be either party-appointed (article 227 of the CGP) or court-appointed (article 230 of the CGP). In the former, the party must bring in the opinion in the corresponding procedural opportunity (with the statement of claim, the statement of defence or the rejoinder to the defence). In the latter, the court adjourns the hearing where the expert must give its conclusions.

Note that as a matter of due process (article 29 of the Constitution of Colombia), the parties have the right to controvert the opinion of the expert whether with the presentation of other expert opinion or by cross-examining the expert in an oral hearing (article 231 of the CGP). Also note that in the Code of Administrative Procedure and of the Contentious Administrative (CPACA) there are special rules upon the practice and contradiction of expert evidence that will constitute lex specialis with respect to that herein described from the CGP.

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

As stated earlier, E&P contracts and mining concession contracts are public in nature and, thus, many industry-standard contracts will be of the administrative jurisdiction, rather than the ordinary civil jurisdiction.

Pursuant to article 229 of the CPACA in declarative proceedings, the interested party may, before the statement of claim or during the procedure, request interim and emergency relief. The court can grant any remedy or emergency relief that it deems necessary for the protection of the rights that are controverted within the procedure. The granting of emergency relief does not translate in prejudgment.

The interim measures can serve four different purposes (which may or not concur): preventive, conservative, pre-emptive or of suspension. As an illustrative list of measures, a court may grant:

- an injunction consisting of the cessation or conservation of a specific situation;
- an order suspending an administrative procedure or action, even of a contractual nature;
- an order of provisional suspension of an administrative act;
- an order consisting of the imposition of an obligation to do or not to do either to the administration or to the person or company party to the dispute; and
- an order directed to the administration in order to compel it to adopt a decision that will conserve or prevent the harm of a specific right.

It is important to highlight that in situations where the collective interest is being menaced (such as in the case of potential or actual harm of the environment), the administrative judge may grant emergency relief on an ex officio basis. In any case, a security must be posted by the interested party in order to guarantee the indemnification or harm that may arise by the granting of such interim relief (article 232 of the CPACA).

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

There are no special proceedings through which energy-related foreign judgments or arbitral awards are enforced. The general regime applies to these disputes.

Regarding arbitral awards, the Arbitration Statute, applicable since 12 July 2012, governs the recognition and enforcement of arbitral awards in Colombia. The Arbitration Statute sets forth the Colombian general regime on arbitration, adopting a dual arbitration system with different rules for domestic arbitrations (section I) and international arbitrations whether seated in Colombia or abroad (section III).

Domestic awards and awards of international arbitrations seated in Colombia (except where the parties have waived set aside proceedings under article 107 of the Arbitration Statue) are not subject to recognition proceedings, and they may be enforced immediately before the competent courts (Arbitration Statute, articles 43, 111(2) and 11(3)). Foreign arbitral awards are subject to recognition and enforcement procedures as set forth in articles 111 to 116 of the Arbitration Statute and the applicable international treaties to which Colombia is a party (New York Convention of 1958, Panama Convention, etc).

The competent court for the purpose of recognition and enforcement of international arbitral awards is determined by means of identifying whether a Colombian state entity is party to the arbitration (Arbitration Statute, article 68).

The Council of State (in the Plenary Chamber of the Third Section of the Administrative Litigation Chamber) is the competent court for the recognition and enforcement of an award rendered by an arbitral tribunal not seated in Colombia where a Colombian state entity was a party to the arbitration. On the contrary, where a Colombian state entity is not a party to the arbitration, the competent court for the recognition proceeding is the Supreme Court of Justice. Following recognition of the foreign arbitral award, collection proceedings are governed by articles 422 et seq of the CGP and the competent courts will be the Civil Circuit Courts.

Recognition of foreign court judgments is subject to a recognition proceeding known as exequatur, which is ruled by article 605 of the CGP.

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

There are no specific arbitration institutions that administer energy disputes. In E&P contracts arbitration is usually administered by the Centre of Conciliation and Arbitration of the Chamber of Commerce of Bogotá DC.

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

In Colombia, the decision whether to enable transitorily private individuals as arbitrators (permitted by article 116 of the Constitution of Colombia) does not depend necessarily on the general preferences of the parties to energy contracts. Indeed, as stated in question 11, the ANH does include arbitration clauses in its E&P model contracts while the ANM does not include this clause in its standard concession contracts. This means that in public contracts, it is not up to the parties whether to prefer arbitration or litigation, as the decision is made by public entities.

In electricity generation, commercialisation and distribution contracts, so long as they are private in nature (private enterprises can enter the wholesale electricity market by virtue of Laws 142 and 143 of 1994); arbitration is usually preferred over litigation in domestic courts for the following reasons:

- celerity: according to article 10 of the Arbitration Statute the award must be decided by the arbitral tribunal within six months after the procedure hearing, extendable for a maximum period of six additional months (this maximum term contrasts the legal one-year duration that is established for Court decisions by article 121 of the CGP since the statement of claim is admitted by the court, which in fact is not normally respected, as it takes longer for a court to decide any case);
- specialisation of the judge: by virtue of the arbitration clause the parties can either vest a specific person or delegate this responsibility to the institutional entity that administers the arbitration. However, in both scenarios the individual that acts as an arbitrator is chosen based upon his or her specific knowledge of the issue, which tends to be preferable to adjudicate technical and complex matters that are not the specialty of general-advocacy trained judges; and
- economy: because arbitration proceedings are more agile than court proceedings, costs associated with the duration of process are mitigated by the former.

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

Conciliation is confidential under Colombian law (article 76 of Law 23 of 1991). This means that statements made by the parties within the hearing or extrajudicial proceeding cannot be disclosed by the parties without incurring in civil liability for the harm made. Also, mediation is, according to the Constitutional Court, confidential (decision C-1195 of 2001).

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

With regard to e-disclosure and e-discovery, there are no specific rules relating to such matter. In general terms a party must submit or present to the court any documents requested by it, except those documents that are confidential by law. With regard to any other documents containing trade secrets or other confidential information, the party may argue before the court that the requested documents contain confidential information that cannot be revealed, and it will be in the court's decision to review whether the objections to the discovery or disclosure of such documents are justified.

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

In Colombia, professional secrecy is a constitutional right (subparagraph 2 of article 74 of the Constitution of Colombia). This constitutional right corresponds to a genre that has different species such as medical, attorney, etc. The same provision states that professional secrecy is inviolable.

The Constitutional Court has consistently protected attorney–client privilege in an ample manner so long as it is understood to comprehend 'all confidential or reserved information that has come to the knowledge of the attorney in relation to or regarding the exercise of its profession or activity' (decision C-301 of 2012). Hence, all of those products that have a reserved or secret nature are protected constitutionally.

It is important to note that attorney–client privilege is not only a constitutional right but a legal duty of the attorney, as pursuant to article 28 of Law 1123 of 2007 (Disciplinary Code of the Attorney), professional secrecy is owed to the client even after the cessation of the professional relationship.

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

As a matter of general administrative law, pursuant to article 161, section 2 of the CPACA, whereas a dispute arises with regard to an administrative act emitted by a state entity, previous to filing claims before administrative courts, the claimant must present to the state entity a request of reconsideration and if applicable an appeal. The request for reconsideration must be filed before the functionary of the entity that emitted the decision and it is decided by the same functionary. The appeal is requested by the functionary of the entity that emitted the decision and must be decided by the superior of such functionary (article 74, section 2 of the CPACA). It is important to note that appeal will only be mandatory when the act that is controverted was enacted by an officer that has a functional superior. This is why, as per article 74 there are no appeals of acts enacted by ministries, administrative department directors, superintendents and legal representatives of territorial entities (eg, the mayor of a city). In energy disputes there is no special rule, but the general ones drafted in the CPACA must be observed.

Regulatory

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

The following administrative entities are broadly speaking, responsible for the regulation of the energy sector:

- The Ministry of Mines and Energy: The management of non-renewable natural resources is a competence of the Mines and Energy Ministry. This is a national entity of the centralised level whose main responsibility is to design and adopt public policies and sectorial guidelines to ensure the efficient and sustainable development of mining and energy resources in order to contribute to Colombia's social and economic development. As a national authority, the ministry elaborates, every five years, a plan of expansion for the public service under its competence and promotes, in coordination with other competent entities the international negotiations concerning the public service.
- The ANH: The main faculties of the agency are: to identify and evaluate the hydro-carbonic potential of the country; to design, promote, negotiate, celebrate and administer the E&P contracts and agreements on hydrocarbons under the property of the country, excepting those celebrated by ECOPETROL until December 2003.
- The ANM: This is a technical entity that is in charge of the integral administration of the state's mineral resources and the promotion of their optimum use, in accordance with the principle of sustainability and in coordination with the state's environmental agencies.
- The UPME: special administrative unit ascribed to the Mines and Energy Ministry. Among its competences, the UPME has the integral planning of the mining sector through evaluations, offer and demand diagnosis. Its primary responsibility is to elaborate and update the national energy plan. Moreover, it manages and administers the mining sector's information in order to underpin public and private decisions.
- The CREG: This is a special administrative unit entrusted with the regulation and promotion of competition in the energy business in order to ensure an efficient and high-quality service. To that purpose, it prepares draft legislation and recommends the adoption of regulatory acts when needed; it defines the efficiency criteria and develops indicators and models to evaluate the financial, technical and administrative management of public services' enterprises; it establishes the methodology for calculating usage charges for the regulated markets. The CREG's resolutions are applicable to the activities of generation, transmission, distribution and commercialisation.
- Superintendence of Domiciliary Public Utilities (SSPD): The SSPD is a decentralised entity that has been created to be the surveillance authority over the public services companies. Its main purpose is to ensure public utilities are provided uninterrupted and with high-quality standards. To that end, it monitors the public utilities companies' compliance with the regulation and code of operations; it can take over public services companies whenever the rendering of their services or viability is at risk and it can impose sanctions for the violations of the code of operations.

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

In relation to the oil and gas industry, in general terms, new entrants to the market have the right to access the existing infrastructure, provided that they fulfil the requirements and regulations set forth by the Ministry of Mines and Energy and the ANH. For instance, as a general rule, provided the fulfilment of all regulations and requirements, if a pipeline carrier has capacity to accept and transport commodities from third parties, it must do so and for its service it should charge the rates established by the Ministry of Mines and Energy.

In relation to the electricity sector, new entrants to the National Interconnected System may access the existing infrastructure. It is important to note that for a new entrant to the market to be accepted in the National Interconnected System it must comply with all the requirements set forth by the Ministry of Mines and Energy, the Regulation Commission on Gas and Energy and the environmental state agencies.

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?

In Colombia judicial mechanisms to review decisions made by administrative agencies are disciplined by the CPACA, articles 135 et seq. These mechanisms are:

(i) annulment due to unconstitutional defects of the act (article 135);
(ii) simple annulment: requested against administrative acts of general nature (ie, government decrees, ministerial resolutions, etc);
(iii) annulment with re-establishment of individual rights: requested against administrative acts of concrete nature;
(iv) electoral annulment;

(v) direct reparation: for cases of damages caused by actions and omissions of the administration when those are not the result of a wilful decision; and
(vi) contractual controversies.

In the energy sector, mechanisms (ii), (iii), (v) and especially (vi) are to be used due to the nature of the acts concluded between private individuals and legal entities and their administration.

Regarding non-judicial procedures, the request for revocation of the administrative act is disciplined by article 93 et seq of the CPACA. This mechanism shall be decided by the same administrative entity that proffered the act (article 93 of the CPACA). It can be requested until the administrative courts admit the statement of claim and can be based on the following arguments: the act is contrary to the constitution or the law; the act is contrary to the public interest; or the act caused unjustified prejudice against a third party. Take into account for this section the answers provided for question 20 in relation to the administrative proceedings that must be followed before presenting judicial claims to administrative courts in certain cases.

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

Up to now no authorisation has been granted by the ANH to any of the applicants for the development of hydraulic fracturing projects.

In Colombia, there is no legal provision that disciplines hydraulic fracturing projects. However, the Ministry of Mines and Energy enacted decree 3004 dated 26 December 2013 by means of which the stimulation of non-conventional deposits is regulated. The decree provided that these technologies were to be regulated in technical matters by a further resolution (which was in effect enacted by the same ministry, namely Resolution 90341 of 2014). As such, in Colombia this technology is regulated both administratively and technically and was notified to the Technical Barriers on Trade Committee of the World Trade Organization.

25 Describe any statutory or regulatory protection for indigenous groups.

In compliance with the International Labour Organization's Convention No. 169, internally adopted by means of Law 21 of 1991, Colombian laws and jurisprudence recognise the right of indigenous people to participate in the decision-making processes regarding any decision or project that might affect them directly.

Based on article 333 of the Constitution, Law 70 of 1993 and article 76 of Law 99 of 1993 mandates that the exploitation of natural resources must be exercised without diminishing the cultural, social or economic integrity of indigenous communities and to that end, all decisions regarding the matter require prior consultation with the communities' representatives.

It is for the Ministry of the Interior to coordinate the prior consultation procedure as it is the authority vested with that responsibility. Non-compliance with the procedure is a reason for the act or decision to be declared null by the competent authority, which is generally the Council of State. Furthermore, because it has been recognised as a fundamental right (decision SU 039/1997 of the Constitutional Court), prior consultation can be protected by means of a *tutela* writ, a special and expedited constitutional mechanism that has to be solved by a judge within 10 days of its presentation (article 86 of the Constitution).

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

There are no legal or regulatory barriers to enter the energy sector that are specifically aimed at foreign companies. Indeed the energy sector is strongly regulated and administrative entities are entrusted with the responsibility to observe that rules, both legal and technical, are observed. However regulation is uniformly designed, regardless of the nationality of the company. Regulation applied on the basis of foreign nationality would result in violation of the National Treatment clause included in many BITs (see question 30) and protected in article III of the GATT.

A legal barrier that foreign companies must endure is that when undergoing business in Colombia, they must establish a branch office in the territory, with the compliance of the requisites included in article 471 of the Code of Commerce.

Update and trends

In relation to the oil and gas sector, it is anticipated that in December 2017 the arbitral tribunal installed to resolve the disputes arising in relation to the interpretation of an E&P contract entered upon the ANH and Petrominarales will present its award. This decision constitutes one of the first precedents regarding the interpretation of the 'high prices' clause mentioned in question 6. Our law firm acts as attorney to the ANH in this dispute.

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

The most common liability that energy sector companies must face is of an environmental nature. Law 1333 of 2009 created and regulated the environmental administrative proceeding that configures as sanctions any infringement to the provisions of Decree Law 2811 of 1974 (the Renewable Resources Code). These provisions are principally aimed at preserving natural resources such as water, soil, clean air and natural reserves. When contamination of the renewable resources is made, the authorities (Ministry of Environment and Sustainable Development, Autonomous Regional Corporations, etc) can impose the following sanctions (article 40 of Law 1333 of 2009):

- daily fines of up to five times the minimum wage;
- temporary or definitive closure of the service, edification or office;
- revocation of the environmental licence, permit or registry;
- demolition of the public work;
- confiscation of specimens, wildlife or mechanisms used as means to commit the infraction; or
- community work.

Criminal charges can also be raised to the legal representatives of the companies that operate in the energy sector (in Colombia, criminal responsibility is individual). These criminal offenses are regulated by the Criminal Code (Law 599 of 2000) from articles 328 to 339 and relate to environmental issues. Usually the criminal offenses relate to serious contamination or illicit appropriation of natural resources. The sanctions are severe: they include stays in penitentiary centres ranging from two to eight years. Fines up to 50 times the minimum wage can be cumulatively imposed.

Other

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

Colombia has two potential sovereign disputes regarding sovereign boundaries that have not yet been settled:

- with Venezuela regarding the gulf in coordinates 11°56'00''. This controversy has not been settled since it first started in 1941 after the signing of the Pact of Bogota where submarine boundaries were not delimited. In 1958 the United Nations Convention on the Law of Seas provided a medium line to delimit shared waters. Nevertheless, Venezuela is not party to the Convention;
- with Costa Rica: the boundary for shared waters in the Caribbean Sea was settled by treaty Fernández-Facio in 1977. It was ratified by Colombia but it is not part of Costa Rican legislation because it was not approved by the legislative assembly of this state. This poses a contingency, although it is not probable that it will result in a controversy.

The most relevant dispute was initiated by Nicaragua before the International Court of Justice in 2001 regarding sovereign domain over certain Caribbean islands and maritime delimitation. Even though the Esguerra-Barcenas treaty of 1928 had given Colombia the sovereign right to San Andres, Santa Catalina and other islands in the Caribbean Sea, the International Court of Justice decided that it had jurisdiction to delimit the maritime frontiers. Later on, in 2012, the court delimited the maritime border beyond the 82 meridian to the east, giving Nicaragua

sovereignty over more than 200 nautical miles. Colombia did not accept the decision; instead, the government denounced the Bogota Pact by which compulsory jurisdiction of the International Court of Justice was accepted by Colombia.

There is no clear indication of how these sovereign boundary disputes can affect the energy sector. In the case of Nicaragua, it is believed that there are significant offshore reserves of oil and gas. However, in the area there is a biosphere coralline reserve (the Seaflower reserve) posing difficulties towards the exploitation of resources.

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

Colombia signed the International Energy Charter in the Hague Conference of 20 and 21 May 2015. The country is also party to several energy-related treaties, namely:

- the Agreement enacted by the Latin American Energy Organization (OLADE) as adopted by Law 6 of 1976;
- the Agreement between the Republic of Colombia and the International Atomic Energy Agency for the application of safeguards in relation to the prohibition of nuclear weapons of Latin America and the Caribbean (adopted by Law 47 of 1982); and
- the Agreement concluded between the United States and Colombia relating to the civil uses of nuclear energy of 1981 (adopted by Law 7 of 1983).

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

Colombia is part of several bilateral investment treaties (BITs) and free trade agreements with a specific chapter that provides protection to investors from the other part's nationality. Colombia is part of 10 BITs, including those with Japan, Singapore, the United Kingdom, Switzerland, France and Canada, among others. It is also part of 10 free trade agreements, all of them with a specific investment chapter, with: the United States, Mexico, Chile, El Salvador, Guatemala and Honduras, among others.

In these treaties, investors are provided with the following standards of protection, which constitute obligations imposed to the parties of the treaty: national treatment, most-favoured nation, fair and equitable treatment, compensation for damages resulting from civil or armed disturbance, prohibition of expropriation (whether direct or indirect), and free transfer of investment, among others.

In case of breach of these standards, the investor can submit a notice for arbitration proceedings, which are normally administered by the ICSID, having the Treaty and International Public Law applicable as law. The arbitral tribunal may adjudicate compensation for damages occurred with the violation of the standards owed by the state.

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.

There are no specific legal standards or best practices regarding cybersecurity relevant to the energy industry.

GÓMEZ-PINZÓN
DESDE 1992

David Ricardo Araque Quijano **daraque@gomezpinzon.com**
Natalia Castellanos Casas **ncastellanos@gomezpinzon.com**
Juan Camilo Alba Botero **jalba@gomezpinzon.com**

Calle 67 No. 7–35 Oficina 1204
Bogotá 110231
Colombia

Tel: +571 319 2900
Fax: +571 321 0295
gomezpinzon.com

Egypt

Girgis Abd El-Shahid, César R Ternieden and Maha Jüstel

Shahid Law Firm

General

1 Describe the areas of energy development in the country.

Considered one of the oldest energy producers in the Middle East, and with more than a century of commercial oil production, Egypt remains the largest oil producer in Africa outside of the Organization of the Petroleum Exporting Countries (OPEC), and the second largest natural gas producer after Algeria. Egypt accounts for 20 per cent of the total oil consumption in the continent as well as more than 40 per cent of total dry natural gas. There are several major gas projects in the pipeline that will be the main drivers for production growth in the next five years. In August 2015, the Italian oil and gas company Eni discovered a 'super giant' natural gas field offshore Egypt, considered the largest gas field in the Mediterranean Sea. The field is believed to hold 30 trillion feet of gas, equivalent to 5.5 billion oil barrels, and is likely to ensure enough supply of gas for Egypt's domestic needs for decades. The Zohr field is expected to contribute to Egyptian natural gas self-sufficiency by end of 2018 and may transform Egypt back into a net energy exporter. Early production form the Zohr field is expected to begin in December 2017, while peak production is anticipated to be achieved in 2019. Further, in June 2016, BP Egypt announced an important gas discovery in the Baltim South Development Lease in the East Nile Delta and a third gas discovery in the North Damietta Offshore Concession. Located 12km from shoreline, the discovery in the Baltim South Development Lease counts as a new accumulation along the same trend of the Nooros field discovered in July 2015. In April 2017, the West Nile Delta Phase One project, operated by BP, started production achieving first gas eight months ahead of schedule and production 20 per cent above plan. The West Nile Delta Phase Two project is scheduled to come online in 2019 with both projects expected to reach about 30 per cent of Egypt's current gas production. In addition, the latest campaign to bring foreign investment and exploration back to Egypt is the signing of three oil and gas exploration agreements with Shell and Apex for new fields in the Western Desert.

Egypt has state-of-the-art liquefied natural gas (LNG) refinery plants. Among the LNG refinery plants is a plant constructed by the major Spanish gas operator Union Fenosa GAS (UFG) located in the city of Damietta on the Mediterranean coast that serves the principal gas markets of Europe, North America and the Far East, and is 80 per cent owned by UFG's subsidiary Spanish Egyptian Gas Company (SEGAS). The other 20 per cent belongs to the Egyptian State Companies Egyptian General Petroleum Company (EGPC) and Egyptian Natural Gas Holding (EGAS). Additionally, BG Group, along with other state partners, owns and operates two LNG facilities located in Idku, northwest of Cairo. Despite having the largest refinery capacity in Africa, refinery output in Egypt has declined by 28 per cent from 2009 to 2013, leading the country's refinery activities to operate well below capacity despite increasing consumption. Egypt, however, has recently been updating existing refineries and setting up new units for production. Among the efforts under way is the Egyptian Refining Company (ERC) project, a refining facility that is currently in its early construction phases and is expected to start operations during the second quarter of 2018. ERC is planned to handle the refining of low-quality residual fuel oil into high-value products at a capacity of 2.3 million tons per year of 10-ppm diesel. And as for financing, ERC has successfully managed to attract financing from the World Bank's International Finance Corporation as well as other developmental banks. The project developers have been keeping in mind an environmentally friendly footprint in order to attract international financing.

The country also has a vital role in regional and international oil and gas markets through operating a number of pipelines such as the Suez Canal, Suez-Mediterranean (SUMED) pipelines and others. Further, the EMG pipeline and possibly new pipelines are being considered for the purpose of the importation of natural gas from recently discovered neighbouring gas fields for which negotiations are underway. In December talks are expected to begin towards an agreement to build a gas pipe from a Cypriot natural gas field to take gas to Egypt.

In May 2017, 4,800MW of electric energy were added to the Egyptian national grid as Siemens began operating twelve electricity production units in the areas of Borollos and Beni Suef north of Cairo, and the New Administrative Capital. Further, the Egyptian Electricity Holding Company (EEHC) signed contracts with Siemens last year to implement three combined-cycle power plants with a total capacity of 14,400MW.

With respect to renewable energy, Egypt further commits to its plan to have renewable energy account for 20 per cent of its energy production by 2022 driving the transition to low-emission energy in support of its climate goals. The Egyptian government authorised a second round (Round 2) of the feed-in tariff (FIT) programme targeting direct foreign investment and foreign financing for a total of 1.3GW solar photo-voltaic projects, all to be located in the Benban Solar Park near Aswan. Thirty out of a total of 36 companies secured the required funds from the World Bank's International Finance Corporation (IFC) and the European Bank of Reconstruction and Development (EBRD) successfully completing financial closure on 27 October 2017. The Egyptian Electricity Transmission Company (EETC) is currently reviewing the financial applications and is expected to announce the approved companies before the end of 2017. In addition, with the target to further diversify the energy mix, the technology giant GE has reached financial closure to build four gas-insulated substations that are expected to connect 7GW to Egypt's national grid.

Last but not least, with respect to the recently renewed interest in nuclear power, on 19 November 2017, Egypt and Russia signed the contract for the construction of Egypt's first nuclear power plant in Dabaa, northwest of Egypt. The plant, expected to render Egypt a regional leader in the field of nuclear technologies and the only country in the region with a generation 3+ plant, will be built by the Russian nuclear energy giant Rossatom. The plant is expected to have four power-generating units, each of them with an output capacity of 1,200MW; providing 5 per cent in nuclear energy to Egypt's intended energy mix. The plant will be operated by a company that will initially be 20 per cent Egyptian-owned. The first pair of reactors is scheduled to start up in 2024.

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

Pursuant to article 32 of the Egyptian Constitution, the state's natural resources belong to the people, while it is the role of the state to preserve and effectively exploit them, prevent depletion, observe the rights of future generations to them, make the best use of renewable energy sources, motivate investment therein, and encourage relevant

scientific research. Disposing of the state's public property is prohibited, instead rights of exploitation of natural resources or public utility concessions must be issued by virtue of a law for a set period of time with limited extension. In addition, and as a result, natural resources in Egypt are not owned by the surface property owner; but are inherently state property, and the state is entrusted with the obligation to regulate and control its exploitation.

With respect to oil, gas, coal, etc, the state issues concession agreements to a state authority, which in turn grants the exploration and development rights to the investing contracting company. Midstream, the state owns and operates the greater core of the national grid of pipelines through GASCO, a state entity, with very few exceptions. Finally, downstream, the state heavily subsidises and controls final consumer prices.

With respect to new and renewable resources, such as wind and photovoltaic power generation, the state enters in a set of cost-sharing agreements with private investors for the construction and development of such facilities, power purchase agreements, and other contracts in order to establish, regulate and control the construction, development and generation of energy until it enters the national grid, which is owned and operated by the state. Final electricity prices are set and subsidised by the state. Indeed, energy-intensive industries, such as steel, cement and fertiliser producers, are carefully licensed, controlled, monitored and regulated by the state to achieve maximum energy balance in light of national policies and priorities.

The 2010 Public Private Partnership Law has now finally begun to generate a number of projects in the energy sector.

The electricity sector comprises a regulatory agency with a rather limited reach and a holding company with several subsidiaries: six generation companies and nine distribution companies and one independent state-owned transmission company (EETC). However, the recently enacted Electricity Law, Law No. 87 of 2015, introduced fundamental changes to the structure and behaviour of the electricity market, to establish a more liberalised market.

Commercial/civil law – substantive

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

As noted above, with respect to oil, gas, etc, the state issues concession agreements to a state authority, which in turn grants the exploration and development rights to the investing contracting company in a production-sharing contract model. While providing for some negotiation, concession agreements are largely standard and are ultimately issued in the form of a special law as required by the Egyptian Constitution.

With respect to energy projects, conventional and renewable where applicable, an energy developer in Egypt usually enters into a network connection agreement, a power purchase agreement (PPA) and a cost-sharing deed with the Egyptian Electricity Transmission Company (EETC); a PPA direct deed with the EETC, the Ministry of Finance and lenders; a guarantee with the Ministry of Finance; and engineering, procurement, construction, operation and management contracts with third-party contractors.

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

No particular set of rules is specifically applicable to contractual interpretations in non-consumer or energy contracts, and instead, the general rules and provisions of the Egyptian Civil Code Law No. 131 of 1948 (ECC) and the Egyptian Commercial Code, Law No. 17 of 1999 (the Egyptian Trade Law), are applicable in the interpretation of contracts in general and energy contracts specifically.

Yet, to the extent that energy contracts are administrative contracts, they are subject to the administrative courts' jurisprudence of contract interpretation, which may at times diverge from the general Egyptian courts' jurisprudence of contract interpretation.

5 Describe any commonly recognised industry standards for establishing liability.

There are no energy industry-specific standards of liability. Therefore, the traditional contractual and civil liability standards are applicable. The Egyptian Civil Code generally requires an analysis of fault, damage and causality. The Egyptian Trade Law establishes a standard care of an ordinary trader. In the absence of further specificity, Egyptian law allows for the consideration of the rules of trading practices and customs. As such, international standards such as that of a reasonable and prudent operator can be applied by incorporation, as well as by contractual agreement.

On a final note, and as discussed below, the Egyptian Environmental Law contains provisions that are applicable irrespective of whether the conduct causing the damage occurred voluntarily or involuntarily.

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?

Egyptian law contains both a force majeure principle (including the concept of impossibility), as well as a hardship or frustration provision. The doctrine of force majeure under Egyptian law allows for the rescission of a contract and the elimination of the contractual obligations where the performance of a party's obligation has become 'impossible' for reasons beyond the party's control. In contrast, the doctrine of hardship under Egyptian law entitles the Egyptian courts to review (ie, adjust) a party's obligations in the event that unpredictable and exceptional events of a general nature render the performance of its obligations by either party excessively onerous, so that a debtor risks incurring an exorbitant loss. Unlike force majeure, hardship does not excuse the non-performance of a party's obligations.

ECC article 373 states that '[a]n obligation is extinguished if the debtor established that its performance has become impossible by reason of causes beyond his control'. This provision establishes firstly that the performance of a party's obligation must have become 'impossible', and secondly, that the impossibility was beyond the party's control. These two initial requirements are reinforced in similar language in article 215 of the ECC dealing with specific performance that states that '[w]hen specific performance by the debtor is impossible, he will be condemned to pay damages for non-performance of his obligation, unless he establishes that the impossibility of performance arose from a cause beyond his control. The same principle will apply if the debtor is late in the performance of his obligation'.

Article 159 of the ECC clarifies that '[w]hen an obligation arising out of a bilateral contract is extinguished by reason of impossibility of performance, correlative obligations are also extinguished and the contract is rescinded ipso facto'. Thus, in the case that impossibility is demonstrated, the Egyptian force majeure doctrine provides relief to the claiming party in the form of the cancellation of the contract, for which no adjustment is contemplated.

Article 165 states that '[i]n the absence of a provision of the law or an agreement to the contrary, a person is not liable to make reparation, if he proves that the injury resulted from a cause beyond his control, such as unforeseen circumstances, force majeure, the fault of the victim or of a third party'.

Thus, Egyptian law does not recognise relative (subjective impossibility or commercial impracticability under other legal systems) or temporary impossibility for the purposes of impossibility leading to the determination of force majeure.

On the other hand, with respect to hardship, article 147 (2) ECC sets out the general principle stating that '[w]hen, however, as a result of exceptional and unpredictable events of a general character, the performance of the contractual obligation, without becoming impossible, becomes excessively onerous in such way as to threaten the debtor with exorbitant loss, the judge may, according to the circumstances, and after taking into consideration the interests of both parties, reduce to reasonable limits, the obligation that has become excessive. Any agreement to the contrary is void'.

Thus, under article 147(2), the Egyptian doctrine of hardship contains three elements: (i) the occurrence of an exceptional and unpredictable event of a (ii) general character (iii) that causes the performance of the contractual obligation, without becoming impossible, to be excessively onerous in such way as to threaten the debtor with exorbitant loss. The relief provided under article 147(2) is that a party may request a reviewing tribunal to reduce the obligation that has become excessive to 'reasonable limits' taking in consideration the circumstances, and the interests of both parties. Case precedents also set the threshold of determining what constitutes 'excessively onerous'

performance quite high. Excessively onerous performance is that which creates immense or extortionate losses to the performer (ie, not the typical common losses).

Article 658 of the ECC stipulates that '[w]hen, however, as a result of exceptional events of a general character which could not be foreseen at the time the contract was concluded, the economic equilibrium between the respective obligations of the master and of the contractor breaks down, and the basis on which the financial estimates for the contract were computed has consequently disappeared, the judge may grant an increase of the price or order the rescission of the contract'.

The unforeseen event must also be general (ie, affect a large number of people). Whether or not an incident satisfies the above is subject to the judge's discretion.

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?

As Egypt is a civil law jurisdiction, there are no extensive rules governing nuisance claims in general, or specific to the energy industry.

Article 104 of the Egyptian Construction Law imposes sanctions in case of construction causing harm to the surrounding area and persons, inter alia.

Yet, there are certain statutory provisions scattered in Egyptian law that are applicable to nuisance claims. Article 12 of the Law No. 453 for 1954 provides for the total or partial cessation of operations of petroleum refining manufacturing facilities, warehouses or trading supplies of liquefied petrol gases or the distillation of coal manufacturing facilities, inter alia, where their operation may pose a danger to the general health or security.

The Egyptian Environmental Law contains numerous provisions addressing waste, discharge and pollution, whether voluntarily or involuntarily, directly or indirectly; with daily violations.

Absent further specific statutory provisions, the traditional contractual and civil liability standards are applicable.

8 How may parties limit remedies by agreement?

The principle of liquidated damages under Egyptian law is set out in article 223 of the ECC, which states that '[t]he parties may pre-estimate the amount of the damages by means of a provision of the contract or in a subsequent agreement …'. As such, a liquidated damages clause merely defines the scope or amount of damages contractually. However, liquidated damages are subject to a judge's review of the debtor's fault; injury to the creditor; and the causal link between the fault and injury, absent which a liquidated damages clause is invalid.

However, the liquidated damage amount agreed must represent a true and genuine pre-estimate of the non-breaching party's damage for the breach by the other party of its obligations under the contract. An exaggerated amount will not be considered liquidated damages under Egyptian law, but a contractual penalty, which may be reduced by the judge. In this respect, article 224(2) of the ECC provides that '[t]he judge may reduce the amount of these damages, if the debtor establishes that the amount fixed was grossly exaggerated or that the principal obligation has been partially performed.'

However, as a general rule, a judge cannot increase liquidated damages. Article 225 of the ECC sets out the exceptions to this rule, stating that '[w]hen the loss exceeds the amount fixed by the contract, the creditor cannot claim an increased sum, unless he is able to prove that the debtor has been guilty of fraud or gross negligence'.

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

While the concept of strict liability is generally not present in civil Egyptian law, where a determination of civil liability generally requires an analysis of fault, damage and causality, the Egyptian Environmental Law contains provisions that are applicable where the conduct causing the damage occurred 'voluntarily or involuntarily', thus, approaching strict liability.

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?

Generally, in the absence of a specific mandatory legal provision stating otherwise (such as with respect to transfer of technology agreements) and subject to overriding public policy provisions, parties are free to determine their choice of forum, law and mode of dispute resolution in connection with commercial transactions, lease, licensing or concessions. In the absence of clear and unambiguous party agreement resulting from the application of contract interpretation rules derived from the ECC or the Egyptian Trade Law as a result of multiple contracts, the ECC directs a judge or arbitral tribunal to employ usage and practice, Islamic law principles, or principles of natural law and the rules of justice, in this order.

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

Yes, stepped and split dispute clauses are both common and enforceable under Egyptian law resulting from the pacta sunt servanda principle.

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

While party expert evidence can be presented in Egyptian courts, its use is greatly minimised and overshadowed by the courts' power and usual practice to task its own court-appointed experts, Egyptian Ministry of Justice experts in most cases, to issue an expert report, or even multiple expert reports, to provide guidance to the court, with their resulting adjudicatory delays.

Such court-appointed expert reports carry strong persuasive weight with the court, greatly overshadowing party-appointed expert evidence. As a result, where expert evidence is expected to constitute an important or the main element of a dispute, international commercial arbitration is often preferred as the choice mode of dispute resolution.

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

Generally, Egyptian law provides for two separate forums for a party seeking injunctive relief: designated courts with broad jurisdiction over interim measures (interim courts); and designated interim judges to adjudicate interim relief on a summary basis relating to a specific set of circumstances (interim judge).

Any request for interim relief submitted to an interim court necessarily involves the court's consideration of arguments submitted by both parties to the matter and cannot be adjudicated ex parte. Interim courts strive to issue a decision on interim relief within three months from the filing. In order to grant an interim measure, interim courts consider the relative urgency for the need of the interim measure requested and must be satisfied that the actual interim measure requested does not affect the ultimate relief requested on the merits.

In addition, Egyptian law has created a specific process for expedient, summary immediate interim relief before an interim judge. Neither law nor jurisprudence list the grounds upon which interim judges may base their decisions to grant or deny requests for interim measures.

Needless to state that Egyptian judges and courts are keen to weigh heavily the interests of end consumers in a balancing of equities.

The Egyptian Arbitration Law does not contain detailed provisions concerning interim measures. However, in a recent precedent decision, the Cairo Court of Appeal recognised an interim order by an ICC arbitral tribunal seated abroad despite the pendency of the arbitral proceedings.

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

There is no specifically tailored process for enforcement of foreign judgments and arbitral awards relating to energy disputes, which must then be subjected to the otherwise regular or traditional forms of enforcement.

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

No.

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

Yes. As briefly noted above, to the extent that energy disputes often involve sensitive commercial information, industry secrets and complex industry-specific commercial and legal concepts, many of which are based on international industry standards, resulting in the need for confidentiality, the submission of complex expert evidence, as well as technically and commercially savvy and dedicated adjudicators, there is a strong preference for arbitration in the energy sector as a whole.

However, the possibility of submission of disputes to arbitration is traditionally only available in contracts between private entities with Egyptian authorities or state-owned companies, and not directly with the Arab Republic of Egypt (GoE). For example, concession agreements for the exploration and development of oil and gas are inherently a tripartite contract between the GoE, the Egyptian authority or state entity, and the investing private party. While an arbitration clause may refer disputes between the private party and the Egyptian authority or state entity to arbitration, Egyptian concession agreements required that any disputes between the private party and the GoE are to be raised in Egyptian courts.

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

There is no statutory provision or evidentiary or admissibility principle establishing that such statements are confidential. While such statements may theoretically be confidential pursuant to contract (under a confidentiality clause) or otherwise (such as in the case of agreed-upon mediation rules providing for the confidentiality of mediation proceedings as in the case of those administered by the Cairo Regional Centre for International Commercial Arbitration, article 11) turning them undiscoverable during proceedings, Egyptian litigating parties are keenly aware that such statements are often submitted in Egyptian proceedings, even if improperly so, in order to sway or influence an adjudicator. This highlights the importance of properly drafted non-disclosure agreements, confidentiality clauses and strong contractually agreed liquidated damages, where possible.

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

Egypt does not have a comprehensive data protection law. Instead, certain minor data protection provisions are scattered throughout different Egyptian laws (ie, state secrets, banking laws, consumer protection, etc).

The Egyptian judiciary has not established a comprehensive process for e-disclosure or e-discovery, and there are generally no disclosure or discovery proceedings before Egyptian courts in the broad sense of the concept as applied in common law jurisdictions. However, articles 20 et seq of the Egyptian Evidentiary Law, Law No. 25 of 1968, provide for a narrower civil law concept where litigating parties may request, under certain limited circumstances, an order from the court for the production of certain specific documents during proceedings.

Trade secrets are not protected by Egyptian laws in the same manner as trademarks or patents are. Trade secrets and undisclosed information are protected under article 55 of the Egyptian Intellectual Property Law, Law No. 82 of 2002, stipulating that information can be identified as undisclosed and subject to protection if under specific circumstances.

Other Egyptian laws recognise information and what should be disclosed or prohibited from disclosure. The Egyptian Trade Law prohibits unfair competition and defined the disclosure or illegal usage of industrial secrets as an act of unfair competition under article 66.

Article 685-d of the ECC provides for the protection of trade secrets in an employment relationship by obliging employees to safeguard the industrial or commercial secrets of their work, even after termination of the employment contract, and article 686-1 prohibits employees from competing with their ex-employer or participating in a competitive undertaking after termination of the employment relationship.

In case of the absence of a contractual obligation or other statutory provisions, the traditional contractual and civil liability standards are applicable.

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

Article 66 of the Egyptian Evidence Law states that attorneys, among other liberal professionals, may not disclose information acquired in the context of the exercise of their profession unless the information is disclosed to them for the purpose of committing a felony. It also compels the disclosure of such information, if the person who gave them such information requests them to do so, unless the laws governing their professions preclude them from doing so.

In turn, article 65 of the Law Regulating the Practice of the Legal Profession (LRPLP) states that attorneys must not disclose information or facts relating to their clients in the context of providing testimony, unless such information is disclosed for the purpose of committing a felony. LRPLP article 79 extends beyond witness testimony stating that an attorney shall keep information provided by a client as confidential, unless the client permits the attorney to disclose it.

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

Article 22 of the new Egyptian Electricity Law No. 87 of 2015 establishes a committee for dispute settlement under the Electric Utility and Consumer Protection Regulatory Agency (EgyptERA), to which parties undertaking to run and organise the power sector may refer their disputes, as well as disputes related to the enforcement and interpretation of the contracts concluded and activities related to the energy sector.

Regulatory

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

Oil and gas

The Egyptian Ministry of Petroleum is the government authority responsible for the development and regulation of the oil and gas industry in Egypt, acting mainly through the Egyptian General Petroleum Authority (more commonly referred to as the Egyptian General Petroleum Corporation (EGPC)), established pursuant to Law No. 20 of 1976 (the EGPC Law), and the Egyptian Holding Company for Natural Gases (EGAS), established pursuant to Prime Ministerial Decree No. 1009/2001 (the EGAS Law).

The EGPC 'is a general authority ... acting for the promotion of petroleum wealth, its good exploitation, and making available the country needs of the different petroleum products. [EGPC] shall practice the powers and competences, provided for in the Law No. 167 of the year 1958, establishing the General Authority for Petroleum Affairs ... within the framework of the aims, plans and general policies which shall be determined by the Supreme Council for Petroleum Sector', article 1, the EGPC Law.

In turn, according to article 4 of the EGAS Law, EGAS 'shall operate in all natural gas activities', with a legal purpose to, inter alia, carry out the management and supervision of gas activity, an important strategic national resource legally and historically tied to the Egyptian state, and 'as shall be determined by the Minister of Petroleum'. Consequently, and in line with the EGAS's scope, the EGAS has a legal mandate to assume and carry out the management and supervision of gas activity, explicitly also encompassing the supply and distribution of gas, according to the Minister of Petroleum's strategic plans regarding Egyptian gas.

Currently, a specialised gas utility regulatory authority is expected to be established; but it has not yet been established.

Power

The EgyptERA was established by Presidential Decree No. 326 of 1997. It is affiliated with the Ministry of Energy and Electricity and is responsible for the issuance of permits and licences for the generation, transmission and distribution of energy.

The New and Renewable Energy Authority was established by Law No. 102 of 1986 and is responsible for identifying, allocating, promoting and developing renewable energy in Egypt.

Update and trends

A change on the horizon for Egypt's energy market is initiated by the new Gas Law, Law No. 196 of 2017, which sets the start for a gradual market liberalisation of the domestic gas market. The new Gas Law aims to encourage new investments, diversification of supply sources and introduces competition and fair market play, and is hoped to bring in greater transparency and flexibility. Similar to the new Electricity Law, Law No. 203 of 2014, which introduced a semi-competitive market allowing private generation companies to sell their products to end users, the new Gas Law permits consumers to choose their own supplier and negotiate prices. It also allows for the eventual import of natural gas by private companies and enables the private sector to directly ship, transport, store, market and trade natural gas using the pipeline and network infrastructure. With the set-up of a natural gas regulatory authority and private companies entering the market, EGAS will no longer be solely responsible for meeting Egypt's rapidly natural gas needs while advancing Egypt's objective to achieve energy self-sufficiency by 2019. The Executive Regulations, which have not yet been issued at the time of writing, will play a key role in implementing the government's vision.

In addition to a decrease of the unified customs rate from 5 per cent to 2 per cent and the decreased sales tax to 5 per cent on imported tools, equipment and machinery necessary for the establishment of the business, the new Investment Law and its recently issued Executive Regulations grant special financial incentives to projects generating or depending on renewables and conventional electricity generation and distribution projects. Classified into different geographic locations, investment projects enjoy a deduction of 30 to 50 per cent of their investment costs from the net taxable profit for the first seven years of the life of the project, subject to certain conditions such as the establishment of the project within three years from the new Executive Regulations coming into effect.

Egypt's adopted mitigation measures to reduce emissions, as outlined in its Nationally Determined Contributions (NDC), is increasing the share of renewables in the energy mix. Egypt has committed to increase its share of renewables in the country's power mix to 20 per cent by 2022 and 37 per cent by 2035 thereby taking advantage of its wealth of renewable energy sources and contributing to reducing global greenhouse emissions. Egypt has acceded to the Paris Climate Agreement, which entered into force as of 29 July 2017. As Egypt is one of the vulnerable countries to climate change, the government has been urged by civil society organisations to accede to the agreement and join the global climate movement. Civil society organisations are playing a crucial role in Egypt's commitment to the Paris Climate Agreement.

The Egyptian parliament is currently considering amendments to the law governing the Nuclear Power Plant Authority which would place the authority within the Electricity Ministry's concern, but with full oversight and regulatory power over the nuclear power sector, in addition to its own independent budget.

Last but not least, the Zohr field is expected to begin production in late 2017 with the inclusion of additional international oil company investors as Eni recently completed its sale of a 30 per cent stake in the Shorouk concession to Rosnef, following the assignment of 10 per cent of its interest to BP in February 2017 with an optional additional 5 per cent.

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

The national electricity and pipeline grids are owned by state entities, with whom producers originally contract for the purpose of obtaining concessions or rights to explore, develop and produce, and to connect to the national grids for the purposes of transportation of their commodities under agreed-upon terms.

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?

Such decisions are subject to the jurisdiction of the Egyptian administrative courts, absent valid arbitration agreements otherwise.

The new Investment Law, Law No 72 of 2017 promulgated in June 2017, reinforces the Egyptian government's efforts to bring more foreign investment back to the country. The law affirms the discretionary powers of three out-of-court forums previously introduced to encourage amicable settlement of investment disputes with the government in the form of different committees tasked with the pursuit of resolution of different targeted umbrella matters, including settling disputes between investors and governmental bodies arising out of investment contracts. The new Investment Law further introduces the establishment of a state-sponsored arbitration and mediation centre, to which investors may agree to resort to settle their disputes with a governmental agency or another investor. In addition, as noted above, article 22 of the new Egyptian Electricity Law No. 87 of 2015 establishes a committee for dispute settlement under EgyptERA, to which parties undertaking to run and organise the power sector may refer their disputes, as well as disputes related to the enforcement and interpretation of the contracts concluded and activities related to the energy sector.

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

There is no regulatory framework with regard to hydraulic fracking in Egypt, nor does the law expressly prohibit it.

25 Describe any statutory or regulatory protection for indigenous groups.

Despite being a country with a significant ethnic diversity, there is no specific legislation dedicated to the issues of indigenous groups. However, historically the regulation of their rights in general and their protection in specific is tackled on a case-by-case basis and usually through presidential decrees that are issued to solve a particular issue. For example, in connection with the construction of the Aswan High Dam, Nubian community clusters were displaced for newly built villages near Kom Ombo through direct government intervention.

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

Generally, foreign companies do not encounter additional barriers to participate in energy development in Egypt, except that they may not carry out import activity for trading without the participation of qualified Egyptian natural or juristic persons under the new Importers Register Law, as amended.

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

Companies in the energy sector in Egypt are often confronted with health and safety liability resulting from initial exploration drillings. Additionally, companies in the energy sector must consider environmental liabilities in connection with demobilisation.

Other

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

Of note is Egypt's objections to Ethiopia's construction of the Grand Ethiopian Renaissance Dam on the Blue Nile River in Ethiopia. At 6,000MW, the dam will be the largest hydroelectric power plant in Africa when completed, with a 74 billion cubic metres storage reservoir volume of water. The potential impacts of the dam have been the source of severe regional controversies. Egypt is demanding to increase its share of the Nile's water flow and has demanded that Ethiopia cease construction on the dam as a precondition to negotiations. Ethiopia denies that the dam will have a negative impact on downstream water flows and contends that the dam will, in fact, increase water flows to Egypt by reducing evaporation on Lake Nasser.

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

Egypt was given observer status on 28 November 2008.

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

There are no energy industry specific forms of investor protections.

Generally, Egypt's accession to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, DC, 18 March 1965) (the Washington Convention) was followed and supported by the multiple bilateral investment treaties (BITs) Egypt has entered into, and which generally provide covered foreign investors with the typical substantive protections falling under five main categories: guarantee of fair and equitable treatment, protection against expropriation, general protection and security, most favoured nation treatment guarantee and, in certain BITs, umbrella clauses.

Domestically, in addition to the Egyptian constitutional protection of private property and equal treatment, and limited only to few exceptions, the new Investment Law retains the guarantees and incentives against nationalisation, confiscation, sequestration, seizure, pricing control, management control, licensing control, etc, already contained in the old Investment Law. In addition, the new Investment Law now pins the principle of equitable treatment of foreign investors with nationals and the protection of private property into the law, thereby guaranteeing such investments protection where BITs do not apply. The new Investment Law also re-emphasises the right of repatriation of all investment profits and transfer of returns. Further, it guarantees that licences issued for investment projects may not be cancelled or suspended without due process of law.

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.

Egypt does not have a comprehensive data protection law. Instead, certain minor data protection provisions are scattered throughout different Egyptian laws (ie, state secrets, banking laws, consumer protection). Considering the absence of regulatory or statutory control over, or guarantees of, consumer data protection, in practice, data retention practices are left to be regulated by the industry and the actors themselves, based either on contractual obligations, internal policies or voluntary actions, or traditional notions of personal injury.

Girgis Abd El-Shahid **girgis.shahid@shahidlaw.com**
César R Ternieden **cesar.ternieden@shahidlaw.com**
Maha Jüstel **maha.juestel@shahidlaw.com**

20 B Adly Street
Cairo 11511
Egypt

Tel: +20 2 2393 3593
Fax: +20 2 2393 5447
www.shahidlaw.com

Germany

Markus Burianski and Thomas Burmeister
White & Case LLP

General

1 Describe the areas of energy development in the country.

The German energy landscape shows a conventional energy share in total energy consumption of roughly 35 per cent oil, 20 per cent gas, 12 per cent hard coal, 12 per cent lignite and 8 per cent nuclear energy. The much-talked-about German energy transition has brought many initiatives with a focus on promoting renewable energy and its smooth integration into the market. The energy transition equally addresses, among other things, storage, network and security of supply issues.

Due to international obligations as well as the corresponding political will, efforts have been undertaken towards reducing greenhouse gas emissions and empowering the renewable energy sector. Looking at nuclear power, it has been announced that Germany will shut down all nuclear power plants by 2022. In December 2016, the German parliament voted for a law that limits the nuclear power plant operators' liability to the closing down and demolition of the nuclear power plants. In return, the state takes over the liability for temporary and ultimate storage.

Recently there have been more and more voices advocating a withdrawal from lignite and coal used for power generation. The reason for this is the high emission of greenhouse gases by coal and lignite power plants. Starting in October 2016 and until October 2019, seven lignite power plants shall be temporarily shut down and used only in emergency cases. After four years of such temporary shutdown, those power plants shall be finally shut down.

The high percentage of oil consumption mainly stems from the transport sector, which accounts for over 50 per cent of German petroleum consumption. In order to reduce consumption, the government fosters electro mobility and the use of alternative fuels, such as natural gas and liquefied natural gas.

While natural gas plays a key role in its mix of energy sources, Germany is still highly dependent on imports of natural gas. Thirty-five per cent is imported from Russia, 34 per cent from Norway, 29 per cent from the Netherlands and 2 per cent from other countries. Domestic production of natural gas covers about 7 per cent of gas consumption. With regard to transportation, the network of gas pipelines with a total length of more than 510,000km shall be used as a composite system. In that system natural gas, biogas as well as hydrogen and synthetic methane produced from renewable energy shall be combined.

Hard coal and lignite account for almost a quarter of primary energy consumption. Coal is the most important energy source in the production of electricity. Around 45 per cent of electricity is generated from coal.

The renewable sector today makes up almost 13 per cent of total energy consumption. It mainly consists of solar power and wind energy as well as biomass, hydropower and geothermal energy. While renewable energy is associated mostly with generating electricity, it also plays an important role for heat production.

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

The ownership and development of energy sources is mostly part of the private sector. In principle, neither the Federal Republic of Germany nor the states of Germany aim at owning or developing energy resources. Nevertheless, some of the large German utilities have public shareholders, for example the two principal shareholders of EnBW, NECKARPRI with a 46.75 per cent share and OEW with a share of 46.75 per cent, are public entities, and municipalities hold a share of approximately 24 per cent in RWE. In addition, on the local and regional level, which represent a market share of 52 per cent in the electricity sector and 62 per cent in the gas sector, numerous municipal utilities with mixed private and public ownership structures exist. Vattenfall's sale of the lignite production sites in eastern Germany has triggered a political discussion on the bailout of the lignite sector.

The government's role is to define the energy policy and to set up the regulatory framework. Recently, the government's most important decisions refer to the phasing out of nuclear generation by the end of 2022, and towards an energy transition that encompasses the decision to produce energy on a sustainable basis (at least 80 per cent until 2050) to make Germany one of the most energy-efficient and environmentally compatible economies in the world. The expansion of renewable energy is one of the main pillars in Germany's energy transition. Germany's energy supply is becoming 'greener' from year to year, although the Renewable Energies Act was recently amended again to further limit an 'uncontrolled extension' of renewable energy generation. Additionally, the government focuses on grid extension and development to integrate the growing onshore and offshore wind energy production into the market. On the local level, a trend towards small-scale energy generation is visible, and in many regions citizens set up local cooperatives that own and operate solar parks and onshore wind parks. Eventually, the government will set up numerous support programmes to enhance energy efficiency measures, especially in the heating sector, and to contribute to the developing technology of energy storage, for example through batteries.

Commercial/civil law – substantive

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

In wholesale trading, the European Federation of Energy Traders (EFET) standard reflects industry practice. Supplying household customers is governed either by directly applicable ordinances or by freely negotiated contracts, which, however, have to comply with Germany's strict law on standard terms and conditions.

As regards access to the regulated electricity and gas networks, specific provisions exist that predefine the content of such contracts. In the electricity sector, the Federal Network Agency defined model contracts for network access. Electricity network operators are obliged to apply the model contracts to all their customers (ie, replace all existing contracts accordingly).

In the gas sector, a multilateral agreement between the gas network operators exists – the Cooperation Agreement – that contains provisions on the organisation of network access and cooperation between the gas network operators.

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

As a general rule, the interpretation of contracts under German law starts from the wording of the contract. The aim is to determine the

will of the parties, as it can be discerned by an objective third party. If the interpretation of the wording yields no clear result, surrounding circumstances are also taken into consideration (German Civil Code sections 133, 157).

Further, courts can review standard terms and conditions for 'appropriateness' even in B2B-contracts. 'Inappropriate' clauses are invalid. Furthermore, it is a general rule that, in case of doubts, standard terms and conditions are interpreted against the entity that supplied them. These rules also apply to energy contracts.

5 Describe any commonly recognised industry standards for establishing liability.

Generally, liability requires at least negligence on the part of the defendant. There are three forms of negligence corresponding to different degrees of carelessness: gross negligence, ordinary negligence and slight negligence. It is possible to agree on different standards of liability in a contract. However, if the limitation of liability is part of the standard terms and conditions, it is subject to the legal rules set out in sections 305 to 310 of the German Civil Code. According to the latter, neither liability for wilful default nor liability for grossly negligent actions can be excluded in contracts. Likewise it is not possible to limit liability for injuries of the life, body or health of a person. Slightly less strict rules apply to B2B contracts.

There are several industry standards for the different kinds of contracts in the energy sector such as grid connection agreements and energy supply agreements. For example, the EFET-sample contracts are commonly used. Pursuant to section 12.2 'General Agreement Concerning the Delivery and Acceptance of Electricity', a party is not liable for any damages except where such damages are due to gross negligence, wilful default or fraud of the party, its employees, officers, contractors or agents.

Moreover, there are specific regulations that contain strict liability, such as, for example section 26 of the Atomic Energy Act, which provides for a combination of strict liability and fault-based liability.

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?

'Economic impossibility' can excuse performance for economic reasons (section 275 of the German Civil Code). However, the hurdles for its application are very high and will not be fulfilled in most cases of commodity price or supply volatility.

In addition, German law recognises the concept of 'interference with the basis of the transaction' (section 313 of the German Civil Code). While this concept does not excuse performance, it allows a party to demand the adaptation of a contract if:

- circumstances, which became the basis of a contract, have significantly changed since the contract was entered into;
- the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change; and
- one party cannot reasonably be expected to uphold the contract without adaptation.

The adaptation is carried out at the discretion of the court. In the adaptation, all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, are to be taken into account. If contract adaptation is impossible or unreasonable, the contract can be terminated.

To the extent applicable, article 79 of the Vienna Convention on the International Sale of Goods also recognises that parties are not liable for a failure to perform any of their obligations if they prove that the failure was due to an impediment beyond their control and that they could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

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?

Generally, pursuant to section 1004 of the German Civil Code, the owner is entitled to file an action for injunction if a third party interferes with its ownership. Hence, operators may be subject to such claims.

Pursuant to section 64 of the Federal Nature Conservation Act, nature conservation organisations are entitled to collective action against certain decisions of environmental authorities, for example, regarding projects that affect the environment, such as the erection of a power plant.

8 How may parties limit remedies by agreement?

Parties to an individually agreed civil law contract can agree that a simple form of negligence will not entitle to damages. However, a party cannot be released in advance from liability for wilful conduct (section 276, paragraph 3 of the German Civil Code). The parties can also agree on lump-sum claims of damages. This would be understood as a prior estimation of the amount of damages, so as to reverse the burden of proof. The entity causing the damage cannot be prevented from proving that the actual damage is less than what was agreed beforehand.

In standard terms and conditions, lump-sum claims for damages cannot be agreed to the extent that they exceed the damage expected under normal circumstances, the customarily occurring decrease in value or if the other party to the contract is not expressly permitted to show that damage or decrease in value has either not occurred or is substantially less than the lump sum (section 309, No. 5 of the German Civil Code). Similarly, in standard consumer contracts, liability for gross negligence cannot be excluded.

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

The possessor of the nuclear facility is bound to damages and compensation, if nuclear fission or nuclear radiation result in injury, death or property damage (section 26 of the Atomic Energy Act). The obligation to indemnify is excluded if the damage is inevitable and if there is no defect of the protection device.

Offshore windfarm operators can demand compensation from the responsible transmission system operator (TSO) for delays in construction or interruption to operation of the offshore connection systems irrespective of whether the TSO is responsible for the interruption of the offshore connection system (section 17e of the Energy Industry Act (EnWG)).

Generally, the compensation amount is limited to 90 per cent of the lost feed-in remuneration as of day 11 of the system interruption. If the TSO acts wilfully, the compensation amounts to 100 per cent as of day one. However, under certain conditions, the responsible TSO is entitled to pass on the compensation payments for delays in construction or interruptions to the operation of offshore connection systems to the other TSOs.

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?

When confronted with competing clauses in multiple contracts, courts analyse the contracts to decide which is relevant to the dispute at hand. This could either be a framework agreement or the more specific, latest agreement between the parties. The court will have to ascertain whether the latest agreement speaks to what is at issue between the parties.

With regard to choice of forum, a German court will assess whether the parties have reached a valid agreement on the competent court, testing the content of and the competence to conclude the agreement (section 38 of the German Code of Civil Procedure). Should one of the parties not have its seat in Germany, German courts will apply Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters or other applicable conventions between the respective home states.

With regard to the choice of law, the relevant regulation concerning contractual obligations is Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations.

With regard to different modes of dispute resolution, the court would interpret which of the agreements guides the relevant dispute and consider itself competent or not in light of the findings.

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

Stepped dispute clauses are not uncommon, but rarely provide for more than two steps. The obligation to negotiate before commencing proceedings is the most usual step. The enforceability of the stepped dispute clauses depends on the formulations chosen by the parties: they have to specify when one step of the mechanism agreed in a clause ends and the next becomes relevant and possible, according to their agreement. The German Federal Court of Justice has recently made clear that the non-compliance with a stepped dispute clause does not affect the jurisdiction of the arbitral tribunal. However, the tribunal is prevented from deciding the respective case on the merits.

Split dispute clauses, where one party can decide whether to go to arbitration or to litigation and the other party just has one of these options, are unusual. Such split dispute clauses are enforceable under German law, if they have been agreed in an individually negotiated contract or if the party that is not the user of standard terms and conditions is the party that can choose. Otherwise, if the split dispute clause solely benefits the user of the standard terms, the clause might be unenforceable. In any event, the party with the right to choose would have to contractually agree to notify the other party within a specified time frame which jurisdiction it intends to follow.

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

Expert evidence can be provided only through court-appointed experts. A court will appoint an expert if one party requests the appointment of an expert and identifies the facts to be assessed by the expert. Expert testimony will be provided primarily in writing, but the court may order the expert to explain its report in a hearing. Courts often ask the parties to propose suitable experts to be appointed by the court.

In addition, parties are free to submit written 'expert evidence' as part of their court submissions. Such submissions by party-appointed experts are qualified as substantiation of the party's pleading only and will not be considered as independent expert evidence.

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

There are no specific rules for interim and emergency relief with regard to energy disputes. Energy disputes are generally brought before civil law courts. As regards disputes between an electricity or gas network operator and the Federal Network Agency, the competent first instance court is the Higher Regional Court in Düsseldorf (civil court).

In civil courts, a party can apply for an injunction regarding the subject matter of the litigation (sections 935 and 940 of the German Code of Civil Procedure). There must be a concern that a change of the status quo might frustrate or render more difficult the realisation of the right enjoyed by a party. Furthermore, a party can apply for a writ of seizure, as an emergency matter to secure the later enforcement of a monetary claim (section 917 et seq of the German Code of Civil Procedure).

Under administrative law, pursuing a legal remedy against an administrative act will generally suspend the binding effect of such act. In circumstances where the pursuit of a legal remedy does not have a binding effect (either by law or administrative act), interim relief against an administrative act of the state can be obtained in administrative courts both by the addressee of the act and affected third parties (section 80, 80a of the Code of Administrative Court Procedure). Furthermore, a party can apply for an interim order to preserve the status quo or obtain a temporary order as regards the dispute if there is a danger a right could be frustrated if the existing circumstances changed or if such change is required for the protection of the respective right (section 123 of the Code of Administrative Court Procedure).

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

The general rules apply to the enforcement of foreign judgments and foreign arbitral awards resulting from energy disputes. For judgments rendered in an EU member state, Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters applies and permits the recognition and enforcement of foreign judgments just like domestic judgments, unless one of the limited grounds for refusal applies, most importantly that the judgment is manifestly contrary to public policy in the member state addressed. Similar rules apply to judgments rendered in Switzerland, Norway and Iceland.

For judgments rendered in most other countries, the domestic rules for the recognition and enforcement of foreign judgments apply (sections 722 and 328 of the German Code of Civil Procedure). In addition to specific requirements relating to the particularities of the individual case, the key criteria for the recognition of foreign judgments are reciprocity between the state rendering the judgment and Germany, and compliance of the foreign judgment with public policy. It is pertinent to note that reciprocity is not confirmed for China and Russia.

The recognition and enforcement of foreign arbitral awards is based on the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention is incorporated into section 1061 of the German Code of Civil Procedure. Further conventions exist, which may permit facilitated recognition of foreign awards in selected bilateral relationships.

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

No, there is no specific arbitration institution for energy disputes. The German Institution of Arbitration (DIS) also administers energy disputes.

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

With regard to disputes between private parties, the mode of dispute resolution depends on the parties' choices and agreements. Disputes between companies on energy supply or EPC contracts are often referred to arbitration. Disputes arising out of contracts with consumers almost exclusively go to court. As a consequence of the process regulation in the Energy Industry Act, disputes concerning regulatory or competition issues are exclusively subject to ordinary jurisdiction.

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

It is usual for private companies in settlement discussions to agree that the content of their written and oral statements and the results of the settlement discussions or mediation are confidential and may not be disclosed, either by the parties or counsel. Such a confidentiality agreement is binding on the parties.

Settlement discussions and the results of such settlement discussions are without prejudice in the sense that no prejudice or admission is created by the outcome of such discussions or the positions held for any future proceedings.

Settlement positions and outcomes are generally not discoverable from private entities. The main reason is that the concept of 'discovery of documents' does not exist (exceptions apply, most notably, the discovery of documents is often possible in arbitral proceedings). Each party generally has to submit its own evidence.

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

German law does not contain any specific regulation on e-discovery. Data privacy rules are important in German law and strict standards have to be consistently respected in all legal undertakings, such as the transmission of data, for example, for the purposes of discovery or disclosure in foreign court proceedings.

Update and trends

The Federal Ministry for Economic Affairs and Energy has recently issued a legislative proposal for an amendment to the existing German regulation for access to the electricity network. In this proposal the German legislator intends to codify the single bidding zone (price zone for electricity) in Germany. Until today, the single bidding zone has been the longstanding custom and practice in Germany, but has yet to be codified in the form of law. One of the main motives of the proposal is to prevent Transmission System Operators (TSOs) from unilaterally dividing the German bidding zone without any prior public consent.

However, this amendment may not be in line with future European law. In the 'Winter Package', the European Commission has already expressed its intention to strengthen the electricity market within the EU and maximise economic efficiency and cross-border trading opportunities. The Commission plans to implement a formal procedure (the 'Bidding Zone Review'), in which TSOs shall submit a proposal to the Commission regarding whether to amend or maintain the bidding zone configuration. The Commission will then have the final decision regarding the division of bidding zones within the European Union.

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

Because the concept of 'discovery' generally does not exist, both 'attorney–client privilege' and 'work product privileges' as defences against discovery do not exist as such. The German law equivalent is 'professional secrecy', which obliges attorneys and their assistants to keep secret anything they learn in their role. Accordingly, attorneys have a right to refuse testimony about facts that have become known to them in their role. The professional secrecy obligation encompasses the attorneys' files in their possession. As of today, in-house lawyers are not considered 'attorneys' in relation to their employer and are neither obliged nor benefit from the concept of 'professional secrecy'.

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

As pursuant to general administrative law, final decisions of the regulatory authorities require preliminary administrative proceedings in which the affected party is granted the right to be heard. Consumer claims may need to be heard by a conciliation agency before they can go to court if the amount in dispute is below €750 (section 15a of the Introductory Act to the German Civil Code in connection with local statutes in the states of Germany).

Regulatory

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

The Federal Network Agency as well as the relevant regulatory authorities of the states of Germany are the responsible authorities for the regulation of energy network operators. The Energy Industry Act and the corresponding regulations contain, in a nutshell, provisions regarding network access and network connection as well as provisions regarding the calculation of the grid fees for the use of the energy networks. Due to the monopoly structure of energy networks, the respective system operators are subject to specific grid regulation to ensure non-discriminatory grid access and grid usage.

The Federal Cartel Office as well as the relevant cartel authorities of the states of Germany are independent competition authorities responsible for the protection of competition. The German Competition Act is the central legal basis for the cartel offices' work. With regard to the value chain of the energy sector, the generation, trade and supply of power to customers shall take place in free, non-regulated markets. To ensure competition on these markets, the Federal Cartel Office and respective cartel offices of the states of Germany are empowered to investigate and prosecute anticompetitive or manipulative practices.

Moreover, there are several authorities competent to issue public permits for the construction or operation of energy projects, such as the mining offices of the states of Germany or the Pollution Control Authorities.

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

The Energy Industry Act provides new entrants with the right to non-discriminatory access to the existing gas and electricity networks. Network operators have to grant access to everyone subject to objectively justifiable criteria. The network operators can deny such claims for access only if they can prove that granting access is either impossible or unreasonable. Access can for example be impossible due to technical preconditions or it could be deemed unreasonable if the access would lead to disproportionate detriments for the network operator.

Such rejection of network access has to be substantiated thoroughly by the network operator and reported to the regulator. If rejected, the petitioner for access has the option to institute proceedings before the regulator against the network operator. If the regulator decides that the rejection was unjustified, it can order the network operator to grant access. Furthermore, the new entrant could also initiate court proceedings against the network operator.

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?

Decisions of the regulator can be appealed. The judicial procedure for such appeals is set forth in the Energy Industry Act and basically follows the rules of administrative jurisdiction. The appeal against a decision must be filed within one month after service of the decision. The reasons for the appeal must then be handed in within another month starting with the filing of the appeal.

With regard to litigation, the Higher Regional Court in Düsseldorf is the exclusively competent court at first instance for the appeal against decisions of the Federal Network Agency. The decisions of the Higher Regional Court in Düsseldorf may be appealed to the Federal Supreme Court.

The legal framework (ie, the Energy Industry Act), does not contain non-judicial procedures to challenge the formal decisions of the energy regulator.

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

In August 2016, legislation was passed regarding hydraulic fracturing. According to the amended Federal Water Act, the fracturing of shale formations and coal beds for the exploitation of oil or natural gas is generally not allowed. However, such fracturing may be allowed for experimental measures in order to examine the effect of hydraulic fracturing to the environment, in particular to underground formations and to groundwater. Such examinations subsequently shall be evaluated by an independent expert committee deployed by the federal government. This expert committee shall report on the results of the experimental measures annually, for the first time by 30 June 2018 and publish their reports publicly on the internet. The federal government will then, on the basis of these reports, decide in 2021 on the continuance of the general prohibition of hydraulic fracturing according to the Federal Water Act.

25 Describe any statutory or regulatory protection for indigenous groups.

In Germany, there is no specific protection for indigenous people, given that there is no distinguishable group of indigenous people.

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

Under the Foreign Trade and Payments Act the trade in goods, services, capital, payments and other types of trade with foreign territories, as well as the trade in foreign valuables and gold between residents (foreign trade and payments) is, in principle, not restricted. There are exemptions to this rule if national security interests are concerned.

On the basis of the European Energy Package, Germany introduced a rule on the investment by third-country investors into German energy transmission networks. In case certification is requested by a transmission system owner or a transmission system operator that

is controlled by a person from a third country (ie, non-EU member state), the national regulatory authority shall notify the European Commission. The regulatory authority shall also notify the European Commission if a third-party investor intends to acquire control over a transmission system or a transmission system operator.

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

There is no specific framework on energy companies' liability. Liability in the sense of legal consequences of non-compliance may derive from a broad range of material laws applicable to companies in the energy sector. In general, non-compliance may lead to public as well as civil liability (the latter one not covered here) and to criminal liability. It depends on the respective business activities and the applicable material laws.

Health and safety, as well as environmental requirements, may derive from the respective permits or statutory provisions. As regards the energy sector, the Federal Emission Control Act is of particular importance: the competent authorities may issue subsequent orders, also with regard to observing the evolving state of the art, and enforce necessary amendments to the plant in question. The competent authorities have the power to demand compliance with these requirements and may also take the measures necessary to enforce them, most notably by imposing penalty payments that may be significant. Ultimately, the authorities may also execute by substitution or even revoke the respective permit.

Apart from the broad range of material laws applicable in a particular case, such as liabilities under the Federal Soil Protection Act and corresponding remediation orders, further environmental liabilities may derive from the Environmental Liability Act and the Environmental Damage Act.

Non-compliance with the requirements of permits or statutory provisions may also qualify as a criminal act or, which is less severe, as an administrative offence, and be sanctioned accordingly. The individual material laws themselves define which wrongdoings qualify as an administrative offence or a criminal act, respectively. Further, the German Criminal Code qualifies certain environment-related conduct, such as water, soil and air pollution, as a criminal act. Administrative offences are sanctioned by administrative fines, which may also be imposed on the respective company; under the Federal Emission Control Act, such fines may amount to €50,000. Criminal liability applies to individuals only; however, representatives of a company may also be held liable.

Other

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

The German energy market changes due to the energy policy turnaround, with the phasing out of nuclear energy and an ever-increasing share of electricity from renewable energies. The centre of electricity generation shifts to the north, with around 7GW offshore wind capacity installed by the end of this decade. This leads to a shift in load flows, too, as the majority of electricity consumption still takes place in the south. Neighbouring countries are affected because the load flow abroad also reacts to the changed situation in Germany. This led to political discussions about the pan-European market area design and it cannot be excluded that utilities or even member states will approach the courts to claim compensation or appeal against measures taken by European bodies such as the European Commission or ACER.

In addition, disputes occasionally concern hydroelectric power stations located in border waters such as the river Rhine, or offshore windfarm projects located in the exclusive economic area, where determining the specific border location may be challenging.

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

The Energy Charter Treaty entered into force in Germany in 1994.

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

National and foreign investors are protected by the guarantees of access to courts in which the decisions and measures of the state can be reviewed. The ultimate guarantee for national investors are the fundamental freedoms contained in the Basic Law, the German Constitution. These include the right to property and the state institutions' obligation to act in accordance with the law. Specifically, the German Constitutional Court has recently found that the Basic Law's safeguard for private ownership can protect (nuclear) investments of energy companies made in trust in the existing legal framework as it stands at the time.

Foreign investors in the energy industry are protected against measures imposed by the state through investment protection treaties. In addition to the Energy Charter Treaty, Germany is bound by a multitude of bilateral investment treaties, which protect investors depending on their nationality.

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.

The legal framework for cybersecurity is composed of several provisions in different laws. Only a few of them are specific to the energy industry.

The 2015 German IT Security Act, primarily introducing changes to existing laws such as the Act to Strengthen the Security of Federal Information Technology, applies to 'operators of critical infrastructure', such as businesses in the energy sector. The operators are obligated to implement technical and organisational measures to ensure the infrastructure's integrity, safety and confidentiality. The Federal Bureau publishes guidelines in this area (eg, the 'IT Grundschutz'). In

WHITE & CASE

Markus Burianski **mburianski@whitecase.com**
Thomas Burmeister **tburmeister@whitecase.com**

Bockenheimer Landstrasse 20
60323 Frankfurt
Germany

Graf-Adolf-Platz 15
40213 Düsseldorf
Germany

Tel: +49 69 29994 0
Fax: +49 69 29994 1444
www.whitecase.com

addition, the EU is close to finalising a new directive designed to create common standards on network and information security across the EU (the 'NIS Directive', also known as the 'Cybersecurity Directive'), which might lead to further changes in German law.

The German Energy Act includes dedicated provisions on cybersecurity in the energy industry sector (sections 21b et seq EnWG). They particularly apply in the area of smart metering and smart grids and aim to secure the gateway components and network. However, large parts of such legislation are based on regulations to be issued by the relevant ministry, detailing the technical and organisational requirements, which have yet to be enacted.

Further (general) provisions are held in the German Federal Data Protection Act (BDSG), the German Telecommunications Act and the German Telemedia Act. In particular, the Annex to the first sentence of section 9 of the BDSG includes further details on technical and organisational measures.

India

Sitesh Mukherjee, Deep Rao Palepu and Rahul Bajaj
Trilegal

General

1 Describe the areas of energy development in the country.

India has a varied energy mix comprising coal, oil and gas, solar, wind, biomass, hydro and nuclear power. India's energy needs are presently met predominantly through coal-based thermal power followed by hydrocarbons and then clean and renewable energy. India's latest energy development goals in the Draft National Energy Policy, 2017 formulated by the National Institution for Transforming India (NITI Aayog), the government of India's apex policy planning body, are as follows: access at affordable prices, greater sustainability, improved security and independence, and economic growth. In the oil and gas sector, improved upstream exploration and production policies such as the Open Acreage Licensing Policy and the Hydrocarbon Exploration and Licensing Policy (HELP) have been introduced in 2016 to incentivise private sector participation by addressing pitfalls of the erstwhile New Exploration and Licensing Policy (NELP). The last round of NELP concluded in 2012. The government has taken hitherto unprecedented steps to incentivise the development of solar and wind energy, and has set an ambitious target of producing 175GW of renewable energy by 2022. In this regard, record low solar (2.44 rupees/kWh) and wind tariffs (2.64 rupees/kWh) have been discovered through competitive bidding in 2017. Further, the government is actively pursuing the exploitation of coal bed methane, shale gas and offshore wind potential.

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

Article 297 of the Indian Constitution vests eminent domain over all natural resources in the central government. Thus, all aspects of energy development in India are administered by functionaries of the central government. The Ministry of Petroleum and Natural Gas (MoPNG) is responsible for overseeing the functioning of the entire oil and gas sector and sets the agenda for the regulation of this sector. It grants leases and licences to private agencies for upstream, midstream and downstream activities. It is also responsible for determining the pricing of gas. Under the aegis of the MoPNG is the Directorate General for Hydrocarbons (DGH), which is the principal authority responsible for regulating the upstream exploration and exploitation of all hydrocarbons in India. The Petroleum and Natural Gas Regulatory Board (PNGRB) is the midstream and downstream regulator that regulates the refining, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas. It is also tasked with the responsibility of resolving disputes between participating entities. The power sector is administered by the Ministry of Power (MoP) and the Ministry for New and Renewable Energy (MNRE). Independent electricity regulatory commissions at the central (Central Electricity Regulatory Commission) and state levels (State Electricity Regulatory Commissions) regulate the distribution and transmission of electricity, and also adjudicate disputes between various stakeholders.

At present, the Integrated Energy Policy, 2006 (IEP) is the key policy document that articulates the energy policy objectives. Broadly, the IEP lays down a blueprint for meeting India's energy needs and outlines steps for achieving the specific targets delineated therein. Some of its salient features are:

- ensuring targeted delivery of subsidies while exploring alternatives that can facilitate the gradual phasing out of subsidies;
- fostering the growth of renewable energy by providing incentives and making the grant of incentives contingent upon outcomes and not merely capacity installed;
- giving energy sector public sector undertakings greater autonomy and accountability to ensure that they emerge as engines for energy efficiency; and
- enforcing standards and norms aimed at ensuring energy efficiency.

The NITI Aayog's draft National Energy Policy dated 27 June 2017, which has been submitted for the union cabinet's approval, will replace the IEP. Some of the salient features of the draft National Energy Policy are:

- creating the requisite infrastructure to facilitate 24/7 electricity by 2022;
- promoting the growth of gas over oil;
- ending the government-owned Coal India Limited's monopoly by encouraging private participation in coal mining;
- introducing an independent regulator for coal, oil and gas;
- ensuring sustainable growth by focusing on clean energy and meeting environmental concerns; and
- replacing government subsidies in the energy sector with direct benefit transfers.

Commercial/civil law – substantive

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

Until recently, contracts for exploration and exploitation of oil, including hydrocarbons, were granted under NELP, which was launched by the government of India in February 1999. NELP provided a broad policy framework for the grant of licences to parties chosen through competitive bidding to explore and exploit hydrocarbons. In view of various disputes between operators and the government under the NELP regime, NELP was replaced by HELP in 2016. Under HELP, the DGH has released a model revenue sharing contract (RSC) and a model reconnaissance contract (RC). The key difference between NELP and HELP is that the profit sharing mechanism under the former has now been replaced by a revenue sharing model. Under the profit sharing model, profits were shared between the government and the contractor after recovery of cost. As the ascertainment of the cost incurred by the contractor was often controversial, this led to many delays and disputes. Under HELP, the government receives a share of the gross revenue from the project. Further, under NELP the government used to identify blocks and thereafter initiate competitive bidding to select a successful bidder, which led to delays. However, under HELP, any party can submit a suo motu expression of interest (EoI) on the basis of the information available in the National Data Repository, a technical database of information on Indian sedimentary basins. On receipt of an EoI, the government will assess it against the qualification criteria outlined in HELP. Once an EoI is accepted, the government will conduct a competitive bid to award the block or area demarcated in such EoI for an RC or RSC as the case may be.

The model RSC sets out the terms and conditions of the licence, such as the period of operation, contours of the work programme, rights

and obligations of parties, environmental protection measures to be taken, confidentiality standards to be maintained, etc. The model RC regulates reconnaissance operations for all kinds of hydrocarbons for a period of two years.

Some other standard-form contracts include:

- Fuel supply agreements released by Coal India Limited (CIL) that govern the purchase of coal from CIL and its subsidiaries. CIL is practically a monopoly in the commercial mining of coal as mines allocated to the private sector are typically for an exclusive pre-specified end use.
- Model design-build-finance-own-operate (DBFOO) and design-build-finance-own-transfer (DBFOT) contracts have been issued by the MoP for long-term procurement of thermal power by distribution utilities. Under the DBFOO model, a licensed distribution licensee invites bids to procure a fixed quantum of power, while also prescribing the type of fuel and technology that is to be used for such supply. Under the DBFOT model, one or multiple government agencies may collectively invite bids for setting up projects on the basis of the lowest tariff, while also specifying the fuel and location of the project (which is required to be arranged by the government agency).
- The MNRE releases standard form power purchase agreements to be executed with the Solar Energy Corporation of India and NTPC Vidyut Vyapar Nigam as part of India's National Solar Mission for procuring competitively bid out solar power.

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

The substantive law regulating contracts in India is the Indian Contract Act, 1872 (ICA). The first principle that Indian courts typically bear in mind while construing commercial contracts is to give effect to the explicit words used by the parties. Where the words used in a contract are clear, Indian courts refrain from resorting to external aids of interpretation. However, when multiple interpretations are permissible, courts typically construe a term considering the meaning that the word has acquired in established trade usage. Further, commercial contracts are generally construed in a harmonious fashion, to ensure that the interpretation of one part of the contract does not do violence to other parts. Another principle that is applied in the construction of commercial contracts is the contra proferentem rule. In accordance with this rule, any ambiguity in a contractual provision has to be construed against the party that drafted the contract. This rule is particularly relevant in the Indian energy sector as the majority of contracts are standard form agreements drafted by the government.

Where the explicit terms of a contract are unclear as to the intention of the parties, courts occasionally apply the 'business efficacy' test, which is an interpretation to achieve the purpose intended by the parties acting as prudent businessmen. The Indian Supreme Court has recently held in its judgment in *Nabha Power Limited v Punjab State Power Corporation Limited & Anr* [2017 SCC OnLine SC 1239], that implied conditions may be read in to interpret a contract in five limited circumstances:

- when the same appears reasonable and equitable;
- when it is necessary to give business efficacy to the contract;
- when such words go without saying;
- when the conditions are capable of clear expression; and
- the conditions must not contradict any express term of the contract.

The *ejusdem generis* rule is also regularly invoked by Indian courts to interpret general phrases appearing at the end of list of specific terms forming part of the same class or category of terms. The construction of such a generic phrase is limited by the subject matter and context of the specific terms. The *ejusdem generis* rule is a facet of the broader noscitur a sociis rule, which stipulates that a term must be interpreted in the context of the terms associated with it, unless a contrary intention appears from the contract.

5 Describe any commonly recognised industry standards for establishing liability.

In oil and gas contracts, such as the model RSC under HELP, contractors are obligated to adopt Good International Petroleum Industry Practices (GIPIP). In 2016, the DGH released a consolidated list of what constitutes GIPIP in key areas, such as: exploration and operations; discovery; production; health, safety and environment; and procurement procedure. Similarly, the erstwhile model production sharing contract contained the concept of reasonable prudent operator, which held an operator to a standard equivalent to a reasonable operator in the same or similar circumstances. Besides GIPIP in HELP, a key parameter against which the conduct of most stakeholders in the energy sector is assessed is 'prudent utility practices'. Typically, these are defined as internationally accepted best practices adopted by similarly placed operators, which account for the operation and maintenance guidelines provided by original equipment manufacturers; the requirements of applicable law; the physical conditions of the site; and the safety of the environment and personnel. Claims for exemption from liability would need to be substantiated by establishing that an operator acted with reasonable care and foresight by doing all in its power to avoid the occurrence of any injury or accident by following internationally accepted best practices.

Indian courts have construed the term 'wilful misconduct' to mean misconduct that is of a more serious nature than misconduct simpliciter, and must therefore satisfy a higher threshold. The Supreme Court in *Shiv Nath Rai Ram Dhari and Ors v Union of India* [AIR 1965 SC 1666] has construed misconduct to mean 'mere negligence or omission would not be enough but that negligence or omission should be such that a businessman would say that it amounted to bad management or mismanagement'.

Further, a party undertaking an energy project is also required to be cognizant of relevant environmental law standards as it can be held liable for any environmental damage resulting from its actions. Indian courts have recognised some important principles in this regard. As per the precautionary principle, an entity undertaking any operations that have environmental consequences is bound to take all precautionary measures permissible to ensure that its actions do not result in the causation of any environmental damage. Similarly, as per the polluter pays principle, if any negative environmental consequences result from the actions of a party, it is duty bound to pay for the same.

As per article 14 of the model RSC under HELP, an energy developer is required to take necessary and adequate steps to prevent or minimise environmental damage, provide adequate compensation to those affected and ensure that its operations are conducted in an environmentally safe and acceptable manner. These obligations have also been imposed on energy developers conducting reconnaissance operations under article 16 of the model RC.

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?

Yes. The concepts of force majeure and frustration are recognised under Indian law. However, commercial impracticability or the coming into existence of more onerous commercial conditions is not recognised as a valid basis to excuse performance. The Supreme Court has held in the case of *M/s Dhanrajamal Gobindram v Shamji Kalidas* [1961 AIR 1285] that a force majeure event is one that is beyond the control of the parties. Further, a party must take all possible measures to mitigate the impact of a force majeure event, and cannot claim relief for such periods by which it ought to have recovered from the effects of a force majeure event.

A comprehensive force majeure clause finds mention in the HELP model RSC (article 29) and model RC (article 13). These articles are identically worded. The article clarifies that a party is exempted from any liability flowing from a delay in performing its obligation or for non-performance if the reason for such delay or non-performance is a force majeure event. The key parameter for ascertaining if an event constitutes force majeure is if it was entirely beyond the control of the party in question and the article sets out a non-exhaustive indicative list of the same. It bears noting, however, that the mere unavailability of funds is expressly excluded from the definition of force majeure. Force majeure relief is typically contingent on the prompt provision of adequate notice to the counterparty within a fixed time frame of the occurrence of the event, setting out the details of the event and its consequences.

Section 56 of the ICA absolves a party of the obligation to perform a contract when its performance becomes impossible (ie, when the contract stands frustrated). In a leading judgment in the case of *Energy*

Watchdog v Central Electricity Regulatory Commission and Ors [2017 SCC OnLine SC 378], the Supreme Court held in the context of a power purchase agreement that relief for force majeure cannot be sought solely on the ground of performance of a contract becoming more commercially onerous. If alternative modes of performance remain open, the doctrines of force majeure or frustration do not come into play.

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?

In India, nuisance constitutes a crime as well as a tort. Under section 268 of the Indian Penal Code, 1860 (IPC), any person who engages in any conduct that causes any common injury, danger or annoyance to the public is guilty of public nuisance. The Criminal Procedure Code, 1973 lays down the procedural scheme for punishing a party for committing public nuisance. Whenever the appropriate magistrate arrives at a finding that any activity is causing public nuisance, he or she is empowered to issue a conditional order for the stoppage of such activity. After hearing the accused, the magistrate is empowered to make such order absolute. Further, the Magistrate is authorised to prohibit the continuation of the public nuisance.

In the realm of tort law, a civil suit can be filed under the Civil Procedure Code, 1908 (CPC) against any party committing public nuisance. The Advocate General or two or more persons with the consent of the Advocate General, even if they are not specially impacted by the nuisance, can institute such a suit. The relief of a declaration that the practice in question constitutes nuisance or an injunction against those causing the nuisance can be sought. As per the Supreme Court's judgment in *Rafat Ali v Sugjani Bai* [(1999) 1 SCC 133], the following two parameters must be satisfied for proving the commission of nuisance: an unlawful act; and damage, actual or presumed.

Operators in the energy sector may also be held liable for negligence in certain cases. According to the Supreme Court's judgment in *Poonam Verma v Ashwin Patel* [(1996) 4 SCC 332], the following parameters must be established for proving the commission of negligence: a legal duty to exercise due care; breach of the duty; and consequential damages.

Consequently, an entity developing energy projects can be held liable for nuisance or negligence if it can be established that its conduct meets the aforementioned criteria by a third party.

8 How may parties limit remedies by agreement?

Parties have wide contractual freedom to limit available remedies, and courts are typically slow to override such freedom. However, damages are not awarded to penalise the party that has breached the contract, or to reward or confer any benefit or gain on the affected party, over and above the actual loss suffered by it. Liquidated damages clauses in respect of specific breaches of contract, general liquidated damages clauses and overall limitation of liability clauses are common in Indian energy contracts. That said, the Supreme Court's judgment in *Kailash Nath Associates v Delhi Development Authority* [(2015) 4 SCC 136] holds that liquidated damages can only be awarded if they are a genuine pre-estimate of the losses incurred. Even where a contract contemplates liquidated damages, if the extent of damages is ascertainable, the party affected by a breach would only be entitled to reasonable compensation. Thus, liquidated damages are treated as a maximum cap, subject to proving actual loss as a matter of evidence. The fundamental principle of damages for a breach of contract is that these are awarded to place the injured party in the same position in which it would have been, had the breach not occurred. Further, damages are awarded to compensate for losses that arise in the normal course of events because of the other parties' breach and not for indirect or remote losses.

Under the ICA, an explicit prohibition is imposed on the 'contracting out' or waiver of certain rights, such as the right to judicial redress and the right to exercise a lawful profession, trade or business. Similarly, the Supreme Court has recently held in the case of *All India Power Engineer Federation & Ors v Sasan Power Ltd & Ors* [(2017)1SCC487] that where a bilateral waiver of any contractual right ultimately has an adverse impact on public interest, it will not be given effect to.

Under article 4.7 of the model RSC, the liability of a contractor is limited to any damage arising out of anything connected with the contract from the effective date of the contract up to the date of relinquishment. As per article 14.10, the liability of a contractor is confined to any damage that occurs to the environment after the effective date of the contract and is attributable to any act or omission of the contractor.

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

Yes. Indian courts have evolved the concept of 'absolute liability', which is an even higher standard than strict liability. In the case of *MC Mehta v Union of India* [(1987) 1 SCC 395] the Supreme Court transformed the doctrine of strict liability into absolute liability. As per the doctrine of absolute liability, where an entity is engaged in a hazardous or inherently dangerous activity, it is obligated to ensure that no harm results from such activity under any circumstances. Consequently, the entity must conduct its operations with the highest standards of safety, and it cannot escape liability by contending that it was not negligent.

The leading case where absolute liability was applied is the case of *Union Carbide Corporation v Union of India* [1990 AIR 273]. The Supreme Court upheld the principle of 'absolute liability', which applies without limitation or exception and is applicable squarely to enterprises that are involved in hazardous or inherently dangerous activities. Unlike other tort claims where the remoteness of damage and the likelihood of its foreseeability is considered, in absolute liability, any person undertaking such hazardous activity will have to be prepared for the most unlikely situations as well. Undertaking exploration and drilling activities especially in eco sensitive zones may attract the principle of absolute liability.

Under section 4(4) of the Civil Liability for Nuclear Damage Act (CLND Act), an operator is strictly liable for any damage arising out of a nuclear accident. As per section 6(2), the liability of such an operator is capped at 15 billion rupees. As per section 5(1) of the CLND Act, if the accident arises because of a force majeure event, like a natural disaster or armed conflict, the central government, and not the operator, is liable. The liability of the central government is capped at US$415 million. Further, section 5(2) of the CLND Act contains a proviso stating that any compensation liable to be paid by an operator for nuclear damage (payable in accordance with section 4 of the CLND Act) shall not have the effect of reducing the amount of its liability under any other Indian laws. Hence, it is possible for concurrent claims under the CLND Act, tort law and under Indian criminal law.

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 cardinal principle that governs the approach of courts in construing such conflicting clauses is the rule of harmonious construction. In accordance with this principle, any contract or suite of contracts are to be construed in a harmonious and holistic fashion to ensure that effect is given to all its provisions and no provision is rendered redundant. If a conflict is unavoidable, then courts look to the overall purpose and intention of the parties to reconcile the same.

In case of any conflict between multiple provisions, Indian courts generally strive to make the contractual arrangement workable in a reasonable and pragmatic fashion, by making good any omissions that can help make the contract workable. For instance, in the case of *Enercon (India) Ltd & Ors v Enercon GmBH & Anr* [(2014) 5 SCC 1] an arbitration agreement provided for a tribunal of three arbitrators to be appointed but delineated the procedure only for the appointment of two arbitrators. In such a situation, the Supreme Court held that, given that the parties' intention to arbitrate was clear, the agreement had to be construed in such a fashion as to give effect to the intention of the parties, which is the governing consideration in all such cases.

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

Stepped or multi-tier dispute resolution clauses envisaging attempts at amicable settlement before arbitration are common in India. So long as parties have made a bona fide attempt to resolve their dispute amicably before resorting to arbitration, strict compliance with any technical procedures for resorting to arbitration is not insisted upon. Under the dispute resolution clause of the model RSC (article 31) and RC (article 14), the dispute resolution clause is multi-tiered. Firstly, the parties are

to attempt to amicably resolve the dispute. Secondly, the parties have the option of referring their dispute to an independent sole expert of international repute, in which case the agreement stipulates that no arbitration proceedings will be initiated. Thirdly, the parties have the option of referring their dispute to conciliation in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (Arbitration Act) during which no arbitration proceedings shall be instituted. Lastly, the parties may initiate arbitration proceedings by each appointing an arbitrator. The arbitrators so appointed are to appoint a presiding arbitrator. The venue and seat of the arbitration is to be New Delhi, and the arbitration is to be conducted in accordance with the rules set out in the Arbitration Act.

In *Visa International Ltd v Continental Resources (USA) Ltd* [(2009) 2 SCC 55], the Indian Supreme Court dealt with a case in which arbitration was envisaged on a failure of the parties to settle the dispute amicably. Holding that the exchange of letters and correspondence between the parties was sufficient for satisfying this condition, the court held that conducting formal conciliation proceedings was not a precondition to the commencement of arbitration. Thus, while stepped arbitration clauses are common and enforceable in India, courts will analyse the facts of each case to determine whether requiring the parties to strictly follow the pre-arbitration steps would be fruitful or practicable. Moreover, notwithstanding the language of the dispute resolution clause in the model RSC and RC contemplating a binding decision to be passed by a sole expert, such a decision may not preclude a party from initiating arbitration proceedings after the sole expert's decision is delivered.

Split-dispute resolution clauses are not common in India.

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

Indian courts consider expert evidence and statements of witnesses in accordance with the provisions of the Indian Evidence Act, 1872 (IEA). Expert evidence typically has more value, followed by documentary evidence. Indian courts have consistently held that the testimony of experts deserves due consideration but cannot be the sole basis for a court to arrive at a finding. In *Magan Bihari Lal v State of Punjab* [(1977) 2 SCC 210] it was held that expert evidence cannot be the sole basis for a court to arrive at a finding. Expert evidence is subject to cross-examination and rebuttal by equally placed experts.

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

Courts in India have extensive powers to grant interim reliefs including temporary injunctions under the CPC, which is the procedural law governing the adjudication of civil disputes. Such injunctions may be granted to:

- preserve subject matter of dispute;
- maintain status quo;
- prevent a person from removing or alienating property; and
- prevent a party from creating any third-party rights over property.

The court may also direct the defendant to furnish security, attach any property and issue a warrant to arrest the defendant who is absconding or has left the local limits of the court's jurisdiction, before the judgment is pronounced. The court may also order the freezing of the defendant's assets to prevent them from being taken abroad (*Mareva* injunction) or order the defendant to permit the plaintiff to enter into the former's premises to obtain evidence essential to the plaintiff's case (*Anton Piller* order).

Similarly, in an arbitral proceeding, under section 9 of the Arbitration and Conciliation Act, 1996 (Arbitration Act), civil courts are vested with the power to grant interim reliefs aimed at preserving the property or goods that are the subject matter of arbitration so as not to frustrate the purpose of conducting the arbitration. Under section 17 of the Arbitration Act, the arbitral tribunal is vested with the power to grant interim reliefs during the pendency of the arbitration proceedings and before the enforcement of the award.

In exceptional cases, where it is established that there is egregious fraud, irretrievable injustice or that there exist special equities, courts are also empowered to injunct the invocation of bank guarantees.

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

Under the CPC, a foreign decree can be enforced in India as a decree of an Indian court if it has been passed by a reciprocating territory. If a decree has been passed by a non-reciprocating territory, such as the United States, it can be enforced in India only by filing a fresh civil suit in an Indian court in which the foreign judgment merely has evidentiary value. The Indian government has recognised 12 reciprocating territories, including the United Kingdom, Singapore, Bangladesh, UAE and Malaysia. It bears noting, however, that a foreign judgment is not enforceable in India if it suffers from any of the legal infirmities outlined in section 13 of the CPC which include:

- judgment not being pronounced by a court of competent jurisdiction;
- where it has not been given on the merits of the case;
- where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
- where the proceedings in which the judgment was obtained are opposed to natural justice;
- where the judgment has been obtained by fraud; and
- where it sustains a claim founded on a breach of any law in force in India.

Insofar as foreign arbitral awards are concerned, the Arbitration Act provides for their enforcement as a decree of an Indian court. India is a signatory to the New York Convention, 1960, and the Geneva Convention, 1924. The award must have been passed in a territory recognised as a signatory to the Geneva or New York Conventions.

Under Indian law, there is an added requirement for the country (in which the award has originated) to be notified in the official gazette of India. Around 50 countries have thus far been recognised by India, including the United States, United Kingdom, France and Germany. For the award to be enforceable, however, it must not suffer from legal infirmities such as being contrary to the public policy of India. The Arbitration Act clarifies that an award would be in contravention of public policy only if: the award is induced by fraud or corruption; the award is in contravention of fundamental policy of Indian law; or the award conflicts with basic notions of morality or justice. A foreign award or an award in an international commercial arbitration will not be reopened on the grounds that it is simply contrary to Indian law or by re-appreciating evidence. Thus, in the case of reciprocating territories, foreign awards may be enforced by approaching a competent civil court to make the foreign award a decree.

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

No.

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

Parties generally prefer arbitration over litigation given the possibility of expeditious disposal and confidentiality of proceedings.

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

As per section 75 of the Arbitration Act, all matters connected with the conciliation proceedings must remain confidential. The section makes clear that confidentiality also extends to the settlement agreement, unless disclosure of the information is necessary for implementation or enforcement of the agreement.

Similarly, under the CPC, a civil court is empowered to refer a matter to mediation. All proceedings in such a court-referred mediation must remain confidential. Further, parties typically insert a confidentiality clause in settlement agreements that clarifies that the terms of the settlement as well as discussions leading up to it must remain confidential.

As regards communications made 'without prejudice', section 23 of the IEA clarifies that when an admission is made by a party with the express stipulation that evidence of it must not be given or when such an admission relates to settlement discussions, such an admission

cannot be used against the party making it. As per the Supreme Court's judgment in the case of *Peacock Plywood v Oriental Insurance* [(2006) 12 SCC 673] the phrase 'without prejudice' must always be construed in the context in which it appears and with regard to the object that it seeks to achieve. Thus, while the legal entitlements of a party cannot be taken away by using the phrase 'without prejudice', use of the phrase can ensure that any admissions made by a party during settlement discussions are otherwise not used against it.

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

Indian courts are empowered to order proceedings to remain confidential in particularly sensitive matters. Generally, courts devise a suitable mechanism on a case-by-case basis to ensure preservation of confidentiality and privacy of information that forms the subject matter of discovery or disclosure in a judicial proceeding. For example, in the case of *M Sivasamy v M/S Vestergaard Frandsen* [2009 SCC OnLine Del 2310] a division bench of the Delhi High Court held that information forming the subject matter of discovery had to be provided in a sealed cover to preserve its confidentiality. The court observed that a suitable mechanism must be designed to ensure that the information is not disclosed to more people than necessary and that the interests of any party are not undermined by such disclosure.

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

Professional communication between a client and his or her attorney has been afforded complete protection under sections 126 to 129 of the IEA, 1872. In accordance with section 126, an attorney or advocate is prohibited from disclosing any communication made to him or her during employment as an attorney unless such communication was made for an illegal purpose or if the attorney has observed, during the course of the professional relationship, that any fraud or crime has been committed by the client. The obligation to not disclose such information exists even after the employment has ceased. The Bar Council of India Rules stipulate that 'An advocate shall not, directly or indirectly, commit a breach of the obligations imposed by section 126 of the Indian Evidence Act'.

As regards work product privilege, there is no specific statutory provision or judgment in India dealing with this species of attorney–client privilege. However, it is likely to fall within the auspices of attorney–client privilege.

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

No, all energy disputes are heard by quasi-judicial statutory regulatory bodies that have been set up for this purpose or directly by civil courts of competent jurisdiction. Under the model RSC and RC, disputes are resolved through ad hoc arbitration. In the midstream and downstream oil and gas sector, the PNGRB is the authority that adjudicates disputes between parties. In the power sector, independent electricity regulatory commissions have been established and empowered to adjudicate disputes at the central and state levels, that is, the Central Electricity Regulatory Commission and State Electricity Regulatory Commissions, respectively.

Regulatory

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

Oil and gas

- MoPNG – responsible for regulating the oil and gas sector, grant of licenses, leases, determination of prices, etc.
- DGH – principle authority for regulating the exploitation of hydrocarbons.
- PNGRB – established under the PNGRB Act and is responsible for regulating the refining, processing, and other activities connected to petroleum products. It also resolves disputes enumerated in the PNGRB Act.

Power

- Ministry of Power – formulates the general policy in the electricity sector, deals with hydro-electric power, thermal power, administration of the Electricity Act, 2003, matters relating to Central Electricity Authority, Central Electricity Board and Central Electricity Regulatory Commission, rural electrification, power schemes, energy conservation and energy efficiency.
- Ministry of New and Renewable Energy – research, design, manufacture and development of new devices, conduct survey, assessment, mapping, identify areas that need renewable energy products, deploy strategies for these new products and provide cost-competitive new and renewable energy supply options.
- Central Electricity Regulatory Commission and State Electricity Regulatory Commissions – performing mandatory functions outlined under the Electricity Act, 2003 such as approving tariff and adjudicating disputes under the Act and advisory functions such as formulating National Electricity Policy and taking measures for promoting competition in the sector.
- Central Electricity Authority – responsible for advising the government on the formulation of the National Electricity Policy and for assisting in the formulation of technical and safety standards with which stakeholders in the power sector must comply.

The Department of Atomic Energy of the government of India governs development of nuclear energy.

The setting up of a Coal Regulatory Authority has been in active contemplation for a few years. While the Coal Regulatory Authority Bill, 2013, which envisaged the setting up of such an authority has lapsed, the draft National Energy Policy envisages its setting up.

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

The principle of open access, in accordance with which a party is empowered to use the transmission or distribution infrastructure developed by others on the payment of the required charges, has been explicitly recognised in many laws in the energy sector.

Under the PNGRB Act, section 2(J) empowers the PNGRB to declare any pipeline for the transportation of petroleum, petroleum products or natural gas a 'common carrier' that allows multiple entities to access such pipelines on a non-discriminatory basis on the payment of the required amount. Similarly, section 2(M) empowers the PNGRB to declare a pipeline for transporting petroleum, petroleum products or natural gas a contract carrier that empowers multiple entities to access the aforementioned facilities in accordance with a firm contract.

A similar open access regime is envisaged by the Electricity Act, 2003 (the Act). Section 2(47) of the Act empowers the appropriate commission to issue regulations for the non-discriminatory use of transmission lines or distribution systems by licensees, consumers and all other entities involved in electricity generation. Section 38(2)(d) and section 39(2)(d) of the Act impose a duty on the Central Transmission Utility and the State Transmission Utility respectively to provide non-discriminatory access to their transmission facilities to licensees or generating companies by imposing the necessary transmission charges and the prescribed surcharge in accordance with the provisions mandating open access. Similarly, section 40(c) of the Act imposes an obligation on transmission licensees to provide access to their transmission facilities on the payment of the required charges and surcharge.

Finally, India's competition law regime is still developing, but as India's competition law jurisprudence develops further, the competition regulator, Competition Commission of India may use provisions in the Competition Act, 2002, to compel monopolists to share essential facilities that their competitors need to be able to effectively compete with them in the market.

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?

Decisions taken by administrative agencies in the energy sector are amenable to challenge, usually under the extraordinary writ jurisdiction of the high courts provided for in article 226 of the Constitution. It bears noting, however, that the scope of the court's power in this regard

Update and trends

The formalisation of the National Energy Policy, 2017 is an anticipated development that will operationalise fundamental changes across the Indian energy spectrum. From introducing policies regulating the deployment of battery storage technologies and electric cars, to setting up an independent coal regulator, far-reaching reforms are envisaged.

The unprecedented pollution emergency in New Delhi has consolidated public opinion and the stance of courts against all polluting industries. Stringent regulatory measures are expected to be taken against pollutant-emitting industries located in northern India, notwithstanding the fact that they may be compliant with extant emission norms.

is very limited. Generally, courts do not probe the wisdom or desirability of any administrative policy but only interfere with the policy if it is arbitrary, completely unreasonable or violative of the fundamental rights guaranteed by the Indian Constitution. Further, non-judicial procedures to challenge the decisions of any energy regulator are not available. Guidelines may be framed by the appropriate government on specific issues under the Petroleum and Natural Gas Regulatory Board Act and the Electricity Act.

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

While the grant of permission for fracking has been a hotly contested issue in India, the government has taken measures in recent years to put in place the appropriate regulatory architecture to promote fracking.

In October 2013, the MoPNG issued its maiden Shale Gas Guidelines, which prohibit shale gas exploration by private parties and only permit government-owned Oil India Limited and Oil and Natural Gas Corporation to conduct prospecting operations in non-conventional energy blocks.

However, under HELP, both private and public-sector entities are to be issued a single licence for exploring conventional and non-conventional energy, which would potentially include fracking. News reports indicate that private investors are awaiting the issuance of guidelines for fracking under HELP.

Further, on 14 August 2017, the Ministry of Labour of the government of India issued Oil Mine Regulations, 2017, which define fracturing as: 'the process of forcing a fluid in the sub-surface strata with the purposes of enhancing flow passages'. According to Regulation 74 of these Regulations, certain precautions must be observed while conducting fracturing operations, such as:

- ensuring that fracturing operations are conducted under the direct supervision of an authorised official;
- creating optimal conditions near the well where fracturing is taking place;
- ensuring that pumping units are located at a safe distance from the wellhead; and
- anchoring and securing all high-pressure pipes.

25 Describe any statutory or regulatory protection for indigenous groups.

Under the Indian Constitution, the fifth and sixth schedules protect the interests of the scheduled tribes. Under the fifth schedule, the interests of the scheduled tribes have to be protected in the scheduled areas. This schedule envisages the setting up of a Tribes Advisory Council and vests the governor of the concerned state with wide powers to safeguard the interests of the tribal population living in the scheduled areas.

Under the sixth schedule, the formation of autonomous districts and regions in the states of Assam, Meghalaya, Tripura and Mizoram for the effective protection of the tribal population residing in these states has been envisaged. Further, under the Schedule Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, special statutory protection for traditional forest dwellers and scheduled tribes has been envisaged. In addition, under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, a separate chapter has been created for the protection of the interests of scheduled tribes in the process of land acquisition. Measures envisaged by this chapter include:

- acquiring land belonging to the scheduled tribes as a last resort;
- formulation of a special development plan for members of these communities whose land is acquired;
- payment of one-third installment upfront; and
- providing resettlement in the same area to the extent possible.

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

In India, 100 per cent foreign direct investment (FDI) is envisaged for companies intending to participate in power generation, transmission, distribution and trading, with the exception of nuclear power. Further, up to 49 per cent foreign investment is envisaged in power exchanges, consisting of 26 per cent FDI and up to 23 per cent foreign institutional investment.

One hundred per cent FDI is allowed under the automatic route for exploration activities in oil and gas fields, infrastructure associated with marketing of petroleum products and natural gas, natural gas pipelines, LNG regasification infrastructure, refinement of petroleum products, etc.

Finally, up to 49 per cent FDI under the automatic route is permitted for petroleum refining activities by public sector undertakings.

As regards legal and regulatory barriers in oil and gas exploration, foreign investors, like Indian investors, have to comply with financial and technical criteria for engaging in competitive bidding under HELP. In addition, the model RSC and RC lay down the terms and conditions in accordance with which such operations are to be conducted, which must be complied with by foreign investors as well.

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

Companies in the energy sector face potential liability under environmental laws dealing with environmental, water and air protection and under the Indian Penal Code.

Under the Environment Protection Act, 1986, which lays down the standards for environmental safety that must be complied with, any contravention of the provisions of the act gives rise to imprisonment for a term which may extend up to five years or a fine up to 100,000 rupees. Similarly, under the Water (Prevention and Control of Pollution) Act, 1974 and Air (Prevention and Control of Pollution) Act, 1981, different penalties have been prescribed for the contravention of different provisions of these acts. If no specific penalty is prescribed for the contravention of a specific provision, the penalty envisaged by the acts is imprisonment for a period up to three months and a fine of 10,000 rupees.

All these acts also envisage the penalisation of a company responsible for committing the offences set out under these acts. In such a case, any person who is directly in charge of or responsible for the affairs of a company or with whose consent or connivance an offence is committed is to be held liable under these acts.

Under the Water and Air Act, the Central and State Pollution Control Boards are also empowered to issue directions for carrying into effect the provisions of these acts. Further, the terms and conditions subject to which environmental clearance for setting up any project is granted must also be complied with.

As per section 27 of the Petroleum Act, 1934, in case of commission of an accident or explosion, the operator is liable to inform the nearest magistrate about the same in an expeditious time frame. Further, under the IPC, those dealing with poisonous substances, combustible material or explosive substances are obligated to deal with them in a prudent fashion. In case of any rash or negligent conduct in dealing with these materials, imprisonment up to six months and a fine of 1,000 rupees is envisaged. The IPC punishes those engaging in rash or negligent conduct resulting in the causation of death with imprisonment for a period that may extend up to two years, or a fine, or both.

Other

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

Not applicable.

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

India is not a party to the Energy Charter Treaty, Lisbon, 1994. However, news reports indicate that India has been contemplating signing the treaty to obviate the need to enter into multiple bilateral treaties.

Other multilateral energy treaties or declarations to which India is a party include: Cebu Declaration on East Asian Energy Security, Statute of the International Atomic Energy Agency and Statute of the International Renewable Energy Agency.

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

The most robust instrument for safeguarding the interests of foreign investors are Bilateral Investment Treaties (BITs), which India has entered into with most nations whose businesses invest in the energy sector in India. India has executed around 73 BITs. These BITs contain clauses that prevent expropriation or wrongful taking of the property of investors, most favoured nation clause for providing conditions most conducive to foreign investors, national treatment principle as per which Indian and foreign investors must be treated on an equal footing, and fair and equitable treatment clause for ensuring that foreign investors are treated in a fair manner.

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.

As per article 24 of the model RSC, the data collated by a contractor is the property of the government and must be shared with it. Such data must be kept strictly confidential (as per article 24.4) and can only be shared in the following circumstances:

- with contractors or sub-contractors and affiliates for the purpose of petroleum operations;
- with labs, data consultants, processors, etc, for the purpose of performing functions related to the petroleum contract;
- with banks and other financial institutions in connection with petroleum operations;
- with bona fide assignees or transferees of the participating interest of a contractor;
- when the same is required by law or share market regulations where the shares of a party are listed;
- with government departments for the preparation of statistical reports connected with petroleum operations; and
- data or information that is generally known by the public.

Any third party with whom data is shared is also bound to keep it confidential.

As per article 7.2.1 of the model RC, any party receiving the reconnaissance data is bound to keep the information confidential and not to use it for any other purpose apart from reconnaissance operations. Such a party is also prohibited from disclosing the information to any other party except on a need-to-know basis and provided that the receiving party agrees to abide by the same standards of confidentiality. The contractor has to recognise that reconnaissance data is the proprietary information of the government and has to return the same to the government when its use is over. The contractor and any third-party licensee must also enter into a confidentiality agreement.

As per section 43A of the Information Technology Act, 2000, if a body corporate does not adopt reasonable security practices and procedures in storing sensitive personal data or information, it must compensate any person who resultantly suffers a wrongful loss or wrongful gain. As per section 72, if a body corporate gains confidential information, it will be held liable for disclosing such information to any third party without the consent of the party owning the information. As per section 72A, any body corporate disclosing confidential information in breach of a contract is liable to imprisonment and fine.

TRILEGAL

Sitesh Mukherjee **sitesh.mukherjee@trilegal.com**
Deep Rao Palepu **deep.rao@trilegal.com**
Rahul Bajaj **rahul.bajaj@trilegal.com**

17th Floor, Tower B, Peninsula Business Park
Ganpat Rao Kadam Marg, Lower Parel (West)
Mumbai 400 013
India

Tel: +91 22 4079 1000
Fax: +91 22 4079 1098
www.trilegal.com

Ireland

Garret Farrelly and Nicola Dunleavy
Matheson

General

1 Describe the areas of energy development in the country.

The principal areas of energy development in Ireland are renewable energy, in particular onshore wind and, to a lesser extent, offshore oil and gas.

The Irish government continues to seek to attract oil and gas companies to explore Ireland's relatively underexplored offshore. The significant activity in the 2015 Atlantic Margin Licensing Round (pursuant to which exploration permits for acreage in the Irish offshore are offered), which was managed by the Petroleum Affairs Division of the Department of Communications, Climate Action and Environment (DCCAE) (formerly the Department of Communications, Energy and Natural Resources) following on from the 2011 Atlantic Margin Licensing Round, was encouraging. The quantity of applications for the 2015 Atlantic Margin Licensing Round exceeded all previous records.

In relation to onshore wind, the first commercial wind farm in Ireland was commissioned in 1992. As of 2017, the installed capacity of wind generation reached 2,878MW. The peak recorded wind power output was 2,815MW, delivered on 11 January 2017. Based on data published on EirGrid's and ESB Network's websites (as of September 2016) there are 445MW of wind generation contracted for connection before the end of 2016 and a further 1,357MW by the end of 2017.

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

The electricity transmission system is owned by the Electricity Supply Board (ESB), a state-owned company, pursuant to section 14(2B) of the Electricity Regulation Act 1999 (as amended) (the 1999 Act). The operation of the transmission system is undertaken by EirGrid plc (EirGrid) which is also a state-owned entity as outlined in section 14(2A) of the 1999 Act. The electricity distribution network is owned by the ESB and the licence to act as distribution system operator is solely granted pursuant to section 14(2C) of the 1999 Act to ESB Networks Limited, an independent subsidiary of the ESB as is stipulated by the European Communities (Internal Market in Electricity) (Electricity Supply Board) Regulations 2008.

The Irish electricity generation and supply market is now fully liberalised since the implementation of full retail competition on 19 February 2005. The establishment of the all-island wholesale single electricity market (SEM) on 1 November 2007 implemented radical reforms in the Irish electricity sector. As a result, the role of market operator for the island of Ireland is now conducted pursuant to a joint venture agreement between EirGrid and the system operator of Northern Ireland, collectively known as the single electricity market operator.

The gas transmission and distribution system of Ireland is owned by Ervia and operated by Gas Networks Ireland, both of which are state-owned entities. The Irish government (through the Petroleum Affairs Division of the DCCAE) regulates offshore oil and gas but does not take ownership in petroleum discoveries. The exploitation of resources is permitted. The government has actively sought to promote investment in Ireland's indigenous oil and gas resources through favourable fiscal terms for petroleum activities. The current fiscal terms in part reflect this policy objective and also reflect the level of technical challenge and risk inherent in the exploration of Ireland's offshore.

The Finance Act 2015 increased the maximum marginal tax rate on oil and gas field exploration in Ireland from 40 to 55 per cent. The overall marginal increase will incorporate corporation tax and the new Petroleum Production Tax (PPT).

The PPT replaces the profit resources rent tax introduced by the Finance Act 2008. The PPT ensures that discoveries made under future exploration licences will be subject to a higher tax rate resulting in an increased revenue stream for the Irish state. In addition, this increased financial return will accrue to the government at an earlier point in time, which will result in higher income security from lucrative offshore resources.

Government policy in the Irish energy sector is driven principally by the Minister for Communications, Climate Action and Environment (the Minister) and by the relevant EU directives and regulations. In December 2015, the DCCAE published a White Paper on the future of energy policy in Ireland. The White Paper is based around the three energy policy pillars of security of supply, competitiveness and sustainability, and also the important contribution that energy policy makes to facilitating economic growth and job creation. The themes being introduced in the White Paper are: the importance of the citizen in having an input to energy-related developments in their areas as well as an input into wider energy policy; continuing to work towards a largely decarbonised energy system by 2050; and continuing to provide certainty for investors as well as positioning Ireland at the heart of innovation for the high-tech solutions that will enable Ireland to move away from dependence on fossil fuels. More specifically, there will be improved domestic grant schemes and a new support scheme will be established for the development of renewable energy technologies with a particular focus on efficient heating systems.

In 2006, the DCCAE published the requirements for participation in the Renewable Energy Feed-in Tariff (REFIT) scheme. The REFIT programme was designed to provide price certainty to renewable electricity generators as well as contributing to Ireland's 2020 renewable energy production goals by supporting electricity generation powered by biomass, hydropower or wind. In 2012 and 2013, the government approved the REFIT 2 and 3 schemes, further incentivising the construction of renewable energy generation projects.

The DCCAE recently closed two public consultations – the first on the Renewable Heat Incentive, a proposed heating support mechanism to help Ireland meet its renewable energy obligations, and the second on the Renewable Electricity Support Scheme (RESS), a proposed support scheme for renewable technologies designed to help Ireland meet its renewable electricity obligations. RESS will involve a significant departure from the previous REFIT schemes. In particular, the Floating Feed-In Premium (FIP), capacity auction and community engagement proposals are being closely watched by industry. It is expected that technology neutral capacity auctions under RESS will mean that onshore wind energy will continue to make an important contribution to meeting Ireland's renewable energy targets, but can also be complemented by other technologies to meet Ireland's renewable energy ambitions. The timing for finalising RESS is not yet clear and will likely depend on the public feedback to the consultation. In addition, the scheme is still subject to EU state aid and Irish government approval.

Commercial/civil law – substantive

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

Joint operating agreements for offshore oil and gas projects in Ireland are often based on model form agreements such as the Oil and Gas UK and Association of International Petroleum Negotiators model agreements.

In Ireland, amended international industry form contracts are used in relation to commodity trading. Regulated standard form contracts are used for electricity connection agreements with ESB Networks and EirGrid as well as Gas Networks Ireland (see question 2). In addition, amended International Federation of Consulting Engineers (FIDIC) standard form contracts are also commonly used in the energy sector, though bespoke forms of design and construction contracts may be used for large thermal generation projects.

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

The Irish approach to contractual interpretation is derived from case law. Irish courts have held that the task of contractual interpretation is to ascertain the intention of the parties from the language the parties have used, considered in light of the surrounding circumstances, the 'factual matrix', and the object of the contract.

The Irish courts have held that contractual interpretation is the meaning the document would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties in the situation in which they were at the time of the contract. Such background knowledge includes anything that would have affected the way in which the language of the contract would have been understood by a reasonable person. The courts have also held that words should be given their 'natural and ordinary meaning'. Irish courts generally exclude the previous negotiations of the parties and their declarations of subjective intent.

5 Describe any commonly recognised industry standards for establishing liability.

It is becoming increasingly commonplace for service providers and contractors to agree to perform their obligations under contracts in the energy sector in Ireland to the standards of a reasonable and prudent operator (RPO), a definition that is largely based on the definition of RPO (or reasonable and prudent industry operator) in regulated industry contracts such as electricity and gas connection agreements. Failure to perform obligations to the RPO standard would often constitute a material breach of the contract entitling the counterparty to terminate the contract as well as giving rise to any other remedies triggered by the termination.

Energy sector contracts typically include an express provision to hold a breaching party liable to the non-breaching party for its negligent acts or omissions that cause damage or loss to the counterparty. Liability limitations for a breaching party are often excluded where the loss or damage to the non-breaching party has been caused by the wilful misconduct of the breaching party. Currently, under Irish law the meaning of gross negligence, while frequently used in commercial contracts in the energy sector to establish liability, is not well settled and there have been conflicting judgments in the Irish courts.

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?

These concepts are recognised in Ireland.

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?

Yes, operators may be subject to nuisance and negligence claims from third parties. A party wishing to make a claim of nuisance regarding an energy development must follow the general rules applicable to nuisance claims. A claimant would usually bring a civil action for the tort of nuisance and have to show that actual damage (ie, a civil wrong) has arisen as a result of an interference without lawful justification with the claimant's use and enjoyment of his or her property. The same is true for negligence, which requires a claimant to show that the defendant was negligent by establishing that a duty of care (ie, a legally recognised obligation to conform to a certain standard of behaviour to protect others against unreasonable risks) exists, that the defendant failed to conform to the required standard, that the claimant suffered actual loss or damage to its recognised interests and that there was a causal connection between the defendant's conduct and the resulting injury to the claimant.

Complaints in relation to shadow flicker (where the blades of a wind turbine cast a shadow over a window in a nearby property and the rotation of the blades causes this shadow to flicker on and off) and noise can arise in respect of developments of wind farms. These and other types of complaints can also be pursued as part of a challenge to planning permission or by a planning injunction as well as through nuisance or negligence claims.

Planning conditions are usually attached to grants of planning permission in relation to shadow flicker and noise. In setting conditions, the planning authorities have regard to Guidelines, issued by the Department of the Environment (now the Department of Housing, Planning, Community and Local Government (DHPCLG)) in 2006. The Guidelines describe the causes of shadow flicker and recommend that offices and dwellings near wind farms be exposed to no more than 30 minutes of shadow flicker per day (or 30 hours per year). The Guidelines also note that two types of noise are emitted from wind farms, namely mechanical and aerodynamic noise, and recommend that an 'appropriate balance' be achieved between power generation and noise impact, following an assessment of the development's impact on neighbouring noise-sensitive locations. The Guidelines are currently undergoing a review, the outcome of which is awaited.

8 How may parties limit remedies by agreement?

Liquidated damages, exclusion of certain losses (eg, indirect or consequential loss), caps on liability and exclusive remedy provisions are all employed in Irish contracts to exclude or limit liability. The inclusion of any of these provisions needs to be considered on a case-by-case basis and in particular in the context of consumer contracts where special rules may apply.

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

Strict liability may apply where energy sector activities cause environmental damage. By way of one example only, there is the potential for strict liability for environmental damage that has significant adverse effects on protected species and natural habitats, water or land under the European Communities (Environmental Liability) Regulations 2008, as amended, which implement EU Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage.

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?

In relation to choice of law, Regulation (EC) No. 593/2008, commonly known as the Rome I Regulation, governs the law applicable to contractual obligations in civil and commercial matters, with certain exceptions. The Rome I Regulation provides that a contract shall be governed by the law chosen by the parties and that the choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. Where the parties have not chosen an applicable law, the law governing the contract will be determined according to rules set out in article 4 of the Rome I Regulation.

In relation to choice of forum, article 25 of Regulation (EU) No. 1215/2012, commonly known as the Recast Brussels Regulation, states that if parties to a commercial transaction have agreed that a court or courts of a member state are to have jurisdiction to settle any disputes, that court or those courts shall have jurisdiction. This jurisdiction is exclusive unless the parties have agreed otherwise. If there is no choice, the default rules set out in the Recast Brussels Regulation

apply, which include that a defendant who is domiciled in a member state should generally be sued in the courts of its domicile.

If there are apparently conflicting indications as to the choice of jurisdiction for the resolution of disputes, Irish courts have suggested that focusing on the requirement to give business efficacy to commercial contracts may assist in construing the contract. However, there is very little Irish case law on this point. There is English case law, which is of persuasive effect in the Irish courts, which has found that the essential task of the courts is to construe a jurisdiction agreement in light of the transaction as a whole. Whether a dispute as to jurisdiction falls within one or more related agreements depends on the intention of the parties as revealed by the agreements.

In relation to resolving conflicts as to the mode of dispute resolution, the Arbitration Act 2010 provides that the courts cannot give an arbitral tribunal jurisdiction over individuals or entities that are not a party to an arbitration agreement. There is also no power to join different arbitration proceedings, unless the relevant arbitration agreements so provide or the various parties agree to a joinder.

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

Stepped and split dispute clauses are used in Ireland. Their inclusion depends on the type of agreement and the parties to the agreement.

The enforceability of these clauses depends on the specificity with which the clause is drafted. For example, a clause requiring mediation as a first step may be enforceable if it is sufficiently specific (eg, it includes a mediation procedure, a process for the appointment of a mediator and a time frame).

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

Expert opinion evidence is permitted in Irish courts. An opinion may be given by a witness who has expertise in a particular area that is relevant to the issues in the case. The purpose of this testimony is to provide the judge (or jury in criminal matters and in a very limited range of civil cases) with the necessary specialist criteria for testing the accuracy of their conclusions, and enables them to form their own independent judgment by applying these criteria to the facts proven in evidence.

The two main requirements that a party must satisfy in order to be allowed to use expert evidence in court are that: it must be shown that the expert evidence is necessary, relevant and has probative value; and it must be established that the witness is a qualified expert.

As a general rule, expert evidence will be allowed in relation to all matters that are outside the scope, knowledge and expertise of the court. There is no admissibility test that would require the party to demonstrate that the expert evidence proposed to be used can be considered to be founded on a sufficiently reliable basis. New rules have applied to the use of expert evidence in High Court litigation since October 2016. Where a party intends to call expert evidence they must disclose that intention in either their statement of claim or their defence. The field of expertise and the matters on which the expert evidence is intended to be offered must also be stated. The expert evidence that is to be offered must be restricted to those matters that are reasonably required to allow the court to determine the proceedings and the default position is that parties can only offer evidence from one expert in a particular field of expertise on a particular issue. The court can also make various directions in relation to expert evidence. For example, it can direct the fields in which expert evidence is to be provided, fix the time for the delivery or exchange of expert reports or direct that a joint single expert be appointed.

Expert reports must be disclosed to the other party prior to the trial. When a party is served with an expert's report it may put a list of written questions to that expert. Any answers that are provided are treated as part of that expert's report. If an expert refuses to answer a question then the court can order that the party that instructed that expert cannot rely on the parts of that expert's report at which the question was directed. The court can direct that the parties' experts meet privately before trial and prepare a joint report that lists all of the matters on which they agree and disagree. At trial, the court can also direct that a 'debate among experts' take place. This process is very rare, but would involve all of the relevant experts giving testimony at the same time, by listing the issues on which they agree and disagree and then, if directed by the court, debating the matters on which they disagree. There is no questioning by legal representatives during this process. Once this process has finished, the court may allow examination and cross-examination of the experts by legal representatives.

Expert evidence will be required in order to explain and prove foreign law. Where an issue of foreign law arises it must be proved as a fact by the testimony and competence of expert witnesses shown to possess the skill and knowledge required for stating, expounding and interpreting that law.

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

A party seeking interim or emergency relief can apply to court for an injunction. An injunction is a court order that restrains a party from doing a particular thing or act, or that requires a party to do a particular thing or act. Temporary injunctions are either 'interim' or 'interlocutory' in nature. Interim injunctions, granted on an ex parte basis (which means that only one party is heard in court), are only granted in cases of urgency and will generally only remain in force for a short period. Interim injunctions will generally only be granted when a court considers that the other party, if unrestrained, might cause irreparable or immeasurable damage. Interlocutory injunctions are granted after a hearing with all parties present and, while temporary in nature, will generally last until the court makes some further order and in most cases until a full trial of the action. There is no injunctive relief that is particular to energy disputes.

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

To enforce any foreign arbitral award, an application for leave to enforce is made to the Irish High Court under the Rules of the Superior Courts. The application is made on notice to the other party to the arbitration, the respondent. An applicant commences such an application by filing an originating notice of motion. The notice must be supported by written evidence on affidavit setting out the basis on which the applicant alleges that the Irish High Court has jurisdiction to enforce the arbitral award. The notice and affidavit must be served on the respondent at least 14 days before the date on which the application to enforce the arbitral award is to be heard. The respondent may file a replying affidavit that should set out concisely the grounds on which the respondent is relying to resist the application to enforce the award. Under the Arbitration Act 2010, there is no appeal from a High Court decision on the recognition or enforcement of an arbitral award.

The respondent may, as a preliminary matter, contest the jurisdiction of the Irish courts and apply to set aside the service of the notice. This 'set aside' application is usually heard and determined as a preliminary issue.

As regards recognition of judgments, the Recast Brussels Regulation streamlines the recognition and enforcement of judgments across the EU. The procedure governing the enforcement of a foreign judgment in cases subject to the Recast Brussels Regulation is contained in the Rules of the Superior Courts. The Rules of the Superior Courts provide that an application for the enforcement of a judgment to the High Court must be made on affidavit together with: the original judgment or a certified copy; and a standard form certificate provided by court officials in the member state in which judgment was given, containing details of the judgment.

The High Court will declare the judgment enforceable if the requirements of the Recast Brussels Regulation are met. The judgment then has the same force and effect as a judgment of the Irish High Court.

For foreign judgments not covered by the Recast Brussels Regulation, there are a number of prerequisites to be met under Irish common law in order for a court to enforce and recognise a foreign judgment, including: the judgment must be for a definite sum, that is a definite monetary value; the judgment must be final and conclusive and unalterable by the court that pronounced it; and the judgment must be given by a court of competent jurisdiction.

A foreign court must have had 'jurisdiction' under Irish conflict of law rules to hand down final judgment.

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

There is no arbitration institute in Ireland that specifically administers energy disputes.

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

Arbitration is used in the energy sector, as are other modes of dispute resolution, including mediation, expert determination and litigation. As arbitration proceedings are generally confidential and not reported, it is difficult to assess whether there is a general preference for litigation over arbitration in the Irish energy sector. Under the Arbitration Act 2010, the High Court or Circuit Court may, if it thinks appropriate and the parties consent, adjourn proceedings to enable the parties to consider whether any or all of the matters in dispute might be resolved through arbitration.

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

Irish law provides for the concept of 'without prejudice' privilege, which means that oral and written statements made during negotiation towards the genuine settlement of a dispute are inadmissible in subsequent court or other proceedings relating to the same subject matter. 'Without prejudice' communications become open to disclosure in later proceedings if a settlement agreement has been agreed and there is any conflict as to the meaning of the settlement agreement.

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

The fact a document or communication might be deemed confidential does not mean it is privileged from disclosure. In some cases, the courts lessen the effects of disclosure of confidential documents by ordering that those documents be delivered in a redacted form only. The principles in relation to redaction are as follows:

- In order for discovery or disclosure to be appropriate, the documents or materials sought must be shown to be relevant.
- If the documents are relevant, then confidentiality (as opposed to privilege) does not, of itself, provide a barrier to their disclosure.
- The court is required to exercise some balance between the likely materiality of the documents concerned with the issues that are anticipated to arise in the proceedings, and the degree of confidentiality attaching to the relevant materials. In that context, the confidence of third parties may be given added weight.
- In attempting to balance those rights, the court can seek to fashion an appropriate order designed to protect both the legitimate interests of the party seeking disclosure to ensure that all relevant materials potentially influential on the result of the case are before the court and, to the extent that it may be proportionate, the legitimate interests of confidence are asserted.

A lawyer-only discovery exercise (sometimes called a 'confidentiality club') is relatively unprecedented in Ireland, though it can arise in very exceptional cases. The exceptions in Ireland that we are aware of include a recent patent case and one executive privilege case. In each case, a court order facilitated the lawyer-only process (including in-house lawyers in the 'confidentiality club' in the patent case).

Irish data protection legislation provides that any restrictions contained in the legislation in relation to the disclosure of personal data do not apply if the disclosure is required by any rule of law or court order. In general the courts seek to balance the interests of privacy and confidentiality with the effective administration of justice.

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

The right of a party not to disclose communications with its lawyer is considered to be a necessary part of the administration of justice in Ireland. There are two types of legal professional privilege in Ireland: legal advice privilege and litigation privilege.

Key elements of legal advice privilege are:

- there must be a communication between a lawyer and his or her client or vice versa;
- the communication arises in a professional relationship; and
- the communication must be made for the purpose of seeking or providing legal advice.

Litigation privilege protects from disclosure confidential communications made for the dominant purpose of being used in connection with existing or contemplated litigation. The document must have been created when litigation is apprehended or threatened. Unlike legal advice privilege, litigation privilege can protect communications between clients, lawyers, third-party witnesses and experts for the purposes of litigation.

The dominant purpose is a matter for objective determination by the court and does not only depend on the motivation of the person who caused the document to be created.

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

Parties who have a statutory right to be connected to the transmission or distribution system under the 1999 Act have a right under section 34(6) to refer a dispute with (as applicable) the distribution or transmission system operator (TSO) to the Commission for Regulation of Utilities (CRU) for resolution. The scope of disputes can extend to a connection request refusal, the terms of a connection offer, the charges proposed or other matters relating to the connection. It is the responsibility of all parties involved to adhere to the process outlined in the 1999 Act including generators, the system operators, and the CRU itself.

Disputes will be determined by the CRU, provided that:

- the dispute is with respect to connection or use of the distribution or transmission system network;
- the party seeking connection demonstrates that there is material matter in dispute and that reasonable efforts have been made to resolve the matter prior to bringing it to the CRU; and
- the parties request the CRU to resolve the dispute.

In order to secure compliance with a determination made under section 34(6) of the 1999 Act, the CRU may, under section 34(7) of the 1999 Act, apply in a summary manner on notice to the High Court for an order requiring compliance with the determination of the CRU made under this section.

Under the 1999 Act, the CRU also has the power to determine certain disputes between gas transmission, gas distribution, LNG or gas storage system operators regarding certain matters as prescribed in that Act, including terms and conditions of access as well as tariffing for the gas network.

Under the Gas Act 1976 (as amended) (the Gas Act), the CRU is also the competent authority tasked with settling certain disputes between certain operators of facilities in the gas market in relation to third-party access to downstream gas pipelines, LNG facilities and gas storage facilities as prescribed by Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009. Under the Gas Act (as amended), the Minister is the competent authority to decide third-party access disputes relating to upstream pipelines as well as certain disputes with road authorities in relation to the construction, maintenance and repair of gas pipelines by Ervia.

Regulatory

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

The CRU is Ireland's independent energy regulator. The CRU has a wide range of economic, customer protection and safety functions in the energy sector. The stated aim of the CRU's economic role is to protect the interests of energy customers, maintain security of supply, and to promote competition covering the generation and supply of electricity and supply of natural gas. Although the Minister has principal responsibility for the creation of energy policy, the regulation of the energy sector is within the remit of the CRU. The Minister reserves the right to give directions to the CRU. These directions extend to the public service obligations that the CRU is required to impose on licence holders and the criteria with which an application for an authorisation or a licence may be granted. The functions carried out by the CRU include the issuing of licences and authorisations, determining electricity tariffs, advising the Minister on the effect of electricity generation, the promotion of competition in the market and ensuring the security of supply to consumers. In addition, the CRU jointly regulates the SEM with its counterpart in Northern Ireland, the Utility Regulator.

The CRU has a significant range of enforcement powers. The Electricity Distribution System Owner and Operator as well as the Transmission System Owner and Operator are also licensed by the CRU. Under sections 23 and 24 of the 1999 Act, the CRU can issue a direction to a licensee to comply with its licence or authorisation conditions. Anyone intending to supply electricity, build a generating station or generate electricity must be licensed by the CRU as per section 14 and section 16 of the 1999 Act. Any subsequent decision made by the CRU may be appealed to the Minister within 28 days.

In the first instance, the Minister will establish a panel for the purposes of hearing the appeal that will have all powers of the CRU conferred on it that are necessary to carry out the appeal function. The board will be afforded certain powers of the High Court that relate to the attendance of witnesses, the production of documents and the board may confirm the refusal to grant a licence or authorisation with or without conditions.

An application for judicial review may also be made in respect of decisions made by the Minister or the CRU. Such an application must be made promptly or within two months of the decision, or in certain cases, within three months. Under section 32(2) of the 1999 Act, leave to bring a judicial review application will only be granted if the High Court is satisfied that there are substantial grounds supporting the fact that the decision is invalid or that it ought to be quashed.

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

Any individual is eligible to apply to EirGrid in order to obtain a connection to the electricity transmission system provided that any offer from the TSO to gain access to the network must be subject to the individual becoming an eligible customer or obtaining a licence or authorisation to construct a generating station pursuant to section 16 of the 1999 Act. An application to gain access to the transmission system that is operated by the TSO is refused where it would be in breach of the Grid Code, the 1999 Act or the regulations under the 1999 Act, where the applicant does not undertake to be bound by the terms of the Grid Code or where the CRU is satisfied that it would not be in the public interest as stated by section 34(4) of the 1999 Act. The same rules apply for the permission to use and refusal of access to the distribution network, and any individual is eligible to apply in order to utilise the distribution infrastructure. Individuals are eligible to apply to the system operator of the gas network for connection agreements to connect to that network.

Third-party access to existing gas infrastructure is governed by section 10(A)(6) of the Gas Act. The CRU may require a pipeline operator to expand its system in order to accommodate new entrants to the market. If an eligible customer applies to the pipeline operator to have the operator transport his or her gas on his or her behalf on the operator's pipeline, the operator may not refuse unless it does not have sufficient capacity on the network and it is uneconomical, or the eligible customer has no connection to the pipeline and the customer is not willing to bear the cost of such connection.

A range of authorisations are required in relation to the development of offshore infrastructure. Pursuant to section 5 of the Continental Shelf Act, the consent of the Minister is required to erect or remove structures in any Continental Shelf Designated Area. Section 40 of the Gas Act stipulates that ministerial consent is required in order to construct and operate upstream pipelines. No person may undertake the exploration for petroleum in any area in Ireland unless the relevant licence has been granted to them by the Minister.

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?

The mechanism for judicial review proceedings against administrative agencies and other public bodies is governed by the relevant legislation and the Rules of the Superior Courts. The first procedural step in seeking judicial review of an administrative decision is generally to seek leave for judicial review from the Irish High Court. An application for leave is to be made 'promptly' and in any event within three months from the date on which grounds first arose, or within any shorter period specified by the relevant legislation. A judgment of the Supreme Court during 2016 confirmed that the requirement to issue proceedings within three months of the ground first arising will ordinarily be interpreted very strictly. However, the court has an exceptional discretion to extend the time limits if it is satisfied that there is good reason.

Leave applications are generally made by public, ex parte application before the High Court, which means that only the side seeking leave is required to appear. At leave stage, it is necessary to satisfy the court that the applicant for judicial review has sufficient interest in the proceedings and an arguable case. The court may, for any good and sufficient reason, direct that the application for leave shall be heard on notice to any other relevant party.

A party who wishes to oppose an application for judicial review is required to file opposition papers. The case generally proceeds to an oral hearing before the court. The court may in certain circumstances combine the application for leave and the substantive application for judicial review.

Following the substantive hearing, the court can make a variety of orders that may include quashing or setting aside the decision of the administrative agency or public body, and possibly requiring the decision to be remade; compelling the administrative agency or public body to take certain steps; or a declaration as to the interpretation of the law.

There is a non-judicial procedure to challenge certain decisions of the CRU. Two categories of person may appeal against a CRU decision to an appeal panel:

- a person whose application for a licence or an authorisation is refused; and
- a person who is holder of a licence or an authorisation and who wishes to appeal against a decision of the CRU:
- to modify the licence or authorisation concerned; or
- to refuse to modify the licence or authorisation concerned.

An appeal panel is constituted on a case-by-case basis by the Minister in consultation with the Competition and Consumer Protection Commission. It consists of at least three people. The appeal panel has all the powers and duties necessary to carry out the functions of the appeal panel, to summon witnesses, administer oaths and compel the production of documents. We are not aware of such an appeal panel ever having been constituted in the energy sector at the time of writing. A decision of the appeal panel may only be challenged by way of judicial review.

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

Hydraulic fracturing has been prohibited in Ireland with effect from 6 July 2017, pursuant to the Petroleum and Other Minerals Development (Prohibition of Onshore Hydraulic Fracturing) Act 2017.

25 Describe any statutory or regulatory protection for indigenous groups.

There is no legislation specifically relating to energy that provides statutory protection for indigenous groups.

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

Ireland is in general an open economy and many foreign companies participate in energy development. There are a number of possible barriers to entry for companies looking to participate in energy development in Ireland including the following:

- The ownership and operation of the gas and electricity networks in Ireland is reserved for state-owned enterprises and to date has not been open to competition.
- Key electricity transmission infrastructure and certain onshore wind farms are not progressing for reasons of social acceptability and, as noted above, the exploitation of non-conventional onshore gas resources is currently prohibited while the conclusions of the EPA-led report on the impacts of such activities on the environment and human health are assessed.
- In relation to the development of energy infrastructure, there is a complex and multi-layered planning, approval and permitting system in Ireland.

Update and trends

Integrated Single Electricity Market (I-SEM)
The wholesale electricity market in Ireland is the Single Electricity Market (SEM). It is an all-island market, meaning that the SEM combines two separate jurisdictional electricity markets – Ireland and Northern Ireland. It operates as a mandatory gross pool, with an ex-post, island-wide system marginal price for each 30-minute trading period. There is a separate capacity payments mechanism.

The SEM is currently being redesigned and will be replaced by the integrated Single Electricity Market or I-SEM in May 2018 (as currently scheduled). The purpose of I-SEM is to implement the European Target Model, which is comprised of binding EU network codes which apply to all member states. The current capacity remuneration mechanism will be replaced with a formal capacity market in the I-SEM. The SEM's day-ahead and forward scheduling process will be replaced with a formal day-ahead market (DAM), an intraday market (IDM) and a balancing market. The DAM will be a pan-European market which establishes a forward position for all market participants. The IDM will be based on a European model. The balancing market is the last hour before delivery where the TSOs take control and dispatch power plants up and down to ensure the system demand equals system generation (the balancing market).

One of the key changes in I-SEM is that 'balance responsibility' will shift from the TSOs (ie, EirGrid plc (EirGrid) in Ireland and SONI Limited (SONI) in Northern Ireland, as the licensed TSOs) to generators. In I-SEM, it is expected that wind generators will trade volumes in the DAM and IDM based on forecasts and any imbalances due to forecast error or outage will be cleared in the balancing market at a single imbalance price.

Any generators that are out of balance after the IDM closes will be exposed to the imbalance price, which will be determined by the market operator (the Single Electricity Market Operator or SEMO, which is a contractual joint venture between EirGrid and SONI) based on the balancing actions related to matching supply with demand.

Participants in the market have not yet been in a position to accurately estimate what their balancing costs will be following I-SEM go-live in May 2018. This regulatory uncertainty is widely recognised as a material commercial risk by financial institutions and investors in the renewable energy sector in Ireland but transactions (both M&A and project financings) have continued to complete and close notwithstanding this uncertainty.

Renewable Energy Support Scheme (RESS)
As noted above in response to question 2, the DCCAE recently closed a public consultation on the Renewable Electricity Support Scheme (RESS), a proposed support scheme for renewable technologies designed to help Ireland meet its renewable electricity obligations.

RESS will involve a significant departure from the previous REFIT support schemes. In particular, the Floating Feed-In Premium (FIP), capacity auction and community engagement proposals are being closely watched by industry. It is expected that technology neutral capacity auctions under RESS will mean that onshore wind energy will continue to make an important contribution to meeting Ireland's renewable energy targets, but can also be complemented by other technologies to meet Ireland's renewable energy ambitions.

The timing for finalising RESS is not yet clear and will likely depend on the public feedback to the consultation. In addition, the scheme is still subject to EU state aid and Irish government approval.

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

Companies in the energy sector may face possible criminal, health and safety, and environmental liability under a number of regimes at the instance of regulators such as the CRU, the Health and Safety Authority and the Environmental Protection Agency, and, in more serious cases, at the instance of the Director of Public Prosecutions.

The functions of the CRU have been outlined in question 21. The CRU has a number of powers under which it can issue court proceedings. For example, the CRU is the national regulatory authority in Ireland for the wholesale energy market. The CRU may appoint officers to investigate market abuse offences by companies and can prosecute summary offences in this area. The type of prosecutions generally taken by the CRU to date have been against individuals for illegally undertaking gas works while not registered.

The Health and Safety Authority is the Irish statutory body responsible for enforcing occupational health and safety law in Ireland. The HSA has issued advice in respect of the wind energy sector, noting in particular the health and safety rules that apply to the design and construction of wind farms and also the EU and Irish regulations that govern the design, manufacture and operation of wind turbines and associated machinery.

The penalties for most breaches of health and safety legislation consist of a maximum fine of €3 million or two years' imprisonment or both for the most serious offences.

The Environmental Protection Agency can also prosecute for environmental law offences under the Environmental Protection Agency Act. Companies and individuals can face fines for serious offences of up to €15 million, imprisonment for a term not exceeding 10 years or both (although we have not to date seen penalties of this scale in Ireland). A number of other environmental regulators can prosecute offences under a range of other environmental legislation.

Other

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

There are no actual or anticipated Irish sovereign boundary disputes that could affect the energy sector.

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

Yes. See question 30.

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

As a member of the European Union, Ireland is bound by European Union law and investment protection measures are contained in a number of European Union directives. Foreign investors can also rely on the various protections under European Union law to the extent that such protections are available to domestic investors.

Ireland is party to a number of treaties that provide investor protection, including the Energy Charter Treaty (ECT). This treaty is a multilateral treaty that establishes a legal framework in order to promote long-term cooperation in the energy field between states. The ECT contains investment protection provisions that each contracting party assumes towards investors of other contracting parties. It allows any such investor to bring an arbitration claim directly against an ECT contracting party for breach of the protections provided for under the ECT in relation to its investment.

Judicial review is a form of High Court proceedings that can be taken against a decision of a public body, for example, the CRU, if the decision involves an exercise of discretion. In a judicial review, the High Court will examine the decision to determine whether it was properly taken in accordance with the relevant legislation. In general, the High Court does not consider whether the decision of the public body is correct, rather the High Court considers whether the decision was made correctly. If the decision was not made in the proper manner, the High Court can declare the decision to be invalid. In particular, where an expert body appointed by statute is making a decision that the statute gives it the power to make, the High Court may defer to the expertise of that body and will not look at the merits of the decision as long as the High Court is satisfied that the decision was lawfully made.

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.

The numerous obligations to keep information and data confidential and secure to which businesses are subject can arise in a wide variety of circumstances: under legislation, regulation, common law and equitable principles, and as a matter of contract.

Businesses that find themselves subject to cybercrime may therefore be exposed to sanctions and claims for damages where the attack exposes a failure to meet those confidentiality and security obligations. Similarly, failure to implement internal policies and procedures to protect information and data properly can give rise to claims. Such claims may be brought by customers arising out of alleged breaches of duties owed to those customers, in particular under contract and common law duties of care, and under Irish data protection legislation.

While technological protections are clearly a key element in implementing strong cybersecurity, businesses cannot approach cybersecurity as a purely IT issue. Cybersecurity is increasingly considered a board-level issue, in light of the significant impact on business of a serious cybersecurity breach. The board will have responsibility for the overall security policy, which should address various aspects of cybersecurity, be they technological, procedural or legal. From a technological perspective, there are few legally mandated standards or solutions that are required to be implemented, and for good reason, in order to minimise the risk of those requirements becoming rapidly outdated.

Industries that are rich in personal data are obliged to take 'appropriate security measures' against unauthorised access to and use of personal data. Some guidance is given in the Data Protection Acts as to what those appropriate security measures might be, not through specification of strict requirements, but by directing that data controllers may have regard to the state and costs of technological developments, and obliging them to ensure that the level of security implemented is appropriate both to the nature of the data and the harm that might result from the breach.

The Irish Data Protection Commissioner has published a breach code of conduct which, while not obligatory, is generally observed and deals with notification both to the Data Protection Commissioner and to affected individuals. The General Data Protection Regulation, which shall apply from 25 May 2018 throughout the European Union, will make reporting of breaches mandatory, and will be combined with significant sanctions of up to the higher of 4 per cent of an enterprise's worldwide turnover or €20 million.

In 2015, the DCCAE published Ireland's National Cybersecurity Strategy outlining Ireland's approach to data protection, an important publication given Ireland's position as a major global hub for leading technology companies. The Strategy establishes the National Cybersecurity Centre, advanced methods of protection for government departments and a legislative framework to give effect to the provisions of the Budapest Convention on Cybercrime and EU Directives on attacks against information systems.

Garret Farrelly **garret.farrelly@matheson.com**
Nicola Dunleavy **nicola.dunleavy@matheson.com**

70 Sir John Rogerson's Quay
Dublin 2
Ireland

Tel: +353 1 232 2000
Fax: +353 1 232 3333
www.matheson.com

Mexico

Enrique González Calvillo and Diana Maria Pineda Esteban
González Calvillo, SC

General

1 Describe the areas of energy development in the country.

Since late 2013, the industry in oil and gas and power generation has been opened to private participation in financing and direct investment and operation in activities that were traditionally reserved to state-owned companies, such as Petróleos Mexicanos (Pemex) in the hydrocarbons sector and the Federal Commission of Electricity (CFE) in the electric industry. Four years after the Energy Reform was enacted, the country has ended the 75-year state oil monopoly and opened oil and gas exploration and production to private investment, through the execution of international public bids. In July 2017, the Energy Reform produced one of its most surprising results at the international level in terms of oil and natural gas exploration, with the fifth largest discovery in the last five years, after the tender of 36 investment projects in the oil sector. In this way, the reality refutes bluntly those who have doubted the benefits of this reform in terms of raising the national platform for production of oil and natural gas, the income obtained by the government and the energy security of the country. It is a historic discovery in the international oil market, as it includes one of the 20 projects in shallower waters worldwide, thanks to which the Mexican government will obtain between 83 and 70 per cent of the income calculated as a result of these investments and, as a whole, a 7.5 per cent increase in national gas production is guaranteed. In early November 2017, Pemex announced a discovery of a new oil field near Cosamaloapan, Veracruz, with a volume of more than 1,500 million barrels of oil and 350 million barrels of reserves, proven, probable and possible. This is the company's most important discovery in the last 15 years.

The establishment of these new industries within Mexico has represented a challenge not only for regulators, but for courthouses as well. We are beginning to get the first judgments after the Energy Reform was enacted, creating judicial precedents and interpretations of the law that are novel to all.

Midstream and downstream activities

After several delays due to regulatory adjustments, Pemex Logistica, a subsidiary of Pemex, executed in May 2017 the first open season tender procedure to allocate, for the first time, capacity rights to private parties in its pipelines and storage facilities within northwest Mexico. Big trading and refining firms, as well as international oil companies and local retail station groups participated in this first procedure, which was allocated in full to the Mexican subsidiary of Andeavor (previously Tesoro Corp). As a result, the awarded company now has capacity rights in nine storage terminals and two pipelines, owned and operated by Pemex. It is the first time that the logistics branch of Pemex has been a service provider for third parties. Following open season, tenders will be announced in early 2018.

Gas sector

The Mexican energy regulator (CRE) established a single natural gas distribution zone spanning the national territory, one of several upcoming changes to how distribution companies operate in the country. This change is expected to streamline the approval process for operating permits, remove barriers to expand distribution networks and reflect the changes introduced by the Energy Reform. The CRE is working on achieving a more safe and certain natural gas market, which is currently heavily reliant on US exports to Mexico. In parallel, the National Hydrocarbons Commission (CNH) tendered several gas oilfields this year, which were majorly awarded to the Mexican firm Jaguar Exploración y Producción (five in total) and its consortium with Sun God Energia de Mexico (six in total). Upon execution of the licence agreements with CNH, Jaguar will become a major operator and potential important trader in the natural gas industry in Mexico.

Power generation

The new wholesale power market has been evolving rapidly since it opened in 2016. During 2017, the National Energy Control Center received bids for 3TWh, with the lowest bids being 1.77¢/kWh from a multinational company, which represented a record in terms of green electricity, just beneath the 1.79¢/kWh from Saudi Arabia. This latest auction was Mexico's third and was the first to include a pre-qualification process, which is a sign of tightening rules and transparency. Additionally, CRE approved the methodology to calculate the new retail tariff in November 2017, a policy long awaited by market participants. In long-term plans, the National Energy Strategy Plan for 2013–2027 establishes as a strategic priority the reduction of fossil fuel generation by promoting potential renewable energy sources (hydroelectric, wind, geothermic, solar and nuclear), to achieve higher percentages of electricity produced from non-fossil fuels – 35 per cent target for 2024, 40 per cent by 2035 and 50 per cent by 2050 – and to maintain carbon emissions that are virtually unchanged.

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

Different from other countries where landowners own the mineral rights of the hydrocarbons within its subsoil, in Mexico such rights are reserved to the state. As provided by the Constitution, all hydrocarbons in the subsoil are owned by the state. They are inalienable and no concessions will be granted. With an aim to contribute to the state's earnings, as well as the long-term development, the exploration and extraction of oil and other hydrocarbons is carried out through allocations made to the productive state enterprises, as Pemex, or through a contractual basis with such productive state enterprises or private entities. In any case, all assignments or contracts shall provide that the hydrocarbons have the original property of the state. Depending on the type of exploration and production (E&P) contract, in licences and production-sharing agreements, private ownership of extracted hydrocarbons is permitted.

According to Mexican law, the ownership of the land is different from the ownership of the subsoil and the natural resources located underneath, as the state may grant exploitation and extraction rights without transferring property land rights. Notwithstanding this, the Energy Reform allows private ownership of the extracted hydrocarbons, depending on the type of contract awarded.

As for real estate issues, the Hydrocarbons Law provides that the activities within the hydrocarbons sector are matters of public interest and, accordingly, shall prevail over any other use of the surface or subsoil.

With a similar policy, the Constitution provides that the nation owns geological, geophysical, petro-physical and petrochemical information, and all information obtained from the E&P activities carried

out by Pemex, any other state company, or private entities. The CNH will collect, protect, use, manage and update such information through the National Centre of Information on Hydrocarbons. Contractors are required to deliver to the CNH all the information obtained in the execution of exploration phases. Discretionally, the CNH may conduct surveys through third parties to confirm or increase the information on energy resources.

Commercial/civil law – substantive

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

Within the oil and gas business, while the state continues to own all forms of hydrocarbons in the subsoil, including those located in shallow and deep waters, the state may, on behalf of the nation, enter into contracts for exploration and production activities. To date, four types of contracts are regulated by the Hydrocarbons Law and the Hydrocarbons Revenues Law:

- service contracts, where companies are paid to execute the activities on behalf of the state, but do not grant mineral rights;
- profit-sharing contracts, where the contractor acquires the right to explore and produce hydrocarbons from a contract area, assuming all associated risks and costs, in exchange for the reimbursement of some recoverable costs and a specific share of the profits, as indicated by the contract with the CNH. The production will be marketed and sold by the state and the remaining profits belong to the state;
- production-sharing contracts, similar to the profit-sharing contracts, where the contractor bears risks and costs in exchange for a percentage of the production obtained; and
- licence contracts, where the licensee will obtain the exclusive right to execute the exploration and production activities from a specific area and for a certain term. The licensee will obtain the ownership of the hydrocarbons after it has paid taxes, royalties and other expenses, once they are extracted from the subsoil.

The above-mentioned contracts are granted by the CNH.

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

In E&P contracts, the Hydrocarbons Law allows alternative dispute resolution mechanisms such as arbitration. However, certain limitations apply to this mechanism as administrative rescission is reserved to federal courts of law. Also, contractual parties cannot submit foreign laws, because it has to be conducted under Mexican federal laws, enforceable through Mexican judicial authorities, conducted in Spanish, and the arbitral award has to be according to strict interpretation of the law.

Furthermore, the Mexican Federal Code of Civil Procedure establishes that Mexican judicial proceedings, writs of execution and attachment orders are not to be issued against Mexican public entities. Also, these entities may not provide guarantees or attachments prior to any judgment or attachment in aid of execution. It is worth mentioning that, due to the Energy Reform, new legislation and entities have been introduced, therefore there are no judicial precedents in this regard as of the date hereof.

5 Describe any commonly recognised industry standards for establishing liability.

Mexico belongs to the civil law and codified tradition, and therefore the general standards to establish liability are provided by the law and in the contract, if agreed by the parties to the extent allowed by law.

Generally speaking, the remedy for tort liability is the re-establishment of the status quo before the damage occurred (compensatory damages), implying the payment of damages and lost profits. The basic contract remedies are specific performance or termination, with damages and lost profits in both cases.

Contracts may regulate the liability with provisions such as breach of contract, whereby the defaulting party may pay damages and lost profits or a contractual penalty of previously liquidated damages.

Recent resolutions by the Supreme Court suggest the allowance of judgments imposing punitive damages, considering the injured rights, the degree of responsibility and the economic situation of the liable party. In this regard, judges should not only consider a compensation that compensates the damages actually suffered, but there may be aggravating factors that shall be weighed and considered in the quantum of the compensation. The Federal Supreme Court has esteemed that the punitive damages shall fulfil a double purpose: an economic compensation and the dissuasion to avoid damaging actions. It is important to note that these precedents on punitive damages are isolated thesis by the court and do not constitute, to this date, a binding interpretation.

As for strict liability, the premise contained in the Civil Code delivers a wide standard providing that a person that makes use of mechanisms, instruments, apparatus or substances that are dangerous by themselves, by the speed which they develop, by their explosive or flammable nature, by the energy of the electric current they carry or for other analogous reasons, such person is obliged to pay the damage caused, even though there were no illicit actions, unless it is proven that the damage was produced by the inexcusable fault or negligence of the victim. As provided by the Civil Code, negligence occurs when the obligor performs acts contrary to the preservation of the object or fails to perform those necessary acts for it.

Within the exploration and production activities, the contractor or operator is liable for breach of duty within the parameters of the Hydrocarbons Law and the contract awarded to execute the said activities in a specific area. The responsibility of the contractor and operation in the exploration and production activities shall be in accordance with the best international practices. In case of accident, the contractor or operator's liability shall not be limited if it is a consequence of fraud or negligence.

Other liabilities related to the energy sector consist of the repair of any damage to health or the environment through compensation to the affected parties.

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 Federal Civil Code, which applies to relationships between business entities, does not contemplate any remedies in case of unpredictable circumstances, such as commodity price changes, supply volatility or extraordinary events. However, the parties may agree to include contractual provisions to allow the review of the terms and conditions under certain cases.

As for force majeure, the said legislation contemplates it as a case in which there can be an exemption of liability, although the alleging party may need to prove that such event prevented the execution of its obligations.

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 claims on nuisance to obstruct energy development may depend on the type of right to develop a specific activity within the energy sector. If the obstruction comes from the state in an unlawful way, the contractor or operator may file a constitutional proceeding (*amparo*) to prevent irreparable damage or loss of rights. On the other hand, if the obstruction is done by a private individual or entity, the affected party may search for remedies within the civil law sphere.

Operators and contractors are subject to nuisance and negligence claims from third parties if their activities cause any damage, either coming from subjective liability, where the operator or contractor may need to be found negligent; or strict liability, where acting with diligence and in accordance with the law does not exempt the operator or contractor from liability.

Additionally, environmental damages and damages to the nation could play an important role within the energy activities.

8 How may parties limit remedies by agreement?

Generally speaking, liability can be regulated by the agreement of the parties, unless the law expressly provides otherwise. The Federal Civil Code allows the parties to agree one or more conventional penalties of liquidated damages in the event a party breaches a specific provision of a contract or the contract itself. Such conventional penalty is subject to limitations regarding the amount, where the liquidated damages may

not exceed the amount of the principal obligation under the contract, and the prevention from claiming such liquidated damages and compensatory damages and loss of profits, unless the conventional penalty was meant to apply for a specific provision within the contract.

Public contracts may provide liquidated damages for the case of breach of contract by the contractor or operator if it fails to fulfil its commitment or has a poor performance due to lack of opportunity or quality in the execution of the works, although such clause may not be interpreted as a limitation of all the liabilities that may be related to the performed activity, due to strict liability, environmental and health liabilities that may be correlative.

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

Yes. The provisions of the Civil Code deliver a wide standard to attribute strict liability when using mechanisms, instruments, apparatus or substances that are dangerous by themselves, by the speed at which they develop, by their explosive or flammable nature, by the energy of the electric current they carry or for other analogous reasons.

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?

In the case of disputes related to exploration and production contracts, the parties may provide alternative mechanisms for their solution, including arbitration agreements in terms of the provisions of Title IV of the Book Fifth of the Commercial Code and international treaties on arbitration and dispute disputes to which Mexico is a party. However, cases of administrative rescission are reserved to federal courts of law. In this type of contract there is little room for competing clauses regarding choice of law, because they have to be executed under Mexican federal laws and, in case of arbitration, the alternative dispute resolution method may be enforceable through Mexican judicial authorities.

There has not been any jurisprudence on this matter, due to the recent execution of the first exploration and production contract in Mexico since the Energy Reform.

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

The said type of clauses are enforceable under the laws of Mexico, with the limitation that administrative rescission has to be brought before federal courts of law.

The exploration and production contracts entered between an operator with the CNH include hybrid dispute resolution clauses, where the parties may negotiate in good faith, providing also for the assistance of an independent expert or a mediator, arbitration or, if related to administrative rescission, litigation before federal courts of law.

If the project is executed through a service contract with Pemex, under the new Pemex Law, project agreements are governed by the said law and, in its absence, by commercial law. In this regard, the Pemex Law does not contain any restrictions for administrative rescission and expressly allows commercial terms in such project agreements.

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

The new exploration and production contracts provide the assistance of an independent expert. However, in the contracts with the CNH, the contractor and the CNH mutual agreement appoint an independent expert that must comply with certain requirements, but the opinions of the expert witness will not be binding on the CNH or to another authority government.

In other types of energy contracts, such as power generation and public works with the CFE, the expert witness's decision is agreed to be binding on both parties and such an independent expert's opinion is final and binding for both parties, except in the event of: inconsistencies in the appointment of the expert, fraud, bad faith or an express mistake in the expert's opinion.

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

Interim injunctions and emergency relief may be solicited to the courts of law. Depending on the type of contract and the parties involved, either civil courts or federal constitutional courts may grant emergency relief to prevent the dispute from inflicting irreparable damage on either party.

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

To enforce an award in Mexico, a party must file a request for recognition and enforcement before commercial courts of law. Then such court may notify the defendant and if the parties produce no additional evidence or after such evidence is analysed, the judge issues a judgment. The judge may deny the recognition and enforcement of the award under limited reasons that mirror those provided by the New York Convention.

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

The institution may depend on the type of contract. New exploration and production contracts with the CNH are held to ad hoc arbitration with the use of the Arbitration Rules by the United Nations Commission on International Trade Law, and the Secretary General of the Permanent Court of Arbitration in The Hague will be the authority appointing the arbitration proceedings.

Other types of energy contracts, including service contracts with Pemex, may opt for arbitration before the International Chamber of Commerce or the International Centre for Dispute Resolution, among others.

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

Various administrative pieces of legislation contemplate the possibility of agreeing on arbitration in public contracts. The laws that rule Pemex and CFE contemplated it before the Energy Reform came into force, hence arbitration is a customary clause found in energy contracts.

The inclusion of arbitration clauses in the new exploration and production contracts with the CNH constitutes a step forward into the embracing of arbitration. However, it should be underlined that administrative rescission may be only heard before federal courts of law.

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

It depends on what was agreed by the parties in the contract.

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

The Mexican Industrial Property Law provides that in a judicial or administrative prodcedure, the authority shall take the necessary means to prevent third parties from accessing trade secrets. Additionally, interested parties are obliged not to reveal or use any trade secrets.

The Mexican system is still ill-equipped to deal with e-discovery and e-disclosure. If a party is seeking to offer electronic information as evidence in a proceeding, it has the burden of proving its existence.

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

Attorney–client privilege is not recognised as such by Mexican law. However, three rules provide for this matter:

- according to the federal law that regulates the exercise of any profession in Mexico, every professional is obliged to strictly keep confidential information that was entrusted to them by its customers or clients, except for mandatory reporting established by law;
- the Federal Code of Criminal Procedures establishes that the attorneys, notary publics, and technical consultants will not be required to testify about the information received, known or in their possession regarding the matters in which they had intervened and have information to be reserved for the exercise of their profession; and

Update and trends

In late 2017, the National Institute of Ecology and Climate Change highlighted that Mexico needs to move to a 'decarbonised economy'. This push is to avoid the average global temperature increasing by more than 1.5 degrees this century. Mexico needs to invest US$120 billion over the next 12 years, which represents less than half of the current national budget for 2017, making it affordable. However, Mexico has stood out for its commitment on climate change, having a national strategy with a vision of 10, 20 and 40 years and a special programme for the years 2014 to 2018 that serves to address new findings, international agreements and projections in its new version for 2018.

- in a similar way, the Criminal Code applicable in Mexico City, as well as some other Criminal Codes that rule within the states of Mexico, punishes attorneys that attend or help two or more parties with opposing contenders or interests, or accept any sponsorship and supports then the opposing party within the same business.

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

If there is a breach of the administrative law, yes.

Regulatory

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

The Ministry of Energy (SENER) is authorised to grant and revoke permits, design contracts and terms for public tenders, approve exploration and production plans, issues licences for petroleum refining, and defines the energy policy. This Ministry assurances a sufficient, high-quality and environmentally sustainable energy supply in the country.

The Ministry of Finance and Treasury shall be the one to apply taxes on the use of gasoline and diesel, regulate and control the fiscal terms and conditions of the contracts, and authorise and determine the oil profits.

The CNH manages the bidding rounds of oil and gas exploration and production, and will administer the contracts.

The CRE is empowered to issue permits for transport, storage and distribution hydrocarbons, as well as marketing, distributing and selling oil and gas, and regulating and promoting competition in the entire energy sector.

The National Agency of Industrial Safety and Environmental Protection regulates and manages the industrial safety and environmental aspects of the hydrocarbon sector in the country.

There are also other agencies such as the National Energy Control Centre, which is entitled to operate the national power system, and the National Gas Control Centre, which is in charge of operating the national pipeline system, among others.

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

According to the Hydrocarbons Law, all permit-holders providing transportation, distribution or storage services will provide open access to their facilities subject to capacity and according to the regulation issued by the CRE. In addition, to encourage competitive prices for consumers and competition among market players, there exists a separation among activities related to transportation of fossil fuels and its derivatives and the marketing of such commodities. Furthermore, private permit-holders may not commercialise hydrocarbons that have been transported or stored in a private party's systems, except in an emergency operational situation, unforeseen or force majeure circumstances. The foregoing to avoid conflicts of interests that may arise whenever a permit-holder is competing with marketing companies with open access. Also, permit-holders may only provide services to other permit-holders (eg, commercialisers or traders, and may only transport and store products they own in whole or in a percentage of capacity determined by the CRE.

The CRE has received 12 formal complaints from users regarding the difficulty that some of their trucks have faced to access certain storage and distribution terminals (TARs), owned by Pemex Logística. Nine of the total complaints were resolved favourably to the users, implicating that Pemex Logistica is mandated to allow access to the TAR's involved.

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?

Administrative courts are deemed to be guardians of the rule of law. Mexico has supported the system where administrative and governmental decisions of federal, local or municipal governments can be challenged through two systems: contentious administrative trial, if the administrative act violates the law, or the constitutional procedure called *amparo*, if the administrative right is against the Constitution itself. It is not uncommon for these administrative decisions to be nullified or declared void by these courts.

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

Despite the broad legislative and regulatory work derived from the Energy Reform, regulations surrounding fracking are not yet fit for purpose. Although Mexico has several blocks of unconventional sources of shale, holding a place near to the sixth largest in the world, there are pending regulations to assure operators can obtain necessary concessions from the National Water Commission (CONAGUA) to use the needed volumes of water required in the fracking process, especially in the areas where there is a lack of aquifers, rivers or not much rain, which are, precisely, the areas where fracking could take place in the northern part of Mexico. The Federal Commission for Regulatoru Improvement (COFEMER) is currently reviewing some proposed guidelines for the protection and conservation of national waters in E&P activities.

Additionally, regulation also fails to address the treatment of possible by-products of the extraction or industrial process, such as pollutants and contaminants. Nevertheless, fracking is not expressly prohibited by statutory provisions.

25 Describe any statutory or regulatory protection for indigenous groups.

In Mexico, SENER, in coordination with the Ministry of the Interior and other competent authorities, may conduct a social impact study prior to the granting of any entitlement or bid publication for extraction and production contracts and other consultation processes and activities. The results of these activities shall be communicated to the entitlement holders or contractors so as to protect the rights of vulnerable social groups that may be in the affected areas.

In addition, SENER, along with the Ministry of Finance, may establish certain economic obligations that titleholders or contractors must fulfil in order to contribute to the sustainable development of local communities or vulnerable social groups.

Furthermore, those interested in midstream and downstream permits shall deliver to SENER a social impact evaluation regarding the impact that the proposed activities may cause and the mitigation measures that may correspond.

Due to the Energy Reform, the National Agency for Industrial Safety and Environmental Protection shall issue certain rules regarding safety and environmental matters.

Besides the regulation contained in the Energy Reform, Mexico ratified the Convention on the International Labour Organization that acquired constitutional status with the 2011 Human Rights Reform and resolution 293/2011 of the Supreme Court of Justice, in which the jurisprudence of the Inter-American Court of Human Rights is also mandatory and binding for Mexican judges, including the rights of indigenous people to consultation. Therefore, in addition to the social aspects of the Energy Reform, indigenous consultation is not a concession by the state, it is now a right that must be guaranteed.

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

Generally speaking, the restrictions to foreign investment within the energy sector have been removed by the Energy Reform. However, the

secondary laws have established a minimum percentage of local content for oil and gas E&P activities that will increase gradually from 25 to 35 per cent. Some exceptions may apply, such as deep-water activities.

Within the power generation industry, most CFE projects require a certain degree of local content, usually referred to workforce and supplies, depending on the specifications of the project.

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

As for environmental liability, the statutory and regulatory framework is developed at the federal, state and municipal levels, each one of them attending a particular matter within the limits of its jurisdiction. For liability matters at a federal level, which would be applicable to federal energy projects, the most relevant environmental statute is the Federal Law on Environmental Liability. The breaches on environmental obligations carry administrative penalties, such as fines, temporary or definitive closure, administrative arrest, seizure of instruments, or the suspension or revocation of concessions, licences, permits and authorisations. Alongside this, environmental damage may cause civil compensations, through the payment of damages and lost profits and the re-establishment or restoration of any environmental damage caused. Lastly, the Federal Criminal Code provides penalties derived from the commission of crimes against the environment, which may include economic fines and even imprisonment.

Contractors may also be held responsible for damages caused to their employees through the imposition of the penalties contemplated by the Federal Law of Work.

Any other damage may be claimed through the general premise of strict liability, which delivers a wide standard of burden.

Other

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

Mexico and the United States naturally share transboundary hydrocarbon deposits that are not necessarily restricted by political borders. Although both countries have agreed to cooperate on such matters, such collaboration may require careful execution on both sides, not only in the exploration and production activities but also regarding oil spills and other environmental damages.

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

Mexico is not a member of the Energy Charter Treaty, however, it has entered into many treaties regarding nuclear energy.

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

The laws of Mexico provide the same judicial remedies for foreign and local investors, with no requirement for foreign entities to post a bond or other security before defending a suit.

Mexico is mostly open to foreign direct investment in its economic sector. However, prior to the Energy Reform, foreign investment in the exploration and extraction activities of hydrocarbons was not allowed in Mexico. Nevertheless, foreign investment is now fully permitted in such activities.

With several bilateral investment treaties (BITs) and free trade agreements (FTAs), and considering that Mexico has been one of the largest recipients of foreign direct investment within the emerging markets, Mexico has participated in several arbitral procedures where the foreign investor has either settled with the government (eg, *Abengoa v Mexico* and *Metaclad v Mexico*) or been awarded the payment of damages (*KBR v Mexico*, although the award was declared void by a Mexican court of law). In either case, there is no public information that shows a refusal of the Mexican state to honour an arbitral award.

The Energy Reform has helped Mexico to become an attractive destination for both domestic and foreign direct investment. Nonetheless, Mexico still has to remove some exclusions adopted regarding the oil and gas industry in BITs and FTAs, so foreign investors qualify under the relevant treaty to be subject to its protection.

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.

In Mexico, there is no legislation concerning cybersecurity as such. However, the Federal Law for Personal Data Protection Held by Private Parties makes no distinction between physical or electronic personal data transmission, and therefore all data is protected under the legislation. The cyber police are in charge of prosecuting cybercrimes. However, there are no measures regarding cybersecurity specifically in the energy industry.

GONZALEZ CALVILLO

Enrique González Calvillo **egonzalez@gcsc.com.mx**
Diana Pineda Esteban **dpineda@gcsc.com.mx**

Montes Urales No. 632, Piso 3
Lomas de Chapultepec
11000 Mexico City
Mexico

Tel: +52 55 5202 7622
Fax: +52 55 5520 7671
www.gcsc.com.mx

Spain

Carlos Vázquez Cobos and Luis Gil Bueno
Gómez-Acebo & Pombo Abogados, SLP

General

1 Describe the areas of energy development in the country.

In order to understand the development of Spain's energy policy it is necessary to first understand several geographic factors that affect the country.

Spain has an ideal geopolitical location, as it combines Atlantic, Mediterranean and European perspectives. In spite of these privileges – geography and geopolitical position – Spain has not attained the necessary level of energy interconnection with the European Union, having less than one-fifth of the average level of interconnections in the Union.

The European Council in 2005 established that the electricity interconnection between Spain and the European Union should be increased by up to 10 per cent of its capacity by 2020; however, we have not yet overcome the threshold of 3 per cent.

Furthermore, Spain is not self-sufficient, in fact less than 1 per cent of the oil and natural gas consumed in Spain is produced domestically.

Nevertheless Spain has gradually increased its interconnection levels. With regard to natural gas, imports have risen mainly due to investments in new facilities such as regasification plants for LNG and new pipelines that connect Spain to the north (with France, the European project South Transit East Pyrenees is under development), to the west (with Portugal, the third interconnection between Zamora and Mangualde is also under construction) and to the south (with Algeria by the existing Magreb–Europe pipeline, together with the Medgaz pipeline to Almería in operation since 2011). These investments, together with the high number of suppliers, not just in gas but in the oil industry, have allowed Spain to increase the security of its supply to the extent that Spain is currently exporting natural gas to countries such as Portugal (the Iberian Gas Hub set up according to European Union goals and legislation), and is now considered a gateway for the gas supply to the rest of Europe.

On the other hand, Spain has tried to decrease its high dependency upon energy sources from foreign countries. As such, in the last several years Spain has developed broad legislation, supported by European law (notably supported by the EU's third energy package), which has enabled the market to benefit from greater competition and a more diversified energy mix.

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

Although some activities (ie, hydrocarbon exploration and extraction) are subject to concessions granted by the public administration – due to the involvement in such activities of publicly held assets – the Spanish energy system is liberalised and open to private initiatives.

The administration plays a key role in the development of the energy sector through the enactment of laws (which are passed by the upper and lower houses of the Spanish parliament) and various types of regulations.

In addition, European law also has a fundamental role in the development of the Spanish energy sector; in fact all the principles and regulatory provisions set up under European law must become part of the national legislation. These European hard and soft laws have supported and boosted the competitive energy market created under the principles of the unbundling, third-party access (TPA) and internal energy market, currently implemented under the 2009 third internal energy market package.

Commercial/civil law – substantive

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

With regard to upstream supply contracts for hydrocarbons (liquid and gas), both long-term and spot contracts, these follow international standards and include terms and conditions commonly used by supplier countries of these products. These agreements are usually characterised by the fact that they are subject to legislation other than Spanish legislation and because their scope of application and execution does not extend into the Spanish energy system.

With regard to those agreements within the Spanish energy sector (intended for the supply of products for end consumers, especially in the natural gas and electricity sectors), we can basically distinguish between the following contract groups:

- Agreements employed for access to fixed facilities for the transport and storage of liquid hydrocarbons, regasification facilities, transport and distribution of gas and electric power: legislation grants TPA to facility titleholders, and obliges facility owners to communicate the content contained in agreements (liquid hydrocarbon facilities), or by exhaustively regulating the terms and conditions (including contract duration and price) that may be applied to facility users (gas and electricity).
- Supply contracts for 'ordinary' consumers of gas and electric power: although legislation sets forth the minimum content for these contracts, in general the main conditions are those that are freely convened by the parties.
- Supply contracts for vulnerable consumers, severely vulnerable or at risk of social exclusion: although there is no standard model contract for these categories of consumers, the awarding of such categories as well as applicable terms and conditions (including duration and price) are set in a regulatory manner.

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

As for general interpretative criteria of contracts, such a regime is set forth under the Spanish Civil Code. However, there are no specific interpretative criteria for contracts dealing with energy issues. Consequently, general criteria are those applicable to the interpretation of clauses included within energy contracts.

Spanish regulations establish that the intention or will of the contracting parties is the most relevant issue, according to the principle of independent will. As such, the first rule observed for the contractual interpretation is the literal meaning of the contractual clauses. Namely, if the terms of the contract are clear and not contrary to the intention of the parties, they shall be directly applicable. Otherwise, the intention of the parties to the contract shall prevail. In this regard, said intention of the parties shall be judged by taking into account their acts at the time and subsequent to entering into the contract.

In addition, should a clause be controversial, it shall be interpreted in connection with the remaining contractual clauses. Hence, its meaning would be determined by taking the entirety of the contract into

consideration. Furthermore, the interpretation of any obscure clauses must never favour the party who caused the obscurity.

In light of the foregoing, if the joint application of the above-mentioned criteria leads to the same conclusion, any discussion on the intention of the parties is unnecessary for the purpose of interpreting the contract.

5 Describe any commonly recognised industry standards for establishing liability.

Contracts subject to Spanish law generally establish liability using the same standards as the Civil Code for non-contractual liability, which are fraudulent misrepresentation or negligence.

However, energy agreements – even when they are subject to Spanish law and entered into between Spanish parties – are often drafted in English and influenced by international standards of liability, such as gross negligence, tortious action or wilful default.

The standard of conduct of a reasonable and prudent operator is also commonly used in the industry, both in contracts and in arbitration. Some local courts may not be fully familiar with this foreign standard, but they can reach the same results through other Spanish law-based standards.

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 concepts of force majeure or acts of God are used in Spanish legislation and are commonly applied by the courts.

On the other hand, the concepts of commercial impracticability and frustration do not exist as such in Spanish law but they are fully applicable if agreed upon contractually.

Such concepts are frequent in energy agreements together with other clauses that permit the modification of the terms of the agreement in the event of certain circumstances, such as *rebus sic stantibus* and hardship clauses.

The *rebus sic stantibus* clause grants the right to review certain conditions of a contract when an extraordinary change in circumstances occurs at the time of performing the contract and it causes an extraordinary disproportion of benefits, it is unforeseeable, and there are no other means to achieve the same end.

In some instances case law has tried to include the concept of hardship within the *rebus sic stantibus*, although this argument has been rejected by case law's mainstream in favour of the independence of the *rebus sic stantibus* clause. Thus, hardship clauses still belong to the realm of international contracts, but are fully applicable in Spanish law if agreed upon contractually.

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?

Along with the controls carried out by the administration that are set in motion during the authorisation procedure for any power facility – in which the various affected administrative bodies must state their opinion on the project – in general, any project of this nature is subject, as an essential procedure for its authorisation, to one, or more, 'public information' proceedings: this proceeding involves the disclosure and explanation of the project's main features and characteristics, in official information media (such as journals and official bulletins). In this manner, any party that is interested in or affected by the project can file the relevant allegations with respect to the same.

In any case, if during the construction of the project – or, moreover, during the execution of the same – there is any damage caused to third parties arising as a result of negligence or tort on the part of the project sponsor or operator, such third parties shall have the right to claim any damages that may apply from the project developer as a result of the damages caused.

8 How may parties limit remedies by agreement?

Damages can be limited by agreement. The agreed amount shall bind the parties and substitute the amount of the damages actually caused; however the courts retain the power to moderate such amounts under certain circumstances, in particular when the breach of duty is partial or when the application of the whole penalty is unequitable.

These limitations do not apply in cases of fraudulent misrepresentation and can be declared null and void in contracts entered into with users and consumers.

The main function of these penalty clauses is to liquidate damages arising from a breach of contract, as they substitute the compensation of damages and the payment of interest unless it is agreed otherwise.

Besides this essential function of liquidating damages, penalty clauses in Spanish law are:

- Punitive: consisting of an aggravation of damages, as usually the penalty clause exceeds the quantum required under the rules of contractual liability, so it punishes the debtor for breach of contract.
- Cumulative: only in case of an explicit agreement whereby the creditor can jointly seek the enforcement of the contractual obligations and the payment of a penalty.

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

In Spain, strict liability is only specifically prescribed for damages arising from activities related to the production of nuclear energy (Liability for Nuclear Damages and Radioactive Materials Act of 27 May 2011).

However, there is a trend of judiciary precedent that applies strict liability in the case of especially dangerous activities. This trend considers that those involved in authorised and fully lawful but potentially dangerous activities from which gain is obtained shall be liable for any damages caused by such activity (judgment of the Supreme Court of 15 November 2004 in the case of damage caused after the canals of a hydroelectric facility flooded nearby fields; judgment of the Supreme Court of 20 January 1992 in the case of damage caused by high-voltage wires that complied with security regulations).

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?

There are no specific rules with regard to this issue. However, case law has analysed the existence of competing clauses in multiple contracts. In this sense, Regulation (EU) 1215/2012 of the European Parliament and the Council regulates the validity of the choice of forum between EU members, whereas the Regulation (EU) 593/2008 of the European Parliament and the Council regulates the admission of the choice of law with universal enforcement. Accordingly, the following must be taken into account:

Choice of forum

The existence of many jurisdictions to which a dispute may be submitted is perfectly valid under Spanish and EU law, where applicable, unless one jurisdiction is exclusively competent. One jurisdiction may be limited to hear only a part of the contract while another jurisdiction could conduct the remaining aspects of that very same agreement. The newer choice of forum provision should expressly derogate the former one in order to be fully enforceable in accordance to the will of the parties, for if not both jurisdictions could be deemed competent on a first come, first served basis.

Choice of law

Contracting parties are free to choose the applicable law. Under EU law dépeçage is admitted, thus contracting parties could submit the contract to different laws provided these respect the peremptory rules of the lex fori. If the contracting parties are members of the EU, they cannot waive applicability of mandatory EU antitrust provisions.

Mode of dispute resolution

The Spanish Supreme Court has established that the submission to arbitration must be clear and exclusive. If one contract provides for disputes to be submitted before the Spanish courts and another contract establishes submission to arbitration, then the arbitration agreement could be annulled unless the arbitration agreement expressly derogates submission to the Spanish court, or it expressly provides the will of the contracting parties to submit disputes to arbitration.

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

Stepped dispute clauses are not very common and they lack specific regulation under Spanish law. However, they are enforceable under party autonomy. There is a recent trend to promote stepped clauses forcing the contracting parties to go through mediation before submitting to arbitration.

Split dispute clauses are not very common either. There is no settled opinion with regard to the enforceability of said clauses. The most recent judgments seem to admit the validity of split dispute clauses. However, there are also judgments to the contrary. Thus, it will all depend on the analysis of each arbitration agreement on a case-by-case basis.

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

According to the Spanish Civil Procedural Act, either the parties or the court, upon request of at least one of the parties, may appoint experts.

Despite being appointed by the parties to support their conclusions or technical considerations, experts are obliged to provide independent and objective opinions. These experts issue a written report that must be attached to the statements of claim or counterclaim. In case a party proves the impossibility to attach the report to the written statements, it must be announced in the relevant pleading and filed before the court at least five working days before the first hearing is held.

The parties have the right to call the expert to appear at trial for cross-examination, to challenge the conclusions of the other party's expert report or to answer the questions and challenges made by the other party.

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

Any claimant, either of the main claim or of the counterclaim may, under his or her liability, seek an injunction from the court for the interim measures deemed necessary to preserve the respective rights of either party.

Under Spanish regulations there is no specific interim relief for energy disputes. However, the Spanish Civil Procedural Act sets an open list of possible measures that may be sought by the parties to ensure the effective protection of their pleadings.

In order for the court to grant the interim and emergency relief sought by a party, three requirements must be met, namely the existence of a risk that derives from the procedural delay, appearance of legal standing (ie, the applicant must submit the particulars, arguments and documentary evidence that justify the provisional relief) and the applicant for the injunction must also post a security that must be sufficient to compensate the damages that the adoption of the relief may cause to the estate of the defendant.

Although injunctions are generally requested together with the main claim, they may also be sought prior to the claim when the applicant alleges and evidences reasons of urgency or necessity. As a general rule, the court shall resolve on the petition for interim relief after hearing the defendant. However, if the applicant requests so, and evidences the existence of reasons of urgency, the court may order the injunction directly by court order within a time limit of five days, explaining the existence of the stated requirements and the reasons it was advisable to order the relief without hearing the defendant.

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

Spanish regulations do not foresee a specific enforcement process for foreign judgments and foreign arbitral awards in energy disputes. Hence, the general regime is applicable.

Under Spanish law, to enforce foreign judgments and other enforceable titles such as arbitral awards, their validity has to be recognised in international treaties. Otherwise, the principle of reciprocity between the countries will apply.

Specifically, the legislation applicable for the recognition of foreign judgments issued by a court in an EU member state is formed by Regulation (EU) 1215/2012 of the European Parliament and of the Council, Regulation (EU) 263/2015, which is valid for judgments in commercial and civil matters and Regulation 805/2004 (and its amendments) for undisputed claims. Outside of the EU, the main international regulations regarding the enforcement process for foreign resolutions that are applicable in Spain are the International Institute for the Unification of Private Law, the Hague Conference on Private International Law, the United Nations Commission on International Trade Law (UNCITRAL) and the NY Convention of 1958.

In absence of the above, in order to enforce foreign resolutions in Spain, certain requirements must be met:

- they should have been issued as a result of the exercise of a personal action;
- they should not have been rendered in absentia;
- the obligations under the judgment or arbitral award must be lawful in Spain; and
- in order to be considered authentic, they must meet the requirements of the state in which they were issued as well as the requirements established under Spanish regulations.

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

There is no specific arbitration institution that administers energy disputes in Spain. There are some commissions, belonging to arbitration institutions, specialised in energy disputes (ie, the Energy and Engineer Committee on Arbitration and Mediation that belongs to AEADE, comprised of lawyers and engineers with expertise in energy matters).

Moreover, there are several arbitration courts that hold arbitrator experts in the field. When appointing the arbitrators, the parties may solely choose arbitrators with expertise in energy matters to conduct the dispute or may opt to appoint an arbitrator with more general knowledge of the public sector and not just in energy.

Finally, the lack of a specific energy arbitration institution does not prevent the current institutions from providing the parties with highly-qualified professionals to serve as arbitrators. The board in charge of appointing the arbitrators shall choose those best suited to conduct the proceedings in the event the parties fail to come to an agreement on the appointment of arbitrators.

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

There are eminent opinions advocating for a general yet not undisputable preference for arbitration in energy disputes. Indeed, there is a greater tendency to choose arbitration over the courts of justice because of its confidentiality.

Furthermore, arbitration agreements are rarely included in short-term contracts whereas said clauses are common in long-term agreements. This is because long-term agreements involve considerable amounts of money and therefore the parties are reluctant to disclose figures that could have a negative impact on their market value. Likewise, parties to a long-term agreement choose arbitration because they also prefer to have experts in the field solving their disputes.

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

According to provision 9 of the Mediation Act of 6 July 2012 statements, information and documents made or disclosed during a discussion subject to the mediation proceedings shall remain confidential.

Statements, information and documents made or disclosed by attorneys acting on behalf of the parties in settlement discussions are subject to the attorney–client privilege and work products privileges and shall remain confidential unless disclosure is authorised by the affected parties.

In general, statements, information and documents shared by the parties to each other without the assistance of attorneys are discoverable unless otherwise agreed. However, unauthorised disclosure or use of business secrets and know-how of the opposite party acquired during settlement discussions may be considered unfair competition and subject to penalties and damages.

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

Firstly, regarding data protection disclosure, the Spanish Data Protection Act excludes from the required consent for any data

communication those data whose recipients are, among others, public authorities, judges or courts. Likewise, regarding trade secrets, the Spanish Civil Procedure Act states that parties can request the confidentiality of information disclosed in the course of the proceeding and therefore limit the access to third parties or request that oral hearings in 'inquiries to substantiate facts' are carried out 'on camera'. Likewise, the Spanish Patents Act, regarding 'verification of facts' procedures, also states that the applicant will not be allowed to assist while it is being carried out. In lieu thereof, the court will serve a certificate exposing, exclusively, the information necessary to file the claim. The new Patents Act in force since 1 April 2017 and its developing Regulation 316/2017, tend to increase the court's scope of action in this regard.

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

Attorney–client privilege includes communications between an attorney and the client and written or oral material or information produced by or with the client in the course of legal assistance. Work products privileges refers to written or oral material or information shared by and communications between opposing attorneys in the course of legal assistance to their clients.

Generally, attorneys shall not disclose nor be compelled to disclose or report on such material or information unless authorised by the affected parties or in compliance with money laundering and terrorist financing regulations.

Unauthorised disclosure is considered a breach of the ethical standards of the legal profession. Only under special circumstances the Bar Association may allow the disclosure or the filing in court of materials and information without the consent of the parties.

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

There is no government agency before which the parties of a dispute ought to appear prior to initiating court or arbitration proceedings. The National Markets and Competition Commission (CNMC) is responsible for supervising the energy market, disciplining misconducts or issuing reports.

The administrative disciplinary measures can be appealed to the contentious-administrative jurisdiction in order to challenge a public decision. On the other hand, any disputes between private parties shall be filed before the civil jurisdiction.

Regulatory

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

As of 2013 the Spanish regulator, formerly the CNE, has become part of a bigger entity named the CNMC that interacts with competition, telecommunications and transportation regulators.

The CNMC acts as an independent regulator with jurisdiction across the entire Spanish territory and is in charge of overseeing and controlling the proper functioning of the electricity and the natural gas sectors, guaranteeing the fair competition and the economic viability of the activities that take place in the energy sector.

Although the CNMC is an independent actor, without the power to affix tariffs (this is contrary to the will of the European Commission that has initiated a sanctioning procedure against Spain because the government still retains the last word to fix tolls and tariffs – although some entitlements have recently been transferred to the CNMC), it does develop regulations with publication of notifications, resolutions and a general overview of competition rules in the energy sector.

The Spanish regulator also has sanctioning power, marking a separation between instruction (developed by the correspondent Direction Officers) and resolution (which corresponds to the Counsel Officers). The resolution will terminate the administrative procedure, consequently any appeal against that resolution would be filed with administrative courts.

Additionally, the CNMC collaborates and cooperates with the Agency for the Cooperation of Energy Regulators and the Body of European Regulators for Electronic Communications.

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

Spanish legislation on electricity and natural gas grants suppliers and consumers with a right of access to the infrastructure (TPA). In fact, since 1997 Spain has developed a liberalised market both in the electricity and natural gas sectors where the utilities compete in a wholesale or spot market, following the provision of the European directives on liberalisation of the energy sector (Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity and Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas).

Access to the regasification – natural gas – transmission and distribution facilities (natural gas and electricity), recently modified in Royal Decree 984/2015, can only be denied on the grounds of capacity constraints or security of supply.

The CNMC is responsible for TPA conflict settlement in an ad hoc administrative proceeding. Decisions of the CNMC on this topic may be challenged before the ordinary courts.

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?

Usually, acts and decisions taken by Spanish administrative bodies and entities (such as the CNMC) are subject to an administrative appeal to be decided by the administrative body itself (appeal for reversal) or by the hierarchal superior entity.

The decision adopted in the administrative appeal may be challenged before the ordinary courts. The competent court for the first instance will depend on the administrative body or entity that issued the resolution being challenged before the courts.

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

Act 17/2013 amended article 9.5 of Act 34/1998 on Hydrocarbons, expressly acknowledging the possibility of fracking. Spain follows the EU's line of action, under which it is necessary to comply with the Environmental Assessment Law in order to develop exploration and mining activities.

Due to the social opposition that is regularly manifested against this technique, several autonomous regions (Cantabria, La Rioja, Cataluña and Navarra) have expressly prohibited fracking-related activities in their territories. Although such pieces of legislation have been considered unconstitutional by the Spanish Constitutional Court on the basis of the exclusive competence of the state in the basic regulation on energy and mining (article 149.25 of the Spanish Constitution), the truth is that the exploration and development of potential fracking sites has simply vanished in Spain, where the four main companies that led the fracking movement in Spain have now abandoned their projects.

25 Describe any statutory or regulatory protection for indigenous groups.

Given that there are no native indigenous groups in Spain, there is no specific regulation in this regard. In any case, regulations on environmental impact assessment for energy projects must analyse and assess any impact that the construction or exploitation of these projects may have on human population centres, particularly when dealing with small-scale population centres.

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

In general terms, foreign investment in Spain is fully liberalised, without any general distinction between European Union residents and non-EU residents, although there are some specific rules that establish some differences between the two categories in some sectors, such as gambling, telecoms, air transportation and energy. General restrictions applicable to foreign investment are also present in activities directly related to national defence.

Update and trends

Draft Bill of Climate Change and Energy Transition Act
As a result of the commitments adopted in (COP 21) Paris Agreement of 2015 against climate change and the measures adopted by the European Commission in the Green Energy for All package published in November 2016, a public consultation has been conducted in Spain from July to October 2017 for the Draft Bill of Climate Change and Energy Transition Act. Three main topics are being addressed: decrease of greenhouse gas emissions, energy efficiency and renewables energies.

Electricity
The major developments have been:
- the new regulation of vulnerable consumers and applicable measures for the protection of household consumers such as the '*bono social*' (Royal Decree 897/2017, of 6 October);
- the continuity of the auctions, in May and July 2017, to award the specific remuneration regime to new projects of renewable sources; or
- the draft regulations on: access and connection to the transmission and distribution grids, the closing procedure for installations and load managers' activity to perform energy recharge services, among others, that will presumably be passed in the following months.

Infringement of the ECT
The Kingdom of Spain has been declared responsible for an infringement of the Energy Charter Treaty (ECT) in the first arbitral award rendered by the ICSID Tribunal regarding the remuneration regime of renewable energy sources in Spain. On 4 May 2017 the ICSID Tribunal (case ARB/13/36 *Eiser Infrastructure Limited and Energia Solar Luxembourg SARL v the Kingdom of Spain*) declared that Spain has committed an infringement of the ECT through the regulatory measures adopted regarding the remuneration scheme of Spanish renewable energy sources. This is the first arbitral award that has ruled against Spain but there are still around 39 pending proceedings before different arbitral tribunals (ICSID, SCC or UNCITRAL) to be resolved in the following months and years. If these tribunals declare that Spain has infringed the ECT, the Spanish government's funds could be seriously harmed if it has to compensate around €7.565 billion estimated to be at stake.

Gas
The organised gas market (MIBGAS) that initiated operations in December 2015 is still under development and for that purpose several proposals have been published in recent months to modify some resolutions regarding the guarantees to be provided, the model contract to obtain access to the installations of the gas system and the conditions to become market maker within MIBGAS. Additionally, a proposal of regulations to restore and authorise certain installations that were transitorily suspended, to regulate the authorisation and closing procedures for installations and the disqualifying process for gas traders within the gas system has been published and will probably be adopted shortly.

Nuclear
In August 2017 the Spanish government rejected the renewal of the operation authorisation for the nuclear plant Santa María de Garoña (Burgos) of 466MW, which will necessitate its dismantling and closing. Additionally, the Spanish government has declared that the continuity of the rest of the nuclear plants in operation in Spain will be affected by the upcoming Integrated National Plan of Energy and Climate for 2030, on which the government is also working.

Although investment in the energy sector in Spain is open to any foreign investor and no previous authorisation is required to carry out such investment, the Ministry of Energy, Tourism and Digital Agenda may impose limitations on certain acquisitions of assets considered as strategic or shares that confer a significant influence in certain companies, like those carrying out distribution or transmission activities in the electricity or gas sector, or activities in the hydrocarbon sector, or that hold strategic assets – such as nuclear or coal-fired electricity generation facilities and oil refineries, pipelines and hydrocarbon storage installations, provided that the acquisition is carried out by a company acting in the energy sector or by a company not located in the European Union or in the European Economic Area, and the acquisition implies an actual and serious threat to the guarantee of electricity, gas or hydrocarbons supply.

Apart from the above, there are certain restrictions that apply to any investor irrespective of location or nationality (which also apply to Spanish investors), namely restrictions on the acquisition of holdings in the energy sector market or technical operators and on the exercise of voting rights when an individual or legal entity holds more than a certain percentage of the share capital of two or more operators.

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

Companies in the energy sector, understood broadly as any productive activity related to the production of energy (for instance, oil combustion plants, photovoltaic plants, etc) face a variety of potential criminal, health, safety and environmental liabilities.

Regarding criminal liability, the Spanish Penal Code sets a number of sanctions consisting of fines and imprisonment in several articles; for instance, in the case of infringement of safety and security measures for employees (articles 316 to 318), as well as crimes against the environment (articles 325 to 337). These two categories are the most commonly faced by these types of companies.

Regarding administrative liability, environmental infringements are the most common. Depending on the level of contamination or pollution the facility is capable of causing, the environmental damage or potential damage will be higher, making the administrative infringement more severe and accordingly increasing the amount of the fine, which can be up to €2 million, and can include other complementary measures such as closure of the plant or interdiction of carrying out the concerned activity for a number of years. Note that these environmental liabilities include damage or potential damage to human health. These infringements and sanctions are mainly established in the Spanish IPPC Act 16/2002 and in Act 22/2011 on waste and soil contamination, although Spain has an important number of regional regulations in this regard that must be taken into account in any case.

Other

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

Cross-border disputes that can affect the energy sector are not very likely to occur in Spain for various reasons. Spain and Portugal have jointly cooperated to form the Iberian Electricity Market, which has been successfully operating for several years, and they have launched the Iberian Gas Hub. The operation of electricity and gas connections between Spain and its bordering neighbours (France and Portugal) is governed by EU regulations on cross-border networks. Specifically, the European Network of Transmission System Operators for gas and electricity guarantees the management of these networks within the EU, promoting cross-border commerce within the framework of the Internal Energy Market.

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

Yes, Spain is a contracting party to the Energy Charter Treaty (ECT). Spain signed the ECT on 17 December 1994, and ratified it on 11 December 1997 and finally the ECT entered into force for Spain on 16 April 1998.

Spain belongs to the group of countries that are members of the ECT under Annex ID, which means that in case of dispute and according to article 26 of the ECT the countries that appeal to the national courts may not appeal for the same litigation to the international arbitration courts. At the same time, the clause of the most favourable country and the reciprocity principle are recognised, in addition to the security, non-discriminatory and legitimate confidence principles, among others.

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

Spain, as a member state of the European Union, has developed a legal system that gives investors the opportunity to be protected under Spanish national, European and international law.

Any dispute affecting investors can be resolved under domestic jurisdiction and can be claimed, on a case-by-case basis, at various courts and through various proceedings. The courts of last resort are the Spanish Supreme Court or the Constitutional Court to resolve the interpretation of laws and principles as settled in Spain's supreme law: the Spanish Constitution.

In addition to the above, investors have the option to request a preliminary ruling from the European Court of Justice (ECJ) filed from a referring domestic court. This procedure enables national courts to submit questions to the ECJ on the interpretation or validity of European law. The request for a preliminary ruling, therefore, offers a means to guarantee legal certainty by uniform application of EU law.

Furthermore, as Spain is a party to the ECT, international investors are also protected by the provisions of said treaty, which provides various procedures available for the vindication of rights.

Finally, Spain is a party to several bilateral investment treaties that also provide protection to the investors investing in Spain from the relevant counterparties of said treaties.

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.

Not applicable.

GA_P
Gómez-Acebo & Pombo

Carlos Vázquez Cobos **cvazquez@ga-p.com**
Luis Gil Bueno **lgil@ga-p.com**

Paseo de la Castellana, 216
28046 Madrid
Spain

Tel: +34 91 582 9100
Fax: +34 91 582 9114
www.ga-p.com/

Switzerland

Sandra De Vito Bieri, Anton Vucurovic and Etienne Gard
Bratschi Ltd

General

1 Describe the areas of energy development in the country.

With the exception of water and wood, Switzerland has very little natural resources and relies heavily on the import of oil, gas, coal and on its own nuclear power capacity in order to meet its energy requirements. However, over recent years interest in 'clean' energies has developed and increased. Accordingly, Switzerland also places a greater focus upon the research and development of renewable power sources such as wind, solar, waste incineration and biogas.

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

With regard to the ownership and development of energy resources, both the federal government as well as the governments of each canton play a role.

The federal government is solely responsible for legislation in the field of nuclear energy and in the field of energy transport, in particular the transmission and distribution systems for the transport of liquid or gaseous fuels. The federal government is further competent to establish regulatory principles (eg, environmental protection) on the exploitation of energy resources and on the economic and efficient use of energy.

Each canton has ownership over the natural resources that are located upon or within its territory. Accordingly, energy companies must obtain concessions or licences from the canton in order to exploit natural resources on its soil. The cantons may also expropriate land against appropriate compensation in order to either promote or prevent the exploitation of natural resources.

Finally, the governments at both levels (ie, federal and cantonal) regularly own substantial participation in companies that produce or distribute energy.

Currently, the Swiss energy policy focuses greatly on fossil fuels, which are the country's primary source of energy. The federal government has however set itself a 20 per cent reduction target of fossil fuel consumption and a 50 per cent increase target of the share of renewable energies by 2020. The general aim of Swiss energy policy is to guarantee a secure, economic and ecological energy supply.

Commercial/civil law – substantive

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

Most energy providers will use standard terms and conditions when entering into contracts with consumers or SMEs. The content and form thereof will vary depending on the energy sector but common features are often the indefinite term of the agreement and the influence of the source of the consumed energy (fully or partly renewable) on the contractual prices.

With regard to B2B contractual relationships, standard form contracts are regularly published by each industry's governing body. As a matter of example, the association of Swiss electricity companies (VSE/AES) has issued a set of 13 standard form contracts covering most of the field of electricity production and distribution. Similarly, the Association for Wood Energy (AWE) published several templates in connection with wood energy (heat supply, access to heating networks).

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

The rules of the Swiss Code of Obligations (CO) and the corresponding case law govern the contractual interpretation under Swiss law.

Under Swiss law, contractual interpretation is based on the real and common intention of the parties at the time when they entered the contract. In order to determine what the real and common intention of the parties is, a judge may consider all the circumstances of the case at hand, including pre- and post-signing behaviour of the parties. In particular, the intention of the parties and thus the true nature of the contract may differ from the contractual wording.

In cases where the real and common intention of the parties cannot be established, the judge must interpret the parties' declarations according to the principle of good faith (ie, how a reasonable person in the situation of one of the parties would have understood the declaration of the other party).

These general rules also apply to energy contracts governed by Swiss law.

5 Describe any commonly recognised industry standards for establishing liability.

Guidelines and recommendations issued by each industry's governing body may be considered by the courts in order to establish if a breach of a duty of care has occurred. This may even be the case if the guideline or standard in question has not been explicitly included in the contract. These guidelines or standards are specifically issued in connection with a given aspect of a particular energy segment. For instance, the Association of Swiss Wastewater and Water Protection Experts issued a series of technical guidelines with regard to wastewater discharge into water bodies in rainy weather. Another example is the directive on the safety of dams issued by the competent surveillance section of the Swiss Federal Office of Energy.

With regard to liability, the relevant benchmark is set by the parties to the contract and, alternatively, by the general legal rules on contractual liability. As a general rule and unless the parties agree otherwise, a party will be held liable for a breach of contract caused negligently.

The concept of reasonable and prudent operator is not known under Swiss law. However, it may be compared to the idea of negligence under Swiss law, where the behaviour of the breaching party will be compared to that of a reasonable person in the same position.

Gross negligence under Swiss law means that the breaching party acted in disregard of the most basic duty of care or out of indifference (BGer, 4C.334/2005, E.2.2). Wilful misconduct is comparable to the Swiss concept of unlawful intent, whereas the breaching party deliberately commits the breach.

It must also be noted that most statutes relating to the energy sector contain specific provision regarding tort liabilities and damages in connection with such industries. These are usually stricter than the aforementioned standards. For example in the case of nuclear exploitations, the operator will be liable without limitation for any damages from a nuclear origin caused by nuclear substances on the installation unless he or she can prove that the damage was caused intentionally or through gross negligence by the victim. With regard to electricity installations, the operating party will be liable for any damage to a person or a thing unless he or she proves that the damage in question is

due to force majeure, wilful misconduct or gross negligence of a third party or the victim.

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?

Swiss law and Swiss courts generally do recognise force majeure. In accordance with article 119, paragraph 1 of the CO, an obligation is deemed extinguished when its performance is made impossible by circumstances not attributable to the obligor.

However, article 119, paragraph 1 of the CO generally only applies to events that are completely beyond the control of the concerned party (eg, in the case of an earthquake, a flood, etc) and only if the performance has become strictly impossible. During periods of commodity price or supply volatility it may be that the performance of the obligation becomes more expensive and more time-consuming but, unless the commodity in question does not exist anymore, the debtor always has the possibility to perform. As a result, article 119, paragraph 1 of the CO is not applicable to periods of commodity prices or supply volatility. Therefore, if the parties wish to extend the effects of force majeure to circumstances such as market volatility, they may define and draft a clear clause about such considered cause majeure events and the consequences thereof.

If the parties did not include any mechanism to adapt the contractual provisions to unexpected and substantial market volatility, the general principle of *clausula rebus sic stantibus* may apply. Accordingly, if exceptional circumstances that the parties did not contemplate when entering the contract occur, a party may request the courts to adapt the obligation in question so as to reflect what the parties would have agreed upon in good faith had they known about these exceptional circumstances at the time that they entered into the contract.

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?

With regard to the construction and development of the project, anyone who is directly affected by an administrative decision (such as an authorisation to build a new energy complex) and has an interest in the decision being cancelled or modified may appeal the initial decision. Unless the court specifically orders so, the appeal has a suspensive effect and the construction cannot take place.

From a private law aspect, landowners are obliged to refrain from any nuisance detrimental to neighbouring properties. In particular, all harmful effects that are not justified by the location and character of the land or by local custom such as air pollution emissions of noxious vapours, noise, vibrations, radiation or the deprivation of sunlight or daylight are prohibited. If such a behaviour is not respected, then the affected person is entitled to sue the landowner or the plant operator for indemnification or for protection against imminent damages.

8 How may parties limit remedies by agreement?

Parties may limit remedies by agreement. In particular, the law governing the contract for work and services and the agency – two recurring forms of contracts in the energy sector – are very flexible, enabling the parties to a contract to limit (or modify) remedies. However, an agreement to waive liability for gross negligence or unlawful intent is null and void if concluded in advance. The courts would generally treat the contractual provision in question as excluding liability for negligence and thus reduce the scope of the liability exclusion clause to the extent permitted by law. Finally, contractual penalties may be included in energy contracts. If that is the case, the party activating the penalty will only be able to request the execution of the contract or the payment of the penalty, unless the parties have contracted differently.

As to liquidated damages, there are no specific regulations under Swiss law. However, they are perfectly admissible and subject to the same judicial review as contractual penalties as per article 163(3) of the CO. As such, grossly inadequate liquidated damages may be reduced at the discretion of the judge.

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

There are no specific provisions governing strict liability for the energy sector as a whole. Instead, the relevant act depending on the pursued activity must be considered. Strict liability of plant operator or electricity providers is to be found in the legislation pertaining to the nuclear and the electricity industries.

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?

Because there is no specific statutory provision governing competing clauses in multiple agreements relating to a single transaction, the general principles of contract law apply. As a result, the starting point is always the common intention of the parties. Assuming there is an overlap between two competing jurisdiction, arbitral or choice of law clauses, the courts will seek to establish, or alternatively, construe the common intention of the parties.

In this regard, it has to be noted that as a matter of principle each contract is to be looked at individually. An exception will only be made if the contracts in question appear to all parties as being a bundle of agreements, which together form an entity (non-published decision of the Swiss Federal Supreme Court dated 18 December 1991, partly reported in: SJ 1992, p 562).

Turning to how the courts resolve such competing clauses, the decision of the Swiss Federal Supreme Court dated 17 January 2013 (4A_244/2012) is to be carefully considered. In this case, a jurisdictional and an arbitral clause were competing in two distinct contracts. The court sought to establish the common intention of the parties and held in this regard that choosing arbitration results in a strong limitation of both parties' appeal possibilities, thus justifying a strict interpretation of the arbitral clause. As a result, unless the clear common intention of the parties to resort to arbitration can be established or construed, the arbitration clause will not be given effect when competing with a choice of forum clause.

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

Stepped dispute clauses are rather common in practice and are enforceable under Swiss law. They are subject to the same validity requirements as regular arbitral clauses (ie, inter alia: written form, consent and arbitrability). If an arbitral tribunal declares itself competent in violation of a stepped clause (eg, no satisfactory mediation procedure took place in the run-up to arbitration), the Swiss Federal Supreme Court will examine this violation under article 190, paragraph 2(b) of the Private International Law Act (PILA) and may take the appropriate measures. In this regard, courts will tend to suspend the arbitral procedure and order that a proper mediation be conducted within reasonable time. This will be the case if a party to a stepped clause files a notice of arbitration in disregard of the mandatory mediation clause (BGE 142 III 296, where a party wrongfully deemed the mediation process a failure and filed a notice of arbitration before the parties had the chance to meet in person, which the Swiss Federal Supreme Court held for mandatory in connection with the agreed-upon ICC ADR rules).

Split dispute clauses are not as common as stepped clauses but are nonetheless enforceable. If considering entering one, do bear in mind that particular attention is to be paid to the specific wording thereof because the lis pendens rules in civil litigation in Switzerland also apply with regard to arbitral procedures. Consequently, a poorly drafted split clause could lead a state court to hold that the issue brought before it is already part of the ongoing arbitration, so that it will dismiss the claim on the ground of lis pendens.

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

Expert evidence is broadly used in courts, especially with regard to technical matters. There are three means of evidence under the Swiss Civil Procedure Code (CPC) that could qualify as 'expert evidence': expert witness (article 175 CPC), expert opinion (article 183 CPC) and arbitrator's opinion (article 189 CPC: which is not to be confused with

the role of an arbitrator sitting on a panel in proceedings based on an arbitration clause). The expert witness is subjected to the same rules as regular fact witnesses and in particular article 307 of the Swiss Criminal Code governing perjury. An arbitrator's opinion (as per article 189 CPC) definitely binds the court as to the reported facts, whereas a judge may depart from the facts detailed in an expert opinion (as per article 183 CPC).

Individuals providing expert or arbitrator opinion are subjected to the same recusal provisions as judges (ie, strict independence requirements) and may be recused, if the conditions are met, upon one or both parties' request.

A private expert report may be submitted to the court but is considered a means of allegation and not a means of evidence (BGE 141 III 433, E. 2.6). There is no particular rule on engagement with regard to private expert, it being understood that a court will not give it a lot of credit if the expert in question is considered too close to one of the parties.

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

Generally speaking, a court may take any interim measure suitable to prevent an imminent harm pursuant to article 262 of the CPC. There is no exhaustive list of measures and the courts have a broad interpretation leeway in this regard. In particular, they may issue an injunction to a party to the procedure, issue orders to third parties and authorities as well as order a payment or a performance in kind. Numerous acts do provide for specific interim measures. In the electricity sector in particular, the competent authority – Federal Electricity Commission (Elcom) – may grant the interim access to the grid according to article 22 of the Electricity Supply Act.

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

There are no specific rules as to the enforcement of foreign judgments and foreign arbitral awards in energy disputes.

With regard to foreign arbitral awards, the New York Convention, of which Switzerland is a signatory party, will systematically apply pursuant to article 194 of the PILA.

With regard to foreign judgments, a distinction is to be made between judgments from a court of a member of the European Union, Iceland or Norway and a judgment from a court of a third country.

The Lugano Convention of 30 September 2007 (CL) contains the same regime as to the recognition and enforcement of foreign judgments as the Brussels Regulation No. 44/2001. In particular, a foreign judgment falling under the scope of the Lugano Convention will generally be recognised without particular procedure pursuant to article 33, paragraph 1 of the CL.

Turning to judgments from third countries, the applicable rules are contained in articles 25 to 32 of the PILA. This recognition regime is not as streamlined as in the Lugano Convention and requires in particular a specific recognition procedure pursuant to article 29, paragraph 1 of the PILA. Please note that Switzerland is not a signatory party to the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

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

No there is not. It is considered that the existing institutions, in particular the Swiss Chambers' Arbitration Institution, provide satisfactory solutions for the energy sector.

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

Disputes between state institutions and private parties regarding regulatory matters are subjected to the administrative procedure and will eventually be heard before state courts. Disputes arising in connection with grid access, grid usage, grid usage fees and the cost of electricity must first be brought in front of the Elcom. As a matter of principle, disputes between companies and consumers are heard by civil courts. As to the commercial disputes in the energy sector, in particular with regard to the construction and operation of facilities and plants or supply agreements, the individual contracts will often refer to arbitration.

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

In the run-up to civil procedures, parties to settlement discussions will very often enter a non-disclosure agreement, thus rendering the content of such discussions confidential. However, this agreement is only binding upon its parties and will not stand a domestic court order requesting that particular documents (including emails or minutes) be disclosed under article 160, paragraph 1(b) of the CPC. The only exception to this disclosure obligation is the attorney–client privilege. As a result, statements made in settlement discussions (including mediation) that are not covered by the attorney–client privilege are confidential but subject to a court disclosing order.

In procedures with state authorities (ie, applications for construction permit or grid access), statements made towards the competent authorities are subjected to the applicable law on public information and data protection. With regard to federal authorities for instance, the Freedom of Information Act of 17 December 2004 applies, whereas the documented discussions with federal authorities are in principle publically accessible but are rendered anonymous wherever possible prior to inspection.

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

There are no specific rules governing e-discovery in Switzerland. In any event, all and any data transfer is subjected to data protection legislation, trade secret rules and state secrets provisions.

In particular with regard to e-discovery, the main issues are in connection to the location of the disclosed data. The Swiss data protection act provides that personal data may not be disclosed abroad if the privacy of the data subject would be seriously endangered as a result of it. This will particularly be the case if the country of destination of the transferred data does not offer sufficient legal data protection. In such a case, the transfer may generally only occur if the data subject approves of such transfer, if contractual safeguards are put in place or if there is a sufficient public interest.

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

Attorney–client privilege is governed by article 13 of the Federal Act on the Freedom of Movement for Lawyers. According to this provision, a Swiss attorney shall keep confidential all and any information regarding all matters brought to him or her as an attorney by his or her client. The attorney–client privilege is unlimited in time. An attorney may be released from this confidentiality obligation by the competent cantonal supervisory body. In such a case, however, the attorney may, but must not, disclose the information in question.

In civil procedure, with the exception of proceedings against the attorney itself, the attorney–client privilege may not be lifted, not even by the court. The same is true for administrative proceedings.

Please note that in-house counsels are not considered as being attorneys for lack of mandatory independence. Hence, they do not benefit from the attorney–client privilege.

Swiss law does not contain any rule as to work product privilege. Information and documents gathered in anticipation of litigation are not subject to any other rule than the aforementioned attorney–client privilege.

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

As a matter of principle, all disputes regarding regulatory issues in the energy sector between private and a particular state institution must first be heard before the corresponding competent authorities. Their decisions may then be challenged in front of the courts. Some exceptions are made. For instance, in disputes regarding grid access, grid usage, grid usage fees and the cost of electricity, the parties must first refer to the Elcom. The Elcom is an independent administrative body. The decision of the Elcom may be challenged in front of the Administrative Federal Court.

The remaining disputes, in particular between private parties, are subjected to civil litigation procedures in front of ordinary courts or, as the case may be, arbitration.

Update and trends

As part of the federal government's project to revise the Water Rights Act, a change to the taxation of water use for energy purposes is planned that is predominantly relevant in connection with dam projects. The alpine cantons, which up until now benefited from this tax, are leading the charge against the planned revision, which shall result in lower taxes being levied on the use of water for energy purposes. The revision project shall be submitted to the parliament in the course of 2018.

As stated above, the entry into force of the new Energy Act on 1 January 2018 is expected to boost investments in renewable energies. As a matter of example, from a tax perspective, companies will be able to spread energy investments and dismantling costs over several tax periods.

The general trend, in the law as well as in public opinion, is to diminish energy consumption as well as to increase the efficiency of energy production. This pressure towards efficiency, together with other factors such as the possible tax diminution in the field of water energy, may lead to a fiercer competition that could trigger both litigation as well as arbitration disputes.

Additionally, it must be noted that the government currently plans a revision of the Swiss lex arbitri. The aim of this change of law is to enhance speed and efficiency of international arbitration, thus ensuring that Switzerland remains a leader in that field. Flagship measures include the possibility to submit appeals in the English language against an arbitral award rendered in Switzerland, enhanced rules regarding the competence of the state judge supporting the arbitral procedure and looser requirements as to the formal requirements of an arbitral clause.

Regulatory

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

At the federal level, the Department of the Environment, Transport, Energy and Communication is the lead department in charge of the country's energy policy-making. Within this department, the Swiss Federal Office of Energy (SFOE) is responsible for the day-to-day monitoring and implementation of the energy policy. The SFOE is responsible for the creation of a sufficient, crisis-proof, broad based, economic and sustainable energy supply. The SFOE ensures the maintenance of high safety standards in the production, transport and utilisation of energy. It creates the necessary conditions for efficient electricity and gas markets and an adapted infrastructure. It actively promotes efficient energy use, an increase in the share of renewable energy and a reduction in CO_2 emissions. It promotes and coordinates national energy research and supports the development of new markets for sustainable energy use and supply.

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

In Switzerland, new entrants have a right to access the infrastructure. The federal law on means of transports by pipelines of combustibles, liquid or gaseous fuel in its article 13 states that the exploiting company has to transport on behalf of third parties and within the technical limits and a healthy use of the installation as long as the third party offers an acceptable remuneration.

In contentious cases between the parties the Federal Office of Energy decides if the exploiting entity has to conclude and enter a contract with the third party and decides on the contractual terms.

Similarly, article 13 of the Electricity Supply Act provides that all grid operators must grant access to third parties on a discrimination-free basis. The ElCom is competent in case of a dispute between the grid operator and the third party wishing to access the grid.

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?

When a federal administrative agency or a public body renders a decision, said decision usually may be internally challenged in front of the internal appealing body. This procedure may be considered non-judicial but the parties to the procedure enjoy comparable procedural rights (ie, right to be heard, right to an attorney, etc) as in front of a judicial instance. All decisions may be challenged in front of the Administrative Federal Court, usually within 30 days of the decision being handed down. The appeal must contain prayers for relief, motivation and exhibits relating to the case.

In certain cases, where a decision is handed down by a cantonal authority, the appeal must be made at cantonal level and may only be challenged in exceptional circumstances at the federal level. Cantonal agencies and public bodies cannot form an appeal at the federal level, cantonal bodies and public agencies must respect the decision of cantonal courts. Only a private party may, in exceptional circumstances, appeal at the federal level.

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

At the current juncture, there is no federal law specifically designed for fracking. The authority to rule on the legality of fracking lies mainly within the cantons as fracking is the exploitation of mineral resources. The federal government may enact provisions as to regulate this practice (ie, environmental protection). The general position on fracking is quite restrictive. Three cantons have already adopted motions that suspended any drilling permits that were previously granted.

That being said, the federal council unveiled a report on fracking in March 2017 by which it found that the application of the technology should in general be possible under certain conditions, and thus saw no reason for a moratorium on fracking.

25 Describe any statutory or regulatory protection for indigenous groups.

There are no indigenous groups in Switzerland.

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

If a foreign company is looking to enter the market through a submission to a public tender, then it will have to abide by the Swiss law on public tenders, which specifies in its article 4 that offers from foreign companies may be considered, provided that said companies are incorporated in a state that has signed the 5 April 1994 agreement on public tender or in other states, provided that Switzerland has concluded an agreement with them or that Switzerland has recognised that these states guarantee equal treatment for Swiss companies taking part in public tenders.

Each sector of energy has an administrative body (ELCOM in the case of electricity, SFOE and the Federal Inspectorate of Pipeline in the case of LNG, CARBURA in the case of petroleum) that will issue a permit or a licence based on the type of commodity being imported.

The National Supply Act, the Pipeline Act, the Pipeline Ordinance, the Ordinance Concerning Safety Standards for Pipelines, Electricity Supply Act and the Energy Act all contain relevant provision regarding the quality and security standards that have to be applied by foreign companies looking to access the Swiss Market.

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

Each law specific to each energy sector typically contains provisions regarding health and safety and the consequences of their breaches. Usually, said consequences are under the form of a criminal liability, that is to say an imprisonment sentence and a fine. For instance, omitting to take safety measures to protect the environment can result in a prison sentence of up to three years.

Other

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

There is no ongoing or anticipated sovereign boundary dispute involving Switzerland. However, other elements affect the energy sector. Generally speaking, Switzerland is experiencing a shift away from the use of nuclear energy. This trend was confirmed on 21 May 2017, as the Swiss voters accepted the 'Energy Strategy 2050' developed by the government. As a result thereof, it is forbidden to build new nuclear plants in Switzerland. This change of law aims at increasing energy efficiency and further promoting renewable sources of energy. Consequently, wind, sunlight and geothermic energies are set to become increasingly popular. This trend is reflected in many areas of the legal system, such as tax law (ie, tax incentives for energy improvements), public procurement (ie, promotional subsidies generally attributed to energy efficient projects) and the progressive renewal and upgrading of the electricity distribution network.

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

Switzerland has been a party to the Energy Charter Treaty since 1998. Switzerland has negotiated since 2007 with the EU regarding a bilateral treaty regarding participation in the development of the electricity single market but so far no agreement has been reached. Apart from bilateral investment treaties or free trade agreements, which may have energy implications, but are not proper treaties per se, there are no further treaties to be mentioned.

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

Domestic and foreign investors are first and foremost protected by the fundamental right to own property anchored in article 26 of the Swiss constitution and according to which any direct or indirect expropriation shall in principle be compensated in full. Additionally, all investors enjoy the right to have access to courts and be heard by them. Furthermore, Switzerland is party to over 120 bilateral investment treaties, which aim at guaranteeing inter alia equal treatment between domestic and foreign investors. In particular in the energy sector, foreign investors may rely on the provisions contained in the Energy Charter Treaty.

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.

In 2012, the Swiss government unveiled its plan to improve cybersecurity with regard to both the country's institutions as well as its entire economy. To this end, the Federal Council conducted a trans-sectoral risk assessment study to find out which areas were subjected to which levels of cybersecurity risks. Within the energy sector, the oil and electricity supply were listed as highly critical, whereas the natural gas supply was listed as very critical. As a result, the entire energy sector is benefitting from the same kind of security measures as the banking sector, telecommunications or water supplies.

There is no specific statutory obligation to comply with international cybersecurity standards such as the ISO/IEC 27000-series or the ISF Standard of Good Practice for Information Security. However, Switzerland takes an active part in the development of international standards in cybersecurity and the ISO/IEC 27000-series is at the core of the guidelines issued by the Federal Data Protection and Information Commissioner, which is the authority responsible for data surveillance in Switzerland. The Data Protection Act is set to soon undergo complete revision and during the consultancy process leading up to the draft of the revision proposal, a discussion regarding an explicit duty to comply with international data protection standards took place. However, such duty was not included in the final draft, which has now been submitted to the parliament.

bratschi

Sandra De Vito Bieri **sandra.devito@bratschi.ch**
Anton Vucurovic **anton.vucurovic@bratschi.ch**
Etienne Gard **etienne.gard@bratschi.ch**

Bahnhofstrasse 70
8021 Zurich
Switzerland

Tel: +41 58 258 1000
Fax: +41 58 258 1099
www.bratschi.ch

Turkey

Mesut Çakmak, Ayşe Eda Biçer and Erdem Başgül
Çakmak Avukatlık Ortaklığı

General

1 Describe the areas of energy development in the country.

Turkey has experienced rapidly and steadily growing demand in the energy sector. Import coal and natural gas (nearly all of which is also imported due to the negligible domestic gas production) fired power plants accounted for respectively 17.52 per cent and 32.16 per cent of the country's electricity generation (Electricity Market 2016 Development Report, Energy Market Regulatory Authority). Turkey has been trying to reduce this high level of dependency by promoting the use of indigenous sources such as lignite and renewable energy sources and nuclear energy.

Turkey has a large potential for renewable energy and aims to generate 30 per cent of its electricity need from renewables by 2023. A recent major development on this front is the legislation concerning the renewable energy resource areas (RERA), which came into force on 9 October 2016. RERA is an investment package comprising the construction and operation of a major-scale renewable power plant and a domestic component production plant, as well as conducting research and development activities. In 2017, the Ministry of Energy and Natural Resources (the MENR) has tendered two 1,000-MW RERA projects – one wind power project and one solar power project – based on the RERA model.

Turkey also aims to establish its own nuclear power capacity in order to diversify the electricity mix of the country. While Akkuyu Nuclear Power Plant is currently under construction, preparations regarding two further power plants located in Sinop and İğneada are ongoing. Turkey's goal is to establish a nuclear capacity with the two nuclear power plant projects in Mersin/Akkuyu and Sinop that would account for 10 per cent of the country's electricity supply by 2023.

In addition, the government has made the following efforts to incentivise domestic coal:

- on 4 June 2016 the Electricity Market Law No. 6446 (the Electricity Market Law) was amended to empower TETAŞ, the state-owned electricity wholesale company, to hold tenders for the procurement of electric power primarily from domestic coal-fired power plants in case of shortages in the electric power required to meet the supply obligations of TETAŞ, and with a further amendment made in December 2017, the amount of electricity to be purchased has been fixed with a formula for the next seven years, and the scope of implementation of the purchase has been extended so as to cover power plants operating based on a mixture of domestic and imported coal as well;
- a Council of Ministers Decree dated 19 September 2016, introduced, with the exception of certain countries, an additional financial obligation to pay at least US$70 per ton of imported coal irrespective of its actual price; and
- lastly, Energy Minister Berat Albayrak noted in late November 2017 that MENR will provide an incentive starting as of 2018 to the existing imported coal-fired thermal power plants on the condition that they convert to local coal.

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

Pursuant to article 168 of the Constitution of the Republic of Turkey, the state is the owner of all energy resources and has the right to explore, exploit, research and operate all such sources. The state may transfer those rights to private individuals and entities for a temporary period through licences or agreements.

There are certain laws regarding the transfer of the exploration, exploitation, research and operation rights for oil, gas and other hydrocarbons and renewable energy sources and, in practice, the government issues various types of licences and signs agreements for the transfer of these rights.

State-owned companies play an important role in the development of energy resources in Turkey. The Turkish Petroleum Corporation (TPAO) has a dominant role in onshore and offshore exploration and exploitation activities. In 2016, 17.885 million barrels of crude oil and 235.06 million cubic metres of natural gas were produced. TPAO dominates both of the production activities (Crude Oil and Natural Gas Sector Report, May 2017, TPAO; Turkish Natural Gas Market Report 2016, EMRA).

Commercial/civil law – substantive

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

Form agreements are generally used in making contracts with public entities having regulatory duties or powers. Prominent examples of such agreements in the electricity market are as follows:

- EPİAŞ (the electricity market operator): market participation agreement, intraday and day ahead market participation agreements (note that the agreements related to assignment of the EPİAŞ receivables are also made based on a standard form agreement);
- TEİAŞ (the state-owned transmission operator): connection agreement, system usage agreement; and
- Takasbank (the central settlement bank): participation agreement.

In addition, some state entities use form agreements in their affairs. For instance, BOTAŞ, the state-owned natural gas utility, uses a form interruptible gas supply contract in some cases.

It should be noted that the government does not use form agreements for the transfer of energy resource exploration or operation rights. The transfer of such rights is usually carried out through licensing, concession agreements, privatisation or private law agreements depending on the type of resources and the right to be transferred.

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

Contractual interpretation rules are generally regulated under article 19 of the Turkish Code of Obligations No. 6098 (Turkish Code of Obligations), which provides that the contracts must be interpreted according to the real and mutual intention of the parties. In addition, several contractual interpretation rules have been developed by legal literature and court precedents such as the following:

- interpretation to the advantage of the party undertaking an obligation should be preferred;
- interpretation to the disadvantage of the party who prepared the contract should be preferred;
- wishes and intentions of the parties at the time of the contract should be considered;
- the relevant provision should be examined alongside the rest of the provisions in the contract;
- provisions excluding rights should be interpreted strictly;
- the contract should be interpreted according to the meaning that a reasonable and honest person would give to it in the circumstances; and
- interpretation that does not comply with a provision of a law, as a substitute legal source, should not be favoured.

These rules apply in both administrative law and private law contracts, including those signed within the energy sectors.

5 Describe any commonly recognised industry standards for establishing liability.

Article 18 of the Turkish Commercial Code No. 6102 defines the principles of prudent merchant in general, according to which every merchant is required to act as a prudent businessperson in all of its commercial activities. This is an objective standard (ie, every merchant is expected to show the care that would be expected from any cautious and visionary merchant operating in the same field of business). Note particularly that electricity and natural gas market legislation specifically stipulate that such market players have a duty to act as a reasonable and prudent operator in their respective activities.

In addition, article 2 of the Turkish Civil Code No. 4721 (the Turkish Civil Code) sets forth the rule on the (objective) good faith principle. Although this article does not provide a definition of the principle, it sets out the boundaries surrounding the exercise and performance of all rights and obligations by stipulating that every person is bound to exercise his or her rights and fulfil his or her obligations according to this good faith principle. Therefore, rights and obligations must be exercised or performed in a way that an honest, trustworthy and reasonable person, who acts in accordance with the trust of the other party, would have exercised or performed such rights or obligations under similar circumstances. In this regard, good faith constitutes a set of rules that is generally recognised and expected from every person, as it is presumed that such rules satisfy the needs of social and business life. In addition, the good faith principle forbids manifest abuse of rights. Although rights contain interests that are protected and can be enforced by law, if exercise of a right amounts to a manifest abuse of such right, the right holder cannot be entitled to the benefit that it expected to achieve by way of exercise of its right in a manner that is contrary to the good faith principle. Legal scholars and judicial precedents acknowledge certain exercises of rights as manifest abuse of a right including but not limited to where such exercise will result in illegitimate benefits or hindrance of other parties' interests.

Finally, article 115 of the Turkish Code of Obligations provides that any agreement made in advance purporting to exclude or limit liability for fraud, wilful misconduct or gross negligence is void. See question 8 for details of this provision.

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?

In the Turkish legal framework, '*pacta sunt servanda*' or the rule of 'obligations shall be honoured' constitutes the main principle of Turkish contract law, pursuant to article 2 of the Turkish Code of Obligations. However, the concept of '*rebus sic stantibus*' acts as the exception to this principle. If the terms of the contract do no longer align with the parties' will, because of unexpected circumstances, the *imprévision* theory comes into force. This principle has found itself a formal scope of application in Turkish law, as the concept was introduced in article 138 of the Turkish Code of Obligations. The principle can be explained as the 'collapse of the underlying basis of the transaction', which leads to either adaptation of the contract by the court – to the extent of the parties' will – or eventually termination of the contract. This principle is applicable to contracts signed in the energy sectors as well.

The concept of force majeure is also recognised under Turkish law, but is not clearly defined in legislation in general. However, as an exception, energy legislation defines force majeure events. According to licensing regulations of electricity, natural gas and petrol markets, for an event to be acknowledged as force majeure, such event must impede the affected party's performance of its obligations under the relevant legislation and be unavoidable, inevitable and unforeseeable even if the affected party has exercised due care and diligence and has taken all precautions.

The Electricity Market Licensing Regulation provides certain examples of force majeure events which include natural disaster, epidemic, war, public uprising, acts of terrorism, sabotage, strike and lockout. Upon the licence holder's application in writing to EMRA indicating the starting date and extent of the force majeure event, its effects to its obligations under the legislation, and if possible, its cure period, EMRA may decide the postponement or suspension of the licence holder's obligations to the extent they are affected from the force majeure event. Further, where it is foreseen that performance of such obligations is not possible, other than transmission and distribution activities in natural gas and electricity markets, EMRA may decide that such obligations will not be applicable to such licence holder.

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?

Under Turkish law, third parties with a legitimate interest can make nuisance and negligence claims mainly through filing compensation lawsuits before civil courts or filing cancellation lawsuits against relevant administrative acts (such as permits or licences) before administrative courts. The initiation of a lawsuit alone does not provide a justification to prevent the development of an energy project. In order for a lawsuit to adversely affect a project, the court must have either rendered an injunction relief decision suspending the implementation of the relevant administrative act, or cancelled it; and the relevant administrative act must be one of the critical acts in the absence of which the project cannot continue.

8 How may parties limit remedies by agreement?

In accordance with articles 26 and 27 of the Turkish Code of Obligations, parties may limit remedies by agreement in light of the freedom of contract principle, provided that such limitation does not violate compulsory provisions of law, ethics, public policy and personal rights. However, it should also be noted that any agreement made in advance purporting to exclude or limit liability for fraud or gross negligence is void according to article 115 of the Turkish Code of Obligations. Pursuant to articles 115 and 116, services that are performed under authorisation from a relevant authority and requiring special skills, limitation of liability arising from either slight or gross negligence or intentional misconduct on the part of the party itself or its agents shall be null and void. Additionally, any limitation of liability arising from the operation of dangerous businesses (as set forth in article 71 of the Turkish Code of Obligations) may not be enforceable.

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

There are two main strict liabilities under Turkish law that may be applicable in the energy sector: the employer's strict liability, which is regulated under article 66 of the Turkish Code of Obligations, and the strict liability of the construction owner, which is regulated under article 69 of the Turkish Code of Obligations. The employer can avoid liability by proving that he or she showed due care in the employment decision, inspection of the work, selection of the tools and organisation of the work, according to objective standards. The construction owner's strict liability cannot be eliminated; but the construction owner can seek recourse to the person who caused the damage. In addition, pursuant to article 71 of the Turkish Code of Obligations, both the owner and operator are severally responsible for liabilities arising from dangerous businesses, including certain energy projects.

Turkey is a party to the Paris Convention on Third Party Liability in the Field of Nuclear Energy dated 29 July 1960, and therefore its provisions would be applicable regarding the liability of nuclear power plant operators in Turkey.

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?

In certain project documents, as we see in major energy projects in practice, such competing clauses are governed pursuant to the 'coordination of disputes protocols' whereby the parties clarify the application of competing clauses such as choice of forum, choice of law or mode of dispute resolution. This protocol includes, among others, provisions in the form of guidance to the parties as to how to coordinate initiation of disputes resolution mechanisms that may relate to multiple parties and contracts. Here, the relevant judge or arbitrator is expected to determine his or her own jurisdiction in respect of the relevant project agreement before him or her (and thus the limits of his or her jurisdiction regarding the other project agreements) on the basis of the rules set out in such 'coordination of disputes protocol'. To the best of our knowledge, the validity and enforceability of such protocols have not yet been tested before the Turkish courts.

In the absence of such protocol, the specific provisions provided in each of the agreements would be separately applicable for disputes arising out of each relevant agreement or document. In such a case, the expectation would be that the judge should look at the project agreements other than the project agreement before him or her to ascertain his or her limits of jurisdiction in respect of the other relevant project agreements. Although it may be more time consuming, this should mainly achieve the same result that is aimed at by way of a 'coordination of disputes protocol'.

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

Stepped dispute clauses are permissible under Turkish law and common in practice in the Turkish energy market. Although there is no specific provision in the legislation dealing with such clauses, the parties can provide a stepped dispute clause in their contracts based on the freedom of contract principle of Turkish law. Stepped clauses are commonly used in the contracts to allow a claim to be resolved in the fastest and most cost-effective way. Typically, stepped clauses involve an internal resolution process through amicable settlement, followed by a stage of alternative dispute resolution such as the involvement of an expert; and the resolution by arbitration or court jurisdiction as the step of last resort.

In order for an arbitration clause or agreement to be valid under Turkish law, the parties' intention to submit disputes to arbitration must be clear and unconditional, and the jurisdiction of local courts must not have been provided as an alternative to arbitration. Split dispute clauses permitting parties to go to arbitration for some disputes and to courts for some others arising from the same contract may not be valid and enforceable under Turkish law if the distinction between these two categories of disputes are not sufficiently clear. This issue is not yet tested before Turkish courts. However, even if there is a distinction between the categories of disputes, given that a dispute may relate to both categories in practice, the validity and enforceability of split dispute clauses may be questionable as a matter of Turkish law.

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

Under Turkish law, parties to a lawsuit can request the judges to appoint an expert, or the judges themselves may appoint experts to prepare a report on issues that require technical and specific knowledge outside the legal issues. Notwithstanding this clear definition, until recently in practice Turkish courts commonly appointed experts in relation to legal issues alongside other issues and referred to such reports as legal ground for their decisions for the legal issues involved as well. In order to prevent such improper practice of expert evidence, the Experts Law No. 6754, which was published in the Official Gazette No. 29898 dated 24 November 2016, reiterated that only experts that have been registered with the official experts' registry by documenting their expertise in an area outside of law can be appointed as experts by the courts.

Apart from such court-appointed experts, the parties to the lawsuit can also obtain opinions from experts and can submit their reports to the court as evidence. In accordance with article 282 of the Civil Procedural Law No. 6100, expert reports are accepted as discretionary evidence. In disputes involving energy matters, it is common in practice for courts to appoint experts and for the parties to obtain their own independent expert opinions as well.

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

There are no energy-specific interim and emergency relief provisions under Turkish law, and therefore the general provisions governing such relief and measures are also applicable for energy disputes. Interim relief is available both under Turkish administrative law and civil law. An injunction relief may be requested by any person with legitimate interest from administrative courts to suspend the implementation of an administrative act. The courts are required to render an injunction relief if both the following conditions are met: the administrative act is clearly contrary to law, and an irreparable damage would occur if the implementation of the relevant administrative act is not suspended. A precautionary measure may be requested from civil courts either during a pending lawsuit or as an independent lawsuit. Precautionary measures may be granted by the courts if there is a risk that a delay may cause considerable damage, or any change in the existing conditions may obstruct or make impossible the usage of a right if the precautionary measure request is not accepted.

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

There are no energy-specific enforcement rules under Turkish law, and therefore, the general enforcement rules are also applicable to energy disputes. Pursuant to the Turkish International Private Law and Procedural Law No. 5718 (the Turkish International Private Law and Procedural Law), for the enforcement of judgments rendered by foreign courts and finalised in accordance with the laws of the concerned states, an enforcement decision has to be given by a Turkish court. In order for a foreign judgment to be enforced in Turkey, the conditions stipulated under the Turkish International Private Law and Procedural Law must be met:

- there must exist reciprocity with the state in which the relevant judgment is given;
- the judgment must not be contrary to public policy rules of Turkey; and
- the right to defence of the parties must not have been violated during the trial process before the relevant foreign court.

The enforcement procedures of foreign arbitration awards will be subject to the Turkish International Private Law and Procedural Law and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York in June 1958 (the New York Convention). It should be noted that in accordance with article 90 of the Turkish Constitution, international treaties such as the New York Convention have the same effect as Turkish domestic law. Turkey has, however, declared the first reservation and limited the applicability of the New York Convention to awards made in other contracting states according to the principle of reciprocity. Therefore, the enforcement of an arbitral award in Turkey shall be subject to the New York Convention only if it is rendered in a state that is a party to the New York Convention. The New York Convention satisfied the reciprocity requirement with respect to all states that are party to it so that no further application of the reciprocity test is required for those states. The enforcement of foreign arbitration awards that are outside the scope of the New York Convention is subject to certain conditions under the Turkish International Private and Procedural Law, which are similar to the conditions for enforcement of foreign court judgments as explained above. In addition, in light of article 15 of the International Arbitration Law No. 4686 (the International Arbitration Law), arbitral awards can be challenged before the relevant first instance court. In such case, the court would examine the file from the point of the cancellation grounds provided in the International Arbitration Law, which are very similar to the enforcement conditions of the New York Convention.

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

There is no arbitration institution specific to the energy disputes in Turkey.

On a general note, Turkey is a party to the Energy Charter Treaty and foreign investors making an investment in Turkey may submit disputes to arbitration pursuant to this treaty.

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

Arbitration is usually preferred to local courts in large-scale energy contracts. It is primarily chosen by the parties for the purposes of shortening the duration of the dispute resolution process, being able to submit the dispute to arbitrators who are qualified experts of the areas related to the specific dispute, and providing a relatively neutral dispute resolution process, especially in international transactions and within the scope of contracts signed with an administrative party.

With entry into force of the Law on Mediation for Civil Disputes No. 6325, mediation has also become an alternative option in resolution of energy-related disputes. In fact, in November 2017, a specialised Energy Disputes Mediation Centre has been established for the promotion and facilitation of mediation in disputes arising in the energy sector under the umbrella of the Energy Law Research Institute.

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

Attorney's Act No. 1136 provides a settlement option under the supervision of attorneys who may invite parties of a dispute to settlement before filing a lawsuit or before the first hearing in the cases where a lawsuit is already filed. In case the counterparty accepts this invitation and the parties reach a settlement, settlement minutes must be signed by the attorneys and their clients. Such minutes will be in force of a final court judgment on the matter subject to the dispute.

The Law on Mediation for Civil Disputes No. 6325 offers mediation as an alternative option for dispute resolution. Pursuant to this law, confidentiality is one of the main principles, and the documents and information submitted during the mediation process, including but not limited to acknowledgement of any factual matters or claims, cannot be used as evidence before courts or arbitral tribunals. The only exceptions to this rule are any agreement of the parties to the contrary, any requirements by law to disclose these or the necessity of their disclosure for implementation of the settlement agreement. The individuals who violate the confidentiality rule under this Law and cause the relevant party to suffer any damage may be sentenced to prison for up to six months. The parties and mediators may sign a settlement agreement to set out the details of their agreement. The enforceability of such agreement requires an enforceability annotation to be received from the relevant court. The agreement will have the force of a court judgment after receiving such annotation. Therefore, the information stated under the settlement agreement may be required to be disclosed by the parties for enforcement purposes.

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

The Turkish Parliament enacted in March 2016 the Law No. 6698 on Protection of Personal Data, which had been on its agenda since 2012 to establish a centralised data protection framework. In the course of the following year, the Board for Protection of Personal Data has been established and the secondary legislation of the Law has been enacted to cast further light on the implementation of the Law. In addition to this Law, there are various laws including provisions applicable to data protection and privacy such as some articles of the Constitution of the Republic of Turkey regarding the privacy of private life and freedom of communication, provision of the Turkish Criminal Code No. 5237 (the Turkish Criminal Code) regarding blocking and impairing the system, destroying or altering the data; and provision of the Turkish Civil Code regarding the protection of personality against violations.

In addition, Turkey is a party to the European Council Agreement on Cyber Crime, the United Nations Universal Declaration of Human Rights, and the Convention for the Protection of Human Rights and Fundamental Freedoms. Turkey has also signed and ratified the Convention for the Protection of Individuals regarding Automatic Processing of Personal Data (Convention No. 108).

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

In accordance with the Attorney's Act, attorneys are obliged not to disclose any information acquired from or in respect of their clients as a consequence of their representation without the client's permission. Furthermore, attorneys have the right to avoid testifying regarding any information acquired as a consequence of the representation of any client even if the client permits testifying.

Turkish law does not provide specific provisions regarding the nature of work products of attorneys or whom such products belong to. In the absence of specific provisions, these work products should be assessed within the context of the general intellectual property legislation. Furthermore, parties can set forth additional contractual obligations regarding the work product privileges in their terms of engagement.

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

There is no specific administrative review for energy disputes required to be initiated before filing a lawsuit.

However, the applicable legislation provides an option to apply to the EMRA for the settlement of certain disputes. For example, in accordance with the Electricity Market Licensing Regulation, distribution and transmission licence holders can apply to EMRA for resolution of disputes arising from connection and system usage agreements.

Additionally, as a general rule in Turkish administrative review procedure, plaintiffs can first apply to the administrative authority ranking higher to the one that has rendered the subject administrative act (or to the administrative authority rendering the subject administrative act if there is no higher-ranking authority) for annulment, cancellation, revision or re-issuance of the respective act before filing of a lawsuit for the same.

Regulatory

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

Administrative authorities regulating the energy sectors in Turkey are as follows:

- EMRA is an independent regulatory authority responsible for the regulation and supervision of the oil and gas markets (ie, midstream and downstream segments) and the electricity market.
- MENR determines and implements national energy policy objectives. In addition, it ensures coordination between related public bodies and private entities; and supervises all exploration, development, production and distribution activities in respect of energy and natural resources.
- The General Directorate of Petroleum Affairs evaluates applications and issues licences for exploration, extraction and operation of oil and gas sources and grants licences for these activities.
- The General Directorate of Mining Affairs evaluates applications and issues licences for exploration and operation of mines.
- The Turkish Atomic Energy Authority is responsible for regulation, supervision and guidance regarding the areas concerned with atomic energy together with EMRA.

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

Both the Electricity Market Law and the Natural Gas Market Law No. 4646 require distribution and transmission network operators to provide access to the network on the same terms and conditions to all system users without discrimination, other than the incentives provided for the renewable energy facilities explained below. Similarly, under the Oil Market Law No. 5015, licensed storage and transmission companies must carry out all storage and transmission requests, save for capacity limitations, without discrimination among applicants. Furthermore, the owners of oil refineries are obliged to provide all distribution companies requesting to purchase oil from them with at least the same conditions they provide to their own distribution companies.

Without prejudice to the generality of the above, certain priorities are provided for facilities based on renewable energy resources. The Electricity Market Licensing Regulation requires both TEİAŞ (as the

Update and trends

Priority for local energy resources
The Minister of Energy and Natural Resources, Berat Albayrak has announced an energy strategy in 2016 where local energy resources will receive precedence in energy investments. Some of the significant reflections of this new strategy are listed below.

Renewable Energy Resource Areas (RERA)
RERA is an investment package comprising the construction and operation of a major-scale renewable power plant and a domestic component production plant; as well as conducting research and development activities. In 2017, the MENR has tendered the first two RERA projects, one wind power project and one solar power project, each with an installed capacity of 1,000MW.

Local coal incentives
The MENR aims to utilise the majority of local lignite and coal reserves for electrical energy production until 2023. The goal is to increase local coal's share in the country's electrical energy production portfolio until 2019. In this pursuit:

- a Council of Ministers Decree dated September 2016 introduced, with the exception of certain countries, an additional financial obligation for importers to pay at least US$70 per ton of coal imported irrespective of the actual price.
- TETAŞ, the state-owned electricity wholesale company, had been empowered in 2016 to hold tenders for the procurement of electric power primarily from domestic coal-fired power plants in case of shortages in the electric power required to meet the supply obligations of TETAŞ. With an amendment made in December 2017, the amount of electricity to be purchased has been fixed with a formula for the next seven years (ie, until the end of 2024) and the scope of implementation of the purchase has been extended so as to cover power plants operating based on a mixture of domestic and imported coal.
- Berat Albayrak noted in late November 2017 that an incentive will be provided to the import-coal fired thermal power plants as of 2018 on the condition that they convert to local coal.

Developments in nuclear energy
Interest in nuclear energy in Turkey has increased recently, bringing along with it several nuclear power plant projects. The aim is to have Akkuyu nuclear power plant's first unit be operational until 2022. The development studies are ongoing for the Sinop nuclear power plant. The total installed capacity of these two power plants is expected to account for 10 per cent of the country's electricity supply by 2023. In addition, the field studies for a third nuclear power plant are ongoing.

Transit natural gas pipeline projects
Turkey is constructing its first transit natural gas pipeline projects with Azeri and the Russian government. Turkey, as an import-dependent country, places a great importance on these projects, with a view to increase and diversify its gas supplies:

- Trans-Anatolian Natural Gas Pipeline is expected to be operational by mid-2018, which will initially transport 16 billion cubic meters (bcm) of Azeri gas every year. Six bcm will be for Turkey's domestic consumption, while the rest will be delivered to Greece, Albania, Italy and further into Europe.
- Construction of the TurkStream gas pipeline was commenced on 7 May 2017. TurkStream will deliver 31.5 bcm of gas annually through the Black Sea to the Turkish Thrace coast. Half of this annual quantity will be consumed in Turkey and the other half will be exported to Europe. Construction of TurkStream is planned to be completed by 2020.

Natural gas organised wholesale market
On 31 March 2017, EMRA published the Natural Gas Organised Wholesale Market Regulation, which introduced establishment of a regulated spot market for natural gas trading. Currently, the market players trade pipeline gas by way of long-term supply agreements or spot trading where the parties conclude agreements by way of emails, or even by telephone. The market aims to complement such bilateral agreements between market participants. They will also be able to remedy their imbalances. The market is envisaged to be operational by 1 April 2018.

Climate Change
Turkey became a signatory to the Paris Agreement on 22 April 2016. However, it has not yet been ratified. Turkey is not subject to the emission reduction targets, while it is subject to common liabilities applicable to all contracting parties, such as the preparation of an intended national determined contributions (NDC). Turkey submitted its intended NDC on 30 September 2015. Under this, Turkey declared that it aims to reduce greenhouse gas emissions by 21 per cent by 2030, and increase its solar power capacity to 10,000MW; and wind power capacity to 16,000MW.

operator of the transmission network) and the distribution licence holders to give priority to those facilities generating electricity from renewable energy resources in terms of their connection to the transmission or distribution systems.

EMRA may intervene in the case of a breach of these requirements by TEİAŞ or distribution companies, and impose administrative fines and other sanctions to ensure fair access of all market players to the transmission and distribution networks.

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?

Decisions and actions of all regulatory authorities can be challenged before administrative courts pursuant to Administrative Procedure Law No. 2577. Furthermore, pursuant to the Ombudsman Law No. 6328, claims regarding administrative decisions and actions can be submitted to the Ombudsman Authority for resolution as well. The decisions of the Ombudsman Authority are not binding on the administration or courts; however, in practice, the administration tends to comply with them, considering the fact that the courts are also likely to comply with them in the case of a cancellation lawsuit filed against the same administrative act.

As explained above, it is also possible for the plaintiff to apply first to the administrative authority that ranks higher than the one that has rendered the subject administrative decision (or to the administrative authority rendering the subject administrative decision itself if there is no higher rankling authority) for annulment, cancellation, revision or re-issuance of the respective decision before filing a lawsuit for the same.

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

The Petroleum Law No. 6491 and its Implementation Regulation permit certain unconventional research and exploration activities as part of the policy to benefit from all domestic resources. The hydraulic fracturing method, which is used for shale gas research activities, falls within the scope of these unconventional research and exploration activities.

The General Directorate of Petroleum Affairs issued more than 40 licences for exploration of shale gas.

The petroleum right holders who have the right to perform hydraulic fracturing must submit an additional form to the General Directorate of Petroleum Affairs. Such form must include all information regarding the results of the activity in terms of water, soil, air and other environmental pollution.

25 Describe any statutory or regulatory protection for indigenous groups.

Turkish law does not provide for a specific statutory or regulatory protection for indigenous groups; however, as explained in question 7, Turkish law permits individuals and legal entities to challenge all administrative acts, such as permits or licences of an energy project, if such administrative act violates the legitimate interests of such individual or legal entity. Such individuals and legal entities can also file compensation lawsuits against the relevant public authorities or private investors for the compensation of their damages arising from the relevant project.

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

Turkish Foreign Investments Law No. 4875 (the Foreign Investments Law) provides that foreign investors are to be granted no less favourable treatment than that accorded to local investors. In addition, the Foreign Investments Law reiterates the constitutional principle that expropriation and nationalisation is only permitted if required for the public good and only in return for adequate compensation. In order to provide additional comfort to foreign investors, the Foreign Investments Law ensures that recourse to local and international arbitration and alternative dispute resolution mechanisms would be available for foreign investors. Foreign investors making an investment in Turkey may submit disputes to arbitration pursuant to applicable bilateral investment treaties or the Energy Charter Treaty.

In respect of the scope of the provided coverage, the Foreign Investments Law provides a broad definition of foreign investment. Any contribution from outside of Turkey of funds in convertible currency, corporate securities (except foreign sovereign bonds), machinery and equipment, or industrial and intellectual property rights constitutes foreign investment. In addition, 'any rights generated in Turkey and relating to dividends, sales proceeds, receivables or other investment rights with monetary value, as well as assets with an economical value such as rights relating to exploration and extraction of natural resources' are included within the definition of foreign investment.

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

Pursuant to Environmental Law No. 2872 and the Turkish Civil Code, in case of environmental pollution, the polluter and the property owner shall be subject to certain administrative fines in addition to their obligation to take preventive measures and eventually clean up the pollution. Pursuant to the Turkish Criminal Code, a person who intentionally or negligently causes pollution of soil, water or air is either imprisoned or punished with a monetary penalty, or both. Occupational Health and Safety Law No. 6331 also sets forth certain responsibilities for the employers such as to appoint an occupational safety expert, workplace doctor and other health personnel from among their employees; and to make a risk assessment directly or have it made by others for its workplace to determine the precautions required for the maintenance of occupational health and safety and the protective equipment to be used for such purposes. Failure to comply with these requirements may result in administrative fines or the shutting down of the works.

A very common risk associated with the Turkish power sector, as in other major energy and infrastructure sector projects, is the risk of legal challenge against permits, licences and any other administrative actions related to their projects. Under Turkish law, any person (individual or legal entity) who has a legitimate actual interest in the cancellation of an administrative action is entitled to file a cancellation lawsuit against such action before administrative courts. 'Legitimate actual interest' is interpreted widely by administrative courts, and therefore any third party (individuals, communities, environmental groups, non-profit governmental organisations or other third parties) whose interests have been claimed to be violated due to an administrative decision may request its cancellation before an administrative court. Licences (including electricity licences), environmental permits, land rights and expropriations, construction permits, etc, are among the administrative actions that may be subject to such cancellation lawsuits. Non-governmental organisations (eg, environmental groups) and professional associations (eg, chamber of architects, environmental engineers) have been quite active in recent years to challenge power projects based on environmental grounds or violation of planning rules.

Other

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

We are not aware of any current sovereign boundary dispute involving Turkey that could affect the energy sector.

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

Turkey's involvement in international energy cooperation dates back to 1991, to the signature of the European Energy Charter, which was also intended to encourage cross-border energy cooperation. Turkey was among the participants of the Energy Charter Conference, and executed the Energy Charter Treaty on 17 December 1994, but did not ratify until 2001. After more than a decade, Turkey has finally ratified the trade-related provisions of the Energy Charter Treaty, providing cross-border conduct of energy markets by implementing the rules of the World Trade Organization, referred to as the Trade Amendment, with the Council of Ministers' decree published in the Official Gazette No. 30001 and dated 8 March 2017. Turkey has also joined the Energy Community, which aims to extend the European Union internal energy market to south-eastern Europe and beyond, with observer status in 2006.

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

Turkey has signed and ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), which permits investment disputes between a state and an investor to be submitted to the International Centre for Settlement of Investment Disputes in Washington, DC. Furthermore, Turkey has also signed bilateral investment treaties with more than 80 countries around the world, all of which allows the investors of such countries to submit their investment disputes to arbitration in various forums, such as ICSID and International Chamber of Commerce.

Çakmak Avukatlık Ortaklığı
Attorneys at Law

Mesut Çakmak **m.cakmak@cakmak.av.tr**
Ayşe Eda Biçer **e.bicer@cakmak.av.tr**
Erdem Başgül **e.basgul@cakmak.av.tr**

Piyade Sokak
Portakal Çiçeği Apt No: 18 C Blok Kat: 3
06550 Çankaya, Ankara
Turkey

Tel: +90 312 442 4680
Fax: +90 312 442 4690
www.cakmak.av.tr

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.

The Electricity Market Licence Regulation, the Natural Gas Market Licence Regulation and the Petroleum Market Licence Regulation require licence holders to operate their institutional information and industrial control systems in accordance with the ISO/IEC 27001 information security management system standards and obtain the relevant certifications from an institution accredited by the Turkish Accreditation Agency. With regard to operations within the electricity market, this obligation covers the licence holders of generation, transmission, supply, market operation and distribution services. While in the natural gas market, transmission and distribution licence holders must hold such certificate; this requirement only applies to refinery licence holders in the petroleum market. Further to the above, in respect of the electricity market, EMRA published two pieces of legislation in July 2017 regarding information systems in energy sector for ensuring the continuity of the information system by way of the supervision of industrial control systems, as well as management and reduction of risks concerning information systems in the energy sector.

United Arab Emirates

Dyfan Owen and James MacDonald
Ashurst LLP

General

1 Describe the areas of energy development in the country.

The oil and natural gas industries remain the prominent areas of energy development in the United Arab Emirates (UAE), although there is an increasing focus on renewables.

The UAE is a member of the Organization of Petroleum Exporting Countries and one of the most significant oil producers in the world. The focus of the oil industry in the UAE is on increasing the level of production from mature oilfields, such as the offshore Upper Zakum field in Abu Dhabi, rather than seeking further significant oil discoveries.

In respect of natural gas, the UAE's domestic demand for natural gas has increased dramatically in recent years, partly as a result of increased demand for gas by the power and petrochemicals sectors. A number of challenging and complex projects form part of the UAE's plans to increase gas production, including the exploitation and development of sour gas. In addition, the UAE is a significant importer of gas, including via Dolphin Energy's undersea pipeline from Qatar and through LNG cargoes of floating regasification facilities in Dubai.

The UAE is also investing considerably in alternative energy supplies, including nuclear, waste-to-energy projects and solar power. Projects undertaken by Masdar (the Mubadala Development Company), including the construction of Masdar City, a planned sustainable city project in Abu Dhabi, highlight the investment that is being made to advance the clean energy industry and to invest in renewable and sustainable energy technologies. In Dubai, a contract was awarded in 2017 for the 700MW, 14.2 billion dirhams fourth phase of the Mohammed bin Rashid Al Maktoum Solar Park – the largest concentrated solar power project in the world.

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

The UAE is a federation consisting of seven emirates, with a federal constitution that allocates powers between the federal government and the government of each emirate. Natural resources are the public property of each emirate, and each has discretion over the exploration, extraction and management of its own natural resources, including oil and natural gas.

The UAE has a federal court system, although Dubai and Ras Al Khaimah are not part of this system and are not subject to the Federal Supreme Court. Dubai and Ras Al Khaimah are, however, subject to federal laws and Federal Law No. 11 of 1992 concerning the Civil Procedures Law (the Civil Procedure Code) applies in Dubai's civil courts. Unless stated otherwise, responses in this chapter are based on UAE federal law.

The energy sector in the UAE is dominated by the various government-controlled companies. Foreign investors engage in gas exploration and production in the UAE, but typically do so by entering into a joint venture with a government-controlled entity or taking an interest in a government-controlled entity. For example, the shareholders of Dolphin Energy (the operator of all upstream, midstream and downstream phases of the Dolphin gas pipeline project) are Mubadala Development Company (on behalf of the government of Abu Dhabi (51 per cent), Occidental Petroleum of the United States (24.5 per cent) and Total SA of France (24.5 per cent)).

The UAE's current energy policy focuses on diversification of the energy sector and increasing efficiency in the consumption of electricity. In January 2017 the UAE announced its Energy Plan for 2050. The majority of the UAE's electricity is currently generated by natural gas-fired generators. However the new energy strategy targets an energy mix of 44 per cent clean energy, 38 per cent gas, 12 per cent clean coal and 6 per cent nuclear. The UAE is also seeking to increase consumption efficiency by 40 per cent by 2050.

Commercial/civil law – substantive

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

Standard form contracts used internationally in the energy sector, such as the Association of International Petroleum Negotiators model contracts and International Federation of Consulting Engineers standard form contracts are used in the energy sector in the UAE. However, they are often negotiated to reflect bargaining power or to be consistent with the governing law chosen.

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

In the UAE, contractual interpretation is governed by Federal Law No. 5 of 1985 on the Civil Transactions Law of the United Arab Emirates (the Civil Code). The articles concerning interpretation are contained in Chapter One of Book One of the Civil Code and they apply to energy contracts governed by UAE law.

If a contract is clear, it will be interpreted in accordance with its terms (article 259 of the Civil Code). However, if there is any ambiguity as to the meaning of a contract, UAE courts will adopt a subjective approach to contractual interpretation. This means judges seek to ascertain the common intention of the parties from the expressions and forms of words used rather than determining the objective meaning of a contractual term (article 265 of the Civil Code).

The rule of construction laid down in article 265 of the Civil Code is qualified by article 266 of the Civil Code, which provides that 'doubt shall be interpreted in favour of the debtor'. There is some uncertainty regarding the proper application of this article but it is widely understood to mean that uncertainty (to the extent uncertainty remains after the application of the rule of construction in article 265 of the Civil Code) should be resolved in favour of the party required to perform the relevant obligation.

5 Describe any commonly recognised industry standards for establishing liability.

Industry standards for establishing liability include 'reasonable and prudent operator', 'wilful misconduct' and 'gross negligence'. However, these are not recognised legal concepts under the Civil Code and therefore these concepts are specifically defined in agreements. It is important to note that the Civil Code provides that any contractual provision exempting a party from liability for a harmful act will be void (article 296 of the Civil Code).

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?

There are a number of provisions in the Civil Code that reflect the concepts of force majeure, commercial impracticability and frustration.

Article 249
When, as a result of exceptional and unpredictable events, the performance of a contractual obligation becomes excessively onerous, the judge may, if justice so requires, and after taking into consideration the interests of both parties, reduce to reasonable limits the obligation that has become excessive.

Article 273
If force majeure makes the performance of an obligation impossible, the corresponding obligation is extinguished. While the Civil Code does not provide a definition of force majeure, it is generally considered to require an exceptional and unforeseen event of a public nature.

Article 287
If a party can establish that an event arising from extraneous circumstances caused loss, that party will not be bound to make good the loss, provided that the cause was outside its control.

Article 893
If an excuse arises that prevents the implementation of a contract, or completion thereof, a contracting party may ask for its rescission or termination.

The ability of a party to rely on such concepts to excuse performance during periods of commodity price or supply volatility will depend on the particular facts of the case, the project in question and the respective contractual obligations of the parties.

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 principle of nuisance, as understood in common law systems, is not specifically recognised under UAE law. However, the principle of tortious liability (an act causing harm) is recognised and addressed in articles 124 and 282 to 298 of the Civil Code.

The Civil Code provides that a person shall be liable under tort if he or she commits an act or omission that results in loss or damage to another. In order to establish liability it is not necessary to prove that a party intended to cause loss. It is sufficient to establish that a party breached a legal obligation to take reasonable care.

The harm caused as a result of the tortious act is categorised as either direct or consequential. If the harm is a result of a direct act, it must unconditionally be made good. Harm caused by a consequential act only needs to be remedied if there was a wrongful act or a deliberate intention to cause harm.

8 How may parties limit remedies by agreement?

It is common for contracts in the energy sector in the UAE to include liability caps and liquidated damages provisions and such clauses are generally enforceable.

However, article 390 of the Civil Code provides that the court can, upon request of a party, vary the amount of agreed compensation according to the actual damage suffered, as assessed by the court. Courts have relied on article 390 to reduce the amount that would otherwise have been payable under a liquidated damages clause, although theoretically the article could also be used to increase the amount that would have otherwise been payable under a limitation of liability clause.

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

The most relevant provision in the Civil Code in respect of strict liability applicable for damage resulting from any activities in the energy sector is article 880. It provides that, where the object of the contract was the erection of buildings or other fixed construction that an architect or designer has designed to be executed by the contractor, under his or her supervision, they shall be jointly liable to the employer, for a period of 10 years, for the total or partial destruction of the building or fixtures, or any defects threatening the soundness or stability of the building. Any contractual provision seeking to limit the architect or contractor's liability under article 880 of the Civil Code will be void, pursuant to article 882 of the Civil Code.

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?

With respect to choice of forum, if faced with any ambiguity, UAE courts are likely to determine they have jurisdiction. The jurisdiction of UAE courts is wide and includes matters involving UAE nationals, non-UAE nationals who have a domicile or place of residence in the UAE, UAE companies, or agreements made or performed in the UAE.

In respect of choice of law, article 19 of the Civil Code provides that, in the absence of an express or implied choice, contractual obligations shall be governed by the law of the country of the common domicile of the parties, or if they have separate domiciles, the law of the place of conclusion of the contract. To the extent that it is unclear what law the parties intended to apply due to competing clauses, the courts should revert to this rule. However, in practice, it is not uncommon for UAE courts to apply UAE law in preference to foreign law.

Regarding the mode of dispute resolution, UAE courts construe arbitration agreements restrictively. Therefore, to the extent that there is ambiguity regarding the parties' intention to arbitrate, UAE courts are likely to resolve the conflict in favour of the court hearing the dispute.

The Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM), however, each have their own separate court systems. The DIFC and the ADGM are financial free zones within Dubai and Abu Dhabi respectively, with their own autonomous and independent judicial systems, based on the common law system. The DIFC courts and ADGM courts each have jurisdiction over civil and commercial matters within their respective free zones and will give effect to a choice of law clause.

In Dubai, a judicial tribunal was established in 2016 to resolve conflicts of jurisdiction between the DIFC courts and the 'on-shore' Dubai courts. To date, most jurisdictional conflicts have been resolved by the judicial tribunal in favour of the Dubai courts. However, as the judicial tribunal is relatively new, it is still too early to identify a clear practice in the approach of the judicial tribunal to jurisdictional conflicts.

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

It is common for contracts relating to the energy sector in the UAE to require that parties attempt to resolve disputes amicably prior to commencing arbitration proceedings (these are known as 'stepped' or 'tiered' dispute resolution provisions). Such clauses are not specifically addressed by the Civil Code but, given that the Civil Code recognises freedom of contract and the implied obligation of good faith, it is expected that such provisions would be enforceable.

'Split' or 'hybrid' dispute resolution clauses, whereby contracts provide for court or arbitration proceedings, coupled with a mechanism allowing one or both parties the right to determine the procedure once a dispute arises, are not common in the energy sector in the UAE. Caution should be used whenever such clauses are considered in arbitration agreements governed by UAE law or where enforcement of an arbitration award would be sought in the UAE. While we are not aware of UAE courts having considered such clauses, there is a risk that they would refuse to enforce such provisions on the basis that they do not provide a proper reference to arbitration (where only one party has the right to refer the matter to arbitration) or they are unfair and against public policy (where they are one-sided).

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

Commercial disputes before UAE courts (excluding the DIFC courts and ADGM courts) involve the exchange of written submissions. Witness evidence and oral submissions are not common, although

expert evidence is commonly used and can be highly influential on the court. The use of expert evidence is governed by Federal Law No. 7 of 2012 on the Regulation of Expertise Before the Judicial Authorities and Federal Law No. 10 of 1992 on Evidence in Civil and Commercial Transactions. The appointment of an expert may be made upon application of one of the parties to the proceedings, but it is also common for courts to appoint experts on their own initiative.

The Rules of the Dubai International Financial Centre Courts 2014 (RDC 2014) and the ADGM Court Procedure Rules 2016 (CPR 2016) govern the appointment of experts in the DIFC courts and ADGM courts respectively, and are based on the English Civil Procedural Rules. There may be court-appointed experts, a party-appointed expert or a single joint expert. The parties require the permission of the courts for the appointment of an expert but in respect of complex energy disputes, a party is unlikely to face difficulty obtaining permission.

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

Only a limited range of interim and emergency relief is available through UAE courts. However, UAE courts do have the ability to provide provisional relief in the form of an attachment of assets. To obtain an order for attachment of assets a claimant must satisfy the court that it has a valid claim and that there is a risk that, unless the relief is granted, the defendant will not comply with a monetary judgment or will dissipate its assets. The claimant must identify the assets sought to be attached. Applications for attachment of assets are heard ex parte. If an attachment order is granted, a substantive claim must be commenced within eight days of the order being granted.

The DIFC courts and ADGM courts have discretion to order a wide range of interim and emergency relief, which go beyond the remedies that are generally available in UAE courts. Part 25 of the RDC 2014 and Part 10 of the CPR 2016 contain a non-exhaustive list of interim remedies that may be granted, which include interim injunctions; orders for the preservation of property; orders restraining a party from dealing with assets; and orders for the disclosure of documents against a non-party.

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

The enforcement of foreign judgments or arbitral awards in the UAE is not straightforward.

For the purpose of enforcement, a judgment or award must first be ratified by a UAE court. The ratification of a judgment or award is addressed in article 235 of the Civil Procedure Code. It provides that a foreign judgment or award will only be ratified if the UAE courts did not have jurisdiction to hear the original dispute and the judgment or award does not contradict any judgment or award issued in the UAE, and does not offend public morality or public policy. In practice the above criteria are widely applied, which makes the enforcement of foreign judgments and awards in the UAE challenging, unless a multilateral or bilateral treaty applies.

Article 238 of the Civil Procedure Code provides that the rules in article 235 of the Civil Procedure Code do not prejudice treaties between the UAE and other states. The UAE is a party to a number of multilateral and bilateral treaties relating to the recognition and enforcement of foreign arbitral awards and judgments, including the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards (the New York Convention). Therefore, where the New York Convention applies, recognition and enforcement of a foreign award should be pursuant to the terms of the convention rather than article 235 of the Civil Procedure Code.

Unfortunately, UAE courts have not been consistent with the recognition and enforcement of foreign arbitral awards, and in some cases the courts have relied on the provisions of article 235 of the Civil Procedural Code to refuse recognition. However, increasingly, and in particular in the courts of Dubai, there appears to be an acceptance that the substantive merits of the arbitral award should not be reviewed when considering the ratification and enforcement of an arbitral award where the New York Convention applies. Although, as there is no doctrine of binding precedent in the UAE, the courts may, in some instances, continue to apply the provisions of article 235 of the Civil Procedure Code to refuse recognition and enforcement of a foreign arbitral award.

Enforcement of a foreign judgment or award in the DIFC is more straightforward and a number of memorandums of guidance on the procedure for enforcement of foreign judgments have been entered into by the DIFC courts with other courts, including the English Commercial Courts, the Federal Court of Australia and the Supreme Court of Singapore.

In the ADGM, a foreign judgment or award from a country where there is an applicable treaty with the UAE for the mutual recognition and enforcement of judgments or awards (such as the New York Convention) should, in theory, be enforced by the ADGM courts. However, enforcement of foreign judgments and awards in the ADGM remains untested.

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

There are no specialist energy arbitration institutions in the UAE.

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

Energy contracts involving foreign investors generally provide for arbitration because of the ability to provide for determination of disputes in an independent country by an independent arbitrator or a panel of arbitrators, in a private and confidential manner.

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

Without prejudice communication is not a recognised concept under UAE law. Documents marked 'without prejudice' and settlement discussions can therefore be referred to in court if a settlement is not achieved. However, as a matter of practice, expatriate practitioners in the UAE generally respect the concept of 'without prejudice'.

There are alternative solutions under UAE law that can be used to ensure that settlement discussions are not later referred to in court. This includes entering into confidentiality agreements in respect of settlement discussions and settlement offers.

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

E-disclosure or e-discovery is not used in litigation before UAE courts as there is no formal process of discovery and disclosure of documents is usually very limited. As such, there are no specific data protection or privacy issues that arise in respect of e-disclosure or e-discovery. It is, however, a criminal offence under article 379 of Federal Law No. 3 of 1987 concerning the Penal Code for a person who has received or accessed confidential information by virtue of their profession or position to divulge this information, other than in circumstances allowed by law. Prior to putting any document before the UAE courts, consideration should be given to confidentiality obligations.

The DIFC courts and the ADGM do have a formal process of disclosure of documents, and the definition of documents under the RDC 2014 and the ADGM court's Practice Direction on disclosure extends to electronic documents. In addition, the DIFC and the ADGM have enacted data protection laws and obligations under these laws should be considered when meeting e-disclosure obligations in court proceedings in the DIFC or the ADGM.

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

The concept of attorney–client privilege and work product privilege does not exist before UAE courts. However, local advocates are regulated by Law No. 23 of 1991 on the Regulation of the Legal Profession, which prohibits an advocate from revealing confidential information unless it is to prevent the perpetration of a crime (article 42). In-house counsel, as with other employees, have a duty not to reveal the secrets of their employer under Federal Law No. 8 of 1980 concerning the Regulation of Labour Relations (the Labour Law). However, this does not amount to privilege as understood in common law jurisdictions.

In respect of the DIFC courts and the ADGM courts, privilege is recognised in rule 28.28(2) of RDC 2014 and rule 90(2) of CPR 2016 as a valid ground for withholding production of disclosable documents.

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

There is no requirement for certain energy disputes to first be heard before an administrative agency.

Regulatory

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

The Ministry of Energy is the federal body responsible for the implementation of energy policies and for ensuring that companies and government authorities comply with those policies. However, in practice the larger emirates, such as Dubai and Abu Dhabi, control their own energy policies.

The Dubai Supreme Council of Energy is the primary governing body for the energy sector in Dubai. The Council seeks to ensure that Dubai's growing economy will have sustainable energy while preserving the environment. The Council's aims include developing alternative and renewable energy sources for Dubai while increasing energy efficiency to reduce demand. The electricity and water sector in Dubai is regulated by the Regulatory and Supervisory Bureau, which is responsible for issuing licences, determining standards and monitoring compliance.

In Abu Dhabi the oil and gas industry is administered and regulated by the Supreme Petroleum Council (SPC). The SPC is responsible for formulating and implementing Abu Dhabi's petroleum policy and also acts as the board of directors for the Abu Dhabi National Oil Company. The water and electricity sector in Abu Dhabi is regulated by the Regulation and Supervision Bureau (Abu Dhabi RSB). It is also responsible for issuing licences to conduct regulated activities (such as the generation, transmission, distribution and sale of electricity), monitoring compliance and making regulations.

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

UAE law does not provide new entrants to the market with any specific rights to access infrastructure – access rights are generally a matter of contract. Under the UAE Constitution, the ruler of each emirate ultimately owns the land in that emirate and the construction of pipelines and other associated energy infrastructure requires a grant of rights from the relevant ruler. Consequently, the ruler retains inherent rights of access. However, as participation in major energy projects is generally through concession agreements with the relevant government authorities, access issues rarely arise.

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?

There is no judicial review in the UAE and little scope to challenge the decisions of the energy regulators. However, disputes between the Abu Dhabi RSB and persons conducting a regulated activity, that relate to a decision of the Abu Dhabi RSB can be referred to arbitration pursuant to Law No. 2 of 1998 Concerning the Regulation of the Water and Electricity Sector in the Emirate of Abu Dhabi.

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

There is no specific legal and regulatory position in respect of hydraulic fracturing in the UAE, but hydraulic fracturing opportunities are being explored.

25 Describe any statutory or regulatory protection for indigenous groups.

There is no statutory or regulatory protection for indigenous groups in the UAE, although the UAE has recently passed a federal law protecting antiquities.

Update and trends

On 1 January 2018, a 5 per cent value added tax (VAT) will be introduced in the UAE. Businesses meeting a certain threshold (ie, making supplies in excess of approximately US$100,000 per year) will be required to register for VAT. VAT will therefore have a direct effect on businesses operating in the energy sector, although certain categories of supplies, including the supply of crude oil and natural gas, will be zero rated.

Although the UAE is continuing to expand its development of green energy projects, the UAE has not introduced any specific climate change regulations following its ratification of the Paris Agreement in September 2016. Government ministries are, however, continuing to consider the UAE's regulatory position and any changes required to implement the UAE's strategic plans. To the extent that regulatory changes are introduced, consideration will need to be given to the impact of any changes and who will bear any associated costs (eg, pursuant to a change in law clause, which are typically included in energy sector contracts).

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

Foreign companies play a major role in the development of energy projects in the UAE and continue to hold significant equity stakes in oil concessions. However, participation in energy projects is generally dependent on entering into concession agreements with government authorities or joint ventures with state-owned companies.

There is a general requirement under Federal Law No. 2 of 2015 concerning Commercial Companies (known as the Commercial Companies Law) that UAE entities be majority owned by UAE nationals or wholly owned by UAE entities. Companies that undertake certain activities in the oil and gas sector are exempt from this requirement. However, in practice, the UAE federal government and each emirate limit, through the granting of concessions and contractual arrangements, foreign and non-government ownership in the energy sector.

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

Companies in the UAE can face environmental liability from breaches of permits, federal laws and laws of the individual emirates. Federal Law No. 24 of 1999 on the Protection and Development of the Environment contains articles prohibiting the pollution of the marine environment, air, land and ground and drinking water. Penalties include fines, imprisonment and the death penalty (for acts relating to nuclear materials). In addition to fines, a person who intentionally or negligently causes damage to the environment is responsible for the cost of repairing the damage and compensating others for losses resulting from the damage.

There are a number of sources of corporate criminal liability in the UAE. Penalties include fines and for some crimes, such as certain acts relating to bankruptcy, imprisonment. In particular, companies in the energy sector should be aware of their obligations under:

- Federal Law No. 4 of 2002 on Anti-Money Laundering and Combating the Financing of Terrorism;
- Federal Law No. 2 of 2015 concerning Commercial Companies, which imposes penalties for various acts, including acts relating to false statements and distributing profits in contravention of the law or the company's Memorandum of Association; and
- Federal Law No. 18 of 1993 issuing the Commercial Transactions Law.

Health and safety issues are primarily regulated by the Labour Law and Ministerial Decision No. 32 of 1982 on Determination of Methods and Measures to Protect Workers against Occupational Risks. Ministerial Decision No. 32 of 1982 sets out detailed health and safety requirements, including requirements relating to providing a safe workplace, training on hazards and notification of accidents. Also relevant to employees in the energy sector are Ministerial Decision No. (4/1) of 1981, which provides that employees undertaking hazardous work, such as oil refining, shall not be required to work more than seven hours a day; and Ministerial Decision No. (27/1) of 1981, which outlines various amenities that must be provided to workers in remote areas.

The penalties for failing to comply with the Labour Law or ministerial decisions are imprisonment or a minimum fine of 10,000 dirhams, or both (article 181 of the Labour Law). These penalties may be levied on a director or, if there is reason to believe they were aware of the facts constituting the offence, the owner of a company (article 184 of the Labour Law). Article 186 of the Labour Law provides that the Ministry of Labour should, to the extent possible, refrain from initiating penal action until it provides advice and guidance to employers and, when necessary, issues a written warning.

Other

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

There are ongoing disputes between the UAE, Saudi Arabia and Qatar over their land and sea borders. The dispute between the UAE and Saudi Arabia over its land borders has hampered the exploration for resources in this area. In June 2017 the UAE severed diplomatic ties with Qatar (as did several other countries in the region) and closed its airspace and territorial waters to Qatar. However, the supply of gas through the Dolphin gas pipeline appears, to date, to be unaffected.

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

The UAE is not a party to the Energy Charter Treaty. It has, however, entered into a number of bilateral investment treaties (BITs) and multilateral investment treaties (MITs), and is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).

In respect of nuclear energy, the UAE is a signatory to the Convention on Supplementary Compensation for Nuclear Damage, the 1963 Vienna Convention on Civil Liability for Nuclear Damage (as amended by the 1997 Protocol) and the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention.

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

Investors from countries with BITs or MITs with the UAE will be able to avail themselves of the protection in these treaties. Notably, the UAE has entered into BITs with China, France, Germany, Jordan, Korea, Russia and the United Kingdom and is a signatory to the Unified Agreement for the Investment of Arab Capital in Arab States and the Agreement on Promotion, Protection and Guarantee of Investments of the Organisation of Islamic Cooperation. Another important consideration for investors in the energy industry in the UAE, in order to protect themselves, is to conduct detailed due diligence on their local partners prior to entering into any joint venture or contractual arrangement.

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.

The National Electronic Security Authority is the government body responsible for cybersecurity in the UAE. It has released a set of standards and guidance for government entities. These include a Critical Information Infrastructure Protection Policy and Information Assurance Standards (based on ISO 27001:2005). Compliance with these standards is mandatory for government entities in critical sectors.

ashurst

Dyfan Owen **dyfan.owen@ashurst.com**
James MacDonald **james.macdonald@ashurst.com**

Sky Tower, Office 1305
Al Reem Island, PO Box 93529
Abu Dhabi
United Arab Emirates

Tel: +971 2 406 7200
Fax: +971 2 406 7250
www.ashurst.com

United Kingdom

Neil Q Miller, Holly Stebbing and Ayaz Ibrahimov
Norton Rose Fulbright LLP

General

1 Describe the areas of energy development in the country.

The UK energy industry comprises a diversified range of sub-sectors including coal, oil, gas, onshore and offshore wind farms, solar farms, hydroelectric, tidal and nuclear.

The UK Continental Shelf Act came into force in 1964 and the first exploration licences for offshore oil and gas were issued for the North Sea shortly thereafter, with production commencing in the 1970s. Production peaked in 1999 and though now in decline, according to industry body Oil and Gas UK, it is estimated that there could be up to 20 billion barrels of oil and gas still to recover from the UK's offshore areas. The government's focus is now on maximising economic recovery (MER) from the UK North Sea.

The UK currently has 15 nuclear reactors generating about 21 per cent of its electricity, with almost half of these to be retired by 2025 when it is planned that new reactors will come on-stream. In September 2016, the UK government gave the go-ahead to build a new nuclear plant at Hinkley Point, which is estimated to start generating electricity by 2025. The construction is progressing according to the expected timetable with nearly £9 billion of contracts signed since the approval of the project.

With a target of sourcing at least 15 per cent of the UK's energy from renewable sources by 2020, government subsidies for renewable energy development have prompted a proliferation of onshore and offshore wind farms and solar farms throughout the UK. However, funding for further onshore wind and solar farms has been withdrawn and, although renewable energy currently comprises 40 per cent of the UK's electricity, the country is still far off its targets for heat and transport, making it likely that the UK will not meet its overall 2020 target. The UK Treasury has recently published a new framework designed to limit 'green taxes' amidst concerns at the costs that consumers are picking up in their energy bills. However, existing agreements still stand and the government has committed over £550 million of funding to support less well established renewable technologies, including offshore wind.

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

Rights to oil and gas in the UK belong to the state. The Petroleum Act 1998 vests all rights to petroleum in the Crown, with licences being granted to third parties to explore for and exploit oil and gas resources. This function was historically carried out by the Secretary of State but was transferred over to the Oil and Gas Authority (OGA) upon the entry into force of the Energy Act 2016. A separate regime applies to onshore oil and gas in Northern Ireland, established under the powers devolved to the Northern Ireland Assembly. The OGA issues licences through competitive licensing rounds that generally take place every year. Companies wishing to participate in the UK oil and gas sector must bid for licences, or seek to acquire an interest in existing assets from third parties. Any such acquisition will be subject to regulatory consents. The terms and conditions for each licence are set out in secondary legislation under the Petroleum Act and are known as 'model clauses'.

The government's stated energy policy is focused on MER of hydrocarbons from the UK Continental Shelf and it has recently bolstered tax incentives to encourage investment from industry as output declines. There is also government support for the development of shale gas in the UK, with changes having been made to planning law to assist with development of this energy resource. Conversely, the government has withdrawn subsidy support for certain renewable energy development in the UK, for all but a limited number of developing renewables technologies.

There is some uncertainty over how the Brexit vote will affect UK energy policy. On 29 March 2017, a formal notice to withdraw from the EU was served by the UK, which triggered a two-year period of exit negotiations. It remains unclear whether, and if so, on what terms, the UK will continue to participate in the Internal Energy Market or whether a new set of bilateral agreements will be negotiated. Alongside withdrawal from the EU, the UK will leave the European Atomic Energy Community (Euratom), which role is to promote and support the development of nuclear energy in Europe, by regulating the nuclear industry, safeguarding the transportation of nuclear materials, overseeing the safe disposal of nuclear waste, and carrying out nuclear research. On 11 October 2017, the Nuclear Safeguards Bill 2017-19 was introduced in Parliament, setting out the government's proposals for a UK-specific safeguarding regime to replace the existing framework following the UK's exit from the Euratom.

Until the UK exits the EU, the existing legal and regulatory regime is likely to remain in place in materially the same form. The government has introduced the European Union (Withdrawal) Bill, which will convert existing EU law into domestic law on the date the UK leaves the EU. The government has always retained control over its energy policy, including key matters such as licensing and taxation of oil and gas exploration, appraisal, development and production activities. Consequently, it is generally expected that there are unlikely to be dramatic changes to the UK oil and gas industry. However, the Brexit vote has already affected the organisational structure governing the UK energy industry, particularly with the merger of the Department for Energy and Climate Change (DECC) with the Department for Business, Innovation and Skills to create a new Department of Business, Energy and Industrial Strategy (BEIS), as described in further detail below. This may indicate more active involvement by the government in the future with an energy strategy focused increasingly towards economic stimulation and business growth.

Commercial/civil law – substantive

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

Oil & Gas UK, a not-for-profit representative body for the UK offshore oil and gas industry, publishes a standard form joint operating agreement, confidentiality agreement, pipeline crossing agreement and decommissioning security agreement. Its subsidiary, LOGIC, supports a suite of 10 standard contracts that cover a broad range of oil and gas operations in the UK Continental Shelf (UKCS), including on and offshore services, well services, construction (including marine construction) and supply of equipment. These standard forms are widely used across the industry.

A Master Deed for UKCS asset transfers has also been developed as part of a joint industry and government initiative to lower barriers to UKCS development. The Master Deed aims to standardise existing pre-emption arrangements, create pro-forma transfer agreements and

reduce complexities around signature and the timing of completions. LOGIC facilitates these transfers by performing the administrator function within the Master Deed.

The Association of International Petroleum Negotiators (AIPN), an independent not-for-profit professional membership association that supports international energy negotiators also publishes model form contracts, including a joint operating agreement, farmout agreement, confidentiality agreement, gas sales agreement and unitisation and unit operating agreement, although these are less commonly used in the UK.

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

Contractual interpretation is the task of ascertaining the meaning that the words of a contract would convey to a reasonable person. Under English law, modern contractual interpretation is a matter of applying general principles of construction rather than strict rules. These principles apply equally to energy contracts, as to other contracts. The starting point for the court will be to look at the language used by the parties and to interpret it in accordance with its conventional usage in order to understand the parties' intentions. Those intentions will be assessed objectively.

Where there are two or more possible interpretations of a term, that which has most business common sense will typically prevail. However, while the courts will be reluctant to adopt an interpretation that will lead to a very unreasonable result, it will keep in mind that the parties may indeed have agreed to something unreasonable or commercially unwise. In the Supreme Court decision in *Arnold v Britton* [2015] EWSC 36, judges were cautioned not to disregard the literal wording of the contract in pursuit of commercial common sense. Lord Neuberger said: 'First, the reliance placed in some cases on commercial common sense and surrounding circumstances ... should not be invoked to undervalue the importance of the language of the provision ... the clearer the natural meaning the more difficult it is to justify departing from it'. In the recent decision of *Wood v Capita Insurance Services Limited* [2017] UKSC 24, the Supreme Court confirmed that a court will look at both the language of the contract (textualism) as well as the commercial context in which the contract was drafted (contextualism) to ascertain the objective meaning of the clause in question.

The courts will not read a particular word, phrase, sentence or clause in isolation but will consider the contract as a whole, including giving due consideration to the commercial purpose of the contract.

As considered in more details below, clear words must be used to exclude rights or remedies that arise by operation of law. The courts will start on the premise that neither party intends to abandon any remedies that arise by operation of law. Express wording should therefore be used to rebut that premise (*Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689). The principle of contra proferentem or strict interpretation will also be used in certain circumstances, including where a clause is relied on that only stands to benefit one party. However, there must be some ambiguity before the rule will be applied and in negotiated commercial contracts the rule has limited applicability. In particular, the Court of Appeal decision in *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373 casts doubt on whether the contra proferentem principle continues to apply to the interpretation of exclusion clauses and suggests that strict interpretation is increasingly seen by the courts as outdated. In this decision the court emphasised that the wording of the clause, the relevant context, and commercial common sense should be sufficient in determining the meaning of a contract term.

In limited circumstances the court may be willing to imply certain terms if, having regard to the express wording of the agreement, it is unable to ascertain the meaning. However, the courts are not permitted to imply essential terms (ie, where the effect is to make a contract where one would not otherwise exist) as per *Wells v Devani* [2016] EWCA Civ 1106. Similarly in the case of *Teekay Tankers Ltd v STX Offshore Ltd* [2017] EWHC 253, the Commercial Court confirmed that where the parties have deliberately agreed to specify an essential term at a later date (eg, delivery dates), the courts will not imply a term in order to uphold the parties' contractual bargain especially in the absence of any objective criteria or mechanism through which any such essential term may later be finalised (eg, expert determination).

Finally, where a general phrase follows a list of specific items in a contract, the phrase will generally be interpreted as being limited to other examples of the same type. This is known as the ejusdem generis rule.

5 Describe any commonly recognised industry standards for establishing liability.

The terms 'wilful misconduct' and 'gross negligence' are commonly used in contracts in the UK energy sector to define and allocate liability between contracting parties. However, these terms are not recognised principles of English law. Their meaning must therefore be defined in the contract or they will be subject to interpretation by the courts in accordance with usual principles of contractual construction.

The English courts have been reluctant to define 'wilful misconduct' but in *Porter v Magill* [2001] UKHL 67 the court referred to deliberately doing something which is wrong, knowing it to be wrong or having reckless indifference as to whether or not it is wrong. In *National Semiconductors (UK) Ltd v UPS Ltd J* [1996] 2 Lloyd's Rep 212 Longmore J said that wilful misconduct requires either an intention to do something that the actor knows to be wrong; a reckless act that the actor is aware may cause loss but does not care whether loss will result or not; or the taking of a risk that the actor knew he or she ought not to take. There is, however, no need to prove motivation or intentional malice.

The English courts have distinguished gross negligence from simple negligence by looking at the seriousness of the act or omission committed, or whether the conduct complained of equates to recklessness (see *Red Sea Tankers Limited v Papachristidis* [1997] 2 Lloyd's Rep 547).

Parties may also hold themselves to the standard of 'reasonable and prudent operator'. Again, this is not a recognised principle of English law and therefore a definition of the standard will typically be found in the contract. In *Scottish Power UK PLC v BP Exploration Operating Company Limited & Ors* [2015] EWHC 2658, the Commercial Court (as upheld by the Court of Appeal) held that a party that deliberately decides not to perform one of its contractual obligations is not acting as a reasonable and prudent operator and it cannot hide behind that standard to justify its breach.

Finally, there is no general duty to perform contracts in good faith under English law. While parties can include an express duty to act in good faith, or wording of a similar nature in a contract, the English courts have generally been reluctant to develop any doctrine of good faith. For example, in *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 the court refused to imply a term that a party could not terminate the agreement in bad faith. The dispute concerned a consultancy agreement requiring Monde to assist WesternZagros in securing an oil contract in exchange for a fee and an option to hold a 3 per cent stake in the future investment. Shortly after the contract was secured, WesternZagros terminated the consulting agreement, depriving Monde of its future interest in the investment.

The courts may, however, use the concept of good faith to imply fact-specific duties into the parties' relationship (see for example the 2013 decision *Yam Seng Pte Limited v International Trade Corporation Limited* [2013] EWHC 111) and in an industry where relational contracts are common, any developments in this area will be watched with interest.

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?

English law takes a strict approach to contractual performance and will only excuse discharge of a party's contractual obligations in very limited circumstances. The basic premise is pacta sunt servanda or 'agreements must be kept'. Only where a supervening event has rendered performance of a contract impossible, or essentially and radically different from that which the parties contemplated, will the common law doctrine of frustration apply. As a consequence of frustration the contract is automatically discharged and the parties are excused from their future obligations. A contract is not discharged by frustration where it is merely more difficult or expensive to perform. Consequently, parties will not be excused from contractual performance during periods of commodity price and supply volatility. These will generally be considered foreseeable risks, which are capable of allocation between the parties by the express terms of the contract.

While there is no English law concept of force majeure, it is common to see express force majeure clauses in contracts. These clauses define what constitutes an event of force majeure and set out the consequences of such an event. As well as widening the circumstances in which performance may be excused beyond the very narrow range of events that will frustrate a contract, a force majeure clause can also provide for the consequences of such an event, whereas if a contract is frustrated, it is treated as immediately and totally terminated (irrespective of the wishes of the parties).

It is relatively uncommon for parties to treat commodity price or supply volatility as events of force majeure, and in some cases it is explicitly excluded. For example, in AIPN's model form gas sales agreement, the force majeure clause provides that the definition of force majeure will not include changes in the market. Instead, parties may use hardship clauses or material adverse change clauses to relieve a party from continued contractual performance where it has become economically disadvantageous (but not impossible).

A hardship clause operates so that if, over time, changes in the market result in relative 'hardship' to a party, it can reopen the terms of the contract to negotiate better economic or other terms. Some clauses provide that if agreement of revised terms cannot be agreed, an independent third party will decide the issue.

Finally, if there is an accepted threshold beyond which it is uneconomic or impossible to continue to supply goods or services, then the parties can link these thresholds to the contractual termination provisions.

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?

Nuisance claims can be divided into common law nuisance (private and public) and statutory nuisance under Part III of the Environmental Protection Act 1990. There are 11 categories of statutory nuisance including noise from premises (including vibration); dust, steam, smell or other effluvia from industrial, trade or business premises; and any accumulation or deposit.

For a claim of private nuisance, the claimant must have a direct proprietary interest in the land affected by the nuisance. A claimant can bring civil proceedings against a defendant for either or both damages to compensate for their loss or injunctive relief to require the defendant to abate a continuing nuisance and to prevent its recurrence. This means that energy developments can be halted by injunctions where the claimant entity establishes a claim in nuisance.

In contrast to private nuisance, the claimant in public nuisance and statutory nuisance claims is not required to have a property interest that is affected. For statutory nuisance the onus and cost is on a local authority to take action to ensure that the nuisance is abated.

For certain types of development, including the construction of windfarms and solar parks and hydrocarbon extraction, an environmental impact assessment (EIA) is needed before a project can receive development consent. The purpose of an EIA is to assess the potential impact of the project on the environment. Any successful planning permission application will have conditions attaching to it in order to minimise any potential nuisance. However, the fact that a defendant has planning permission for the activity causing a nuisance is not a defence to a common law nuisance claim. Neither is the defendant's compliance with an environmental permit, of itself, a defence.

8 How may parties limit remedies by agreement?

Contracts in the energy sector will typically include comprehensive regimes for the allocation of liabilities between parties, using a variety of contractually agreed remedies and exclusions of liability. As a matter of English law, contracting parties have a wide freedom to limit remedies by agreement, although this must be done expressly. Courts will generally proceed on the basis that parties do not intend to give up rights or claims which the general law gives them and accordingly any such rights are only capable of being excluded and limited using clear words to that effect (*Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689). In *Scottish Power UK PLC v BP Exploration Operating Company Ltd and Others* [2016] EWCA Civ 1043, Scottish Power (Buyer) entered into long-term agreements for the sale and purchase of natural gas from the sellers. The agreements provided that the only remedy the buyer was entitled to in respect of any underdeliveries was default gas at the default gas price (70 per cent of the contract price). The buyer subsequently initiated proceedings against the sellers, claiming that in underdelivering gas the sellers had breached their obligation to operate the facilities to the standard of a reasonable and prudent operator (RPO) and that accordingly, Scottish Power was entitled to common law damages, rather than default gas. Scottish Power argued that a breach of the RPO standard was not caught by the default gas regime, which only applied to underdeliveries caused by events such as non-negligent accident or a natural cause (ie, underdeliveries despite compliance with the standard of RPO). However, the Court of Appeal held that the contractual drafting was sufficiently clear in providing for the exclusive remedy of default gas in respect of any underdeliveries (howsoever caused) and that there was therefore no scope for the payment of additional common law damages. This case demonstrates that clear and unequivocal drafting can operate to replace common law rights with a different contractual remedy.

Agreements in the oil and gas sector may include an overall cap on one party's liability to the other. The cap can be applied annually or over a lifetime of the relevant agreement and can be expressed in a variety of ways (eg, by reference to the contract price, tariff or capacity payments in gas transportation agreements).

Liquidated damages clauses are also used, which prescribe a fixed sum or sums to be paid in the event of certain specified breaches of contract (again, often up to an agreed cap). They are frequently used in construction contracts for delay-related breaches and will typically be an exhaustive remedy precluding the innocent party from claiming general damages. Liquidated damages can also apply to other breaches of contract, for example, as above for underdeliveries in long-term supply contracts.

If a liquidated damages clause amounts to a penalty it will not be enforceable on grounds of public policy. The traditional definition of a penalty looks at whether the liquidated damages constitute a genuine pre-estimate of loss and whether the overriding objective was deterrence from breach rather than compensation for damage suffered. However, the Supreme Court reconsidered the law on penalties (in *Cavendish Square Holding BV v El Makdessi* [2015] 3 WLR 1373 and *Parking Eye Ltd v Beavis* [2015] UKSC 67) and held that to be a penalty, a clause must be a secondary obligation which imposes a detriment out of all proportion to a legitimate interest of the innocent party.

Clauses excluding liability for particular types of loss are also commonly used and, consistent with the principle of freedom of contract, permissible under English law. However, as set out above, such clauses will be interpreted strictly and the courts will only accept that a party has surrendered legal remedies where clear words to that effect are used. Recovery of consequential losses are often excluded from recovery but the definition of what constitutes a 'consequential loss' is a matter of debate among English lawyers and accordingly these clauses are frequently litigated. The recent appeal decision in *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] EWCA Civ 372 is a good example of this. In *Star Polaris v HHIC-Phil Inc* [2016] EWHC 2941 exclusion of liability for 'consequential losses or expenses' was given an expansive meaning by the court and reduced the range of recoverable damages under the contract. The general rule under English law for the recovery of damages following breach of contract is set out in *Hadley v Baxendale* [1854] 9 Ex 341. Recoverable losses are those that either arise naturally or directly from the breach of contract (known as direct losses) or those that were within the contemplation of the parties at the time of the contract (known as indirect or consequential losses). Where 'consequential loss' is excluded under an exclusion clause it will typically be interpreted as excluding recovery of losses under the second limb. Accordingly, where a party can show that a loss of profit is a direct loss (ie, limb 1), then those losses will be recoverable.

Other types of contractually agreed remedies seen in joint operating agreements in the oil and gas sector include, loss of voting rights, loss of petroleum entitlements, forfeiture and withering clauses to give parties access to remedies that would not be available at law and to promote contractual certainty. Historically there had been concern that forfeiture could amount to a penalty but the recent Supreme Court cases mentioned above have alleviated these concerns in the context of joint operating agreements as such agreements would seem to be good examples of cases where there is a wider legitimate interest beyond compensating the innocent party.

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

Strict liability applies to certain health and safety, and environmental offences. The UK has a highly developed health and safety and environmental regulatory regime that applies to all industries and includes a particular focus on the extractive industries, which are perceived as high risk. Lessons learnt from incidents that have occurred in the oil and gas sector, such as the Piper Alpha disaster, have contributed to the development of this regime.

Strict liability is applicable to the operators of nuclear installations and extends to any damage to third parties caused by radioactive emissions from the installation. The nuclear liability regime in the UK is based on the Paris and Brussels Conventions together with the yet to be ratified 2004 Protocols. In preparation for the ratification of the Protocols, on 4 May 2016 the UK government issued the Nuclear Installations (Liability for Damage) Order 2016 which puts the existing UK nuclear liability regime in line with the protocols by increasing the scope of operators' liability and broadening the coverage in the event of a nuclear incident. Once the protocols are ratified, the order will come into force, which is not expected to take place until the beginning of 2018 at the earliest.

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?

While the case law in this area is not entirely consistent, the overall approach of the English courts to competing choice of dispute resolution or governing law clauses is one of contractual interpretation.

In relation to competing dispute resolution clauses, the Court of Appeal in *Sebastian Holdings Inc v Deutsche Bank AG* [2010] EWCA Civ 998 (and endorsed in *AmTrust v Trust Risk* [2015] EWCA Civ 437) talked about adopting a 'broad and purposive construction' and in *UBS AG v HSH Nordbank AG* [2009] EWCA Civ 585 Lord Walker stated that 'the parties must be presumed to be acting commercially'. In *AmTrust* the court stated that 'what is required is a careful and commercially-minded construction of the agreements providing for the resolution of disputes'. As regards competing governing law clauses, the matter was considered by the High Court in *Desarrollo v Kader Holdings* [2014] EWHC 1460 (QB) and, again, the question was treated as one of construction.

Whether the approach of the courts will change following the Supreme Court's call for a more literal contractual interpretation in *Arnold v Britton & Ors* [2015] UKSC 36 remains to be seen.

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

Stepped clauses for dispute resolution are increasingly common in contracts governed by English law. Stepped clauses will typically require discussions at management or board of director level, followed by mediation and finally litigation or arbitration.

The practical and commercial benefits of such clauses are obvious: they require the parties to attempt to reach settlement at an early stage which, if successful, avoids the costs and delays associated with litigation and arbitration and may also allow parties to preserve their commercial relationship. The Civil Procedure Rules now expect that parties will consider alternative dispute resolution methods before litigating and using a stepped pre-action process is a good way to meet this requirement.

Until the decision in *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited* [2014] EWHC 2104 (Comm), the English courts had been reluctant to find that prescribed steps such as senior executive negotiations are condition precedents to commencing litigation or arbitration on the basis that agreements to agree are unenforceable. However, in *Emirates Trading* the judge held that a time-limited obligation to hold 'friendly discussions' to resolve the dispute was enforceable and therefore a condition precedent to the right to arbitrate. Parties who wish to incorporate stepped clauses into their contracts should therefore take care with the drafting to ensure that the agreement is sufficiently certain to be enforceable.

Split clauses are less commonly used in energy contracts and would typically only be found in energy financing documents. A typical clause will specify that the courts of one jurisdiction will have exclusive jurisdiction to resolve any disputes, but then provide that such exclusivity is stipulated solely for the benefit of financing parties, who may, should they wish, bring an action against the borrower before any other court with competent jurisdiction. If suitably drafted, split clauses are generally enforceable as a matter of English law.

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

Independent expert evidence is used to assist the court when a claim involves particular technical or specialist issues about which the court does not have the necessary knowledge. While experts are party-appointed, their primary duty is to help the court and this duty overrides any duty to the instructing party.

An expert will typically give their opinion evidence in the form of a written report and will then be called to give oral evidence at trial. Pursuant to CPR 35.4, no expert report may be served or expert evidence used without the court's permission. The experts' written reports will normally stand as evidence in-chief, so the expert does not need to provide oral evidence on the matters set out in their statement. The opposing party can cross-examine the expert, following which the party calling the expert has the opportunity to re-examine that expert. The expert may also be asked questions by the judge.

Since 1 April 2013, the court has been able to order that oral evidence from experts at trial be given concurrently. This is known as hot-tubbing. Anecdotal evidence suggests that hot-tubbing is not being widely used in practice. Following the study by the Civil Justice Council amendments were proposed to the practice directions allowing the judge to set the agenda for the evidence to be given in any appropriate manner including by way of concurrent expert evidence. It has not been announced yet when the changes to the CPR will come into force and it remains to be seen whether the increased powers of the judge in this regard, once introduced, will have any effect on the use of hot-tubbing in courts.

The rules governing the conduct of expert witnesses can be found in CPR 35 and the accompanying Practice Direction. The Courts and Tribunals Judiciary has also published guidance for the instruction of experts in civil claims which should be referred to, together with the relevant court guide, when appointing an expert.

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

The English courts have wide powers to grant interim and emergency relief, including interim injunctions, freezing injunctions, search orders, specific disclosure, security for costs and payments into court. Usually, English courts will only make orders relating to property within the jurisdiction. However, in exceptional circumstances, the English courts will grant freezing injunctions with worldwide effect.

The English court may also grant interim relief (typically in the form of freezing injunctions) in aid of legal proceedings anywhere in the world. On 17 July 2014, the European Account Preservation Order (EAPO) Regulation entered into force, creating a new procedure under which a creditor is entitled to freeze monies in any EU bank account held by a debtor up to the value of its debt. The procedure started to be applied by participating member state courts on 18 January 2017. The UK government has not opted into the Regulation and currently EAPO is not an alternative to seeking a freezing injunction in England. However, account holders and companies operating in participating member states will still be affected by the Regulation in situations where an application for an EAPO is made by a creditor in a participating member state against the bank account of an English entity which is located in another member state.

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

Foreign judgments

Broadly speaking there are four regimes for enforcing foreign judgments in England and Wales:

- the UK regime covers judgments from Scotland and Northern Ireland;
- the European regime covers judgments from EU and certain European Free Trade Area countries;
- the statutory regime covers judgments from most commonwealth countries; and
- the common law regime covers judgments from other countries, such as the USA.

The regime under which the foreign judgment falls will determine the ease or difficulty of enforcement, in addition to the types of defence open to the party against which the judgment has been awarded.

Foreign arbitral awards

The UK is a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) meaning that courts in England and Wales will recognise and enforce arbitral awards made in the territory of another contracting state as if they were a UK award. Arbitration proceedings in England and Wales are governed by the Arbitration Act 1996. The procedure for enforcement is largely the same as for domestic awards.

Where the New York Convention does not apply, foreign awards may be enforceable under the Geneva Convention, the Foreign Judgments (Reciprocal Enforcement) Ordinance (mainly applicable to former Commonwealth nations) or common law rules.

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

At present, there is no arbitral institution in England or Wales that is dedicated to energy disputes. However, the London Court of International Arbitration and the London Maritime Arbitrators' Association administer a significant number of energy and marine-related arbitrations, both for UK matters and internationally.

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

The choice of dispute resolution method will very much depend on the subject matter of the contract and surrounding circumstances. Where there are international enforcement or particular confidentiality concerns, arbitration will generally be selected. However, the English courts remain very popular with both domestic and international players in the energy sector offering a relatively quick, cost-efficient and predictable forum for dispute resolution.

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

Negotiations, whether written or oral, which are genuinely aimed at settlement are generally subject to without prejudice privilege, meaning they are excluded from evidence to encourage parties to 'fully and frankly put their cards on the table' (*Cutts v Head* [1984] CH 290, 306 (CA)). If there is a challenge to a without prejudice claim, the court will look to the substance rather than the form of the disputed document. Accordingly, labelling a document without prejudice will not necessarily bring it within the without prejudice privilege rule.

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

The Data Protection Act 1998 (DPA) contains mechanisms that restrict the circumstances and means by which an organisation can disclose personal data to third parties. This will also be the case under the General Data Protection Regulation (GDPR), which will come into force in EEA states in May 2018 and will effectively replace the DPA. However, case law in the English Court of Appeal (*Durham County Council v Dunn* [2012] EWCA Civ 1654) has established that these provisions may effectively be overridden by obligations to disclose information during the course of proceedings under the Civil Procedure Rules.

In addition, the general legal and regulatory obligations described above should always be borne in mind.

In order to optimise data security, many law firms put in place protocols to limit the access to and use of data that the law firm is handling.

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

Under English law there are two principal types of privilege: legal advice privilege and litigation privilege.

Guidance from *Three Rivers* [2005] 1 AC 610, states that legal advice privilege extends to communications (both written and oral) between a client and a lawyer (or an intermediate agent of either) which is made in confidence for the purpose of giving or obtaining legal advice or assistance and whether or not in the context of litigation. Third-party communications (lawyer and a third party or a client and a third party) are not covered by legal advice privilege.

For the purpose of legal advice privilege, 'client' is narrowly construed to mean only those individuals within the company who are authorised to instruct lawyers and to receive legal advice on the entity's behalf on the matter in question. The narrow interpretation of 'client' was most recently applied in the case of *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch), where it was confirmed that 'client' only extended to those individuals who are authorised to seek and obtain legal advice on behalf of the organisation and does not include those who are authorised only to provide information to the lawyers. Where a third party (or an employee who is not part of the client) provides information to the lawyer, this will not be privileged outside the litigation context. This case concerned the status of certain notes and transcripts produced RBS's in-house lawyers and external counsel from some 124 interviews with current and former employees in relation to two internal investigations.

The communication must be confidential and must include an element of giving or receiving legal advice.

Litigation privilege covers confidential oral and written communication between a client or lawyer on the one hand and third parties on the other (or other documents created by or on behalf of the client or his lawyer) that come into existence once litigation is in contemplation or has commenced for the dominant purpose of use in the litigation.

The courts will look at the dominant purpose of the communication or document; where there is a dual purpose, it is necessary to identify the dominant purpose. It is not sufficient if the relevant litigation purpose is a secondary or equal purpose. In addition, litigation must have commenced or be contemplated; it must be more than a 'mere possibility' or even a distinct possibility that sooner or later someone might make a claim. In *Serious Fraud Office (SFO) v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017, it was held that certain documents generated during internal investigations by ENRC were not subject to litigation privilege and that a criminal investigation did not constitute 'litigation' for the purpose of litigation privilege and that it did not follow that if a criminal investigation by the SFO was ongoing or in the company's contemplation, a criminal prosecution was also in reasonable contemplation such that litigation privilege would apply. This case is currently on appeal and being closely followed given its potentially limiting impact on the privilege parties to regulatory investigations can claim.

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

It is not usual for energy disputes to be first heard before an administrative agency. One exception, however, is that the OGA may intervene, or be requested to intervene, in disputes between infrastructure owners and third parties relating to access to upstream oil and gas infrastructure (see question 22). The OGA has also been granted dispute resolution powers under the Energy Act 2016.

Regulatory

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

The principal regulators in the energy sector include BEIS, the OGA, the Office of Gas and Electricity Markets (OFGEM) and the Office for Nuclear Regulation (ONR). The Environmental Agency, the Health and Safety Executive, the Maritime and Coastguard Agency and the police also play an enforcement role in regulating the industry.

BEIS sets the UK's energy and climate change mitigation policies, having replaced DECC as the governmental body responsible for UK energy policy following the post-Brexit change in government. It

is responsible for establishing the framework for achieving the policy goals in these areas.

The OGA is responsible for regulating offshore and onshore oil and gas operations in the UK including licensing, with an emphasis on maximising oil and gas recovery in the North Sea. It was launched on 1 April 2015 as an executive agency of DECC (now BEIS) and took over a number of responsibilities for oil and gas regulation. The OGA became a government company in October 2016 and was established as a fully independent regulator by the Energy Act 2016, which granted it new powers and amended various statutory provisions, including provisions of the Petroleum Act 1998, in order to transfer powers from the Secretary of State to the OGA. The OGA is now able to issue enforcement notices and financial penalties, and to revoke licences arising from breaches of the MER UK Strategy, which came into force in March 2016 and aims to ensure that the maximum value of the UK's remaining oil and gas is recovered. In addition to these powers the OGA has the power to investigate 'qualifying disputes' and make non-binding resolution recommendations that are intended to contribute to the fulfilment of the MER UK Strategy. OFGEM is the government regulator for the downstream gas market and electricity market in the UK. The ONR carries out the function of the safety regulator for the civil nuclear industry in the UK.

The Environmental Agency (EA) is the environmental regulator for all onshore oil and gas operations in England. The EA must be consulted on a wide range of issues including on matters relating to shale gas.

The Health and Safety Executive (HSE) is responsible for enforcing health and safety legislation and principally acts through its Energy Division in regulating the oil and gas industry.

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

The Infrastructure Code of Practice (ICoP) was introduced in 2004 to ensure that new entrants and smaller players in the UK Continental Shelf could exploit discoveries that required access to existing third-party infrastructure to make the field commercially viable. ICoP requires owners to publish annually their main commercial conditions for access to their upstream infrastructure. These commercial conditions form the basis for negotiations between the owners and third parties. The ICoP and its accompanying guidance notes were updated in 2012 and were again most recently revised in August 2017 to reflect certain legislative changes (principally the transfer of power from DECC/BEIS to the OGA) and more general drafting improvements.

While ICoP is voluntary, non-binding and industry-led, it is supported by a statutory regime through which the OGA can intervene to grant access to infrastructure. The OGA may become involved where parties have had a reasonable time to reach an agreement but there is no realistic prospect of an agreement being reached or where a third party has made an application to the OGA for a notice granting the relevant rights. Importantly it is worth noting that under section 83 of the Energy Act 2011, the OGA can issue an access notice under its own initiative, however guidance from the OGA envisages that this power would only ever be used in very limited circumstances, as this would override the right of a prospective user to make an application to the OGA at the time that they see fit and at the time of writing, the author does not believe that the OGA has not exercised this right.

Under the Gas Act 1995, a similar regime applies to downstream gas processing facilities (for example, facilities that process gas for the purpose of the gas being put into storage, an LNG import or export facility, a gas interconnector or a distribution system pipeline).

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?

In England and Wales, judicial review is the mechanism that allows an affected party to request that the courts consider the lawfulness of a decision or action taken by a body exercising a public function. The court's supervisory jurisdiction is found in the Senior Courts Acts 1981 but has largely developed through case law.

Judicial review is only available in limited circumstances and serves a specific function. The court's role is not to remake the decision or to decide on the merits of the decision (other than for the purpose of considering whether it was lawful). It is to review the process by which the decision was reached and to determine whether that process was lawful or fair. If there is an appeal process, a claimant should exhaust this route before applying for judicial review.

To bring an application for judicial review:

- a party must have sufficient interest or 'standing';
- the decision or action must be amenable to judicial review, that is, there must be some exercise of public function, which can apply to government departments, public bodies and in certain circumstances, private parties;
- one of the substantive grounds for judicial review must apply:
  - illegality;
  - irrationality;
  - procedural unfairness; or
  - breach of a legitimate expectation; and
- the application must be brought promptly and in any event within three months of the date when grounds for the application first arose.

If a judicial review claim is successful, the principal remedies that the court may grant are a mandatory order requiring the body being reviewed to do something; a prohibiting order restraining the body being reviewed from doing something; or a quashing order that sets aside the decision of the body being reviewed. It is worth noting that the result of a successful judicial review might be the same decision but reached in a lawful way.

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

If shale gas can be extracted at a commercial rate from local sources, it is estimated that it could meet around 10 per cent of the UK's gas needs. In its 2017 Guidance on Fracking, BEIS reiterated the government's commitment to shale gas and its ability to provide the UK with greater energy security, growth and jobs.

Under the Petroleum Act 1998, the Crown owns the mineral rights in relation to land and not the landowner; the OGA is responsible for regulating onshore and offshore oil and gas operations in the UK, including granting licences for exploration and production of shale gas on behalf of the Crown.

The Infrastructure Act 2015 contained some key provisions relating to shale gas exploration. These provisions include a new underground access regime to use deep-level land (300 metres below the surface), which prevents landowners who have not agreed to drilling access under their land from claiming that there has been a trespass. The Infrastructure Act separately introduced a number of safeguards against hydraulic fracturing as well as bans to fracturing in certain protected areas (eg, National Parks, Areas of Outstanding National Beauty, the Broads and World Heritage Sites).

The Finance Act 2014 introduced a new tax regime to encourage the exploration of shale gas, which the government believes will make the shale gas regime in the UK the most competitive in Europe.

For exploration and production a number of consents are required and may include: a Petroleum Exploration and Development Licence (PEDL) as issued by the OGA, planning permission from the relevant minerals planning authority, environmental permits (from the Environment Agency, Natural Resources Wales, or the Scottish Environment Protection Agency), abstraction licence, authorisation from the coal authority, well consent and notification, field development consent, flaring and venting consent and consents from the landowners whose land is affected by the exploration. In August 2015, DECC (now BEIS) and the Department for Communities and Local Government implemented new planning processes to allow shale gas planning applications to be fast-tracked, with the aim that faster decision making on shale gas will promote economic growth and energy security. In February 2017, BEIS published further guidance on the process of seeking consent to commence hydraulic fracturing operations within the UK.

25 Describe any statutory or regulatory protection for indigenous groups.

Not applicable.

Update and trends

The energy industry both in the UK and globally is continuing to go through a period of almost unparalleled change and disruption triggered by various political, economic, scientific and social factors.

The UK's commitment to the Paris Agreement has meant continuing growth in the renewable energy sector, notwithstanding the reductions in government subsidies. This has triggered a fundamental change in the UK's energy mix away from reliance on fossil fuels towards a more diverse portfolio of energy sources including a range of renewable technologies. In September 2017 the first non-subsidised solar farm came into operation in the UK, fuelling hopes that with continued decreases in the costs of construction, renewable energy can be economically viable without government support. Exciting new renewable opportunities come in the form of the construction of the world's first tidal lagoon power plant in Swansea Bay, which is currently being planned.

Meanwhile, oil and gas companies are facing increased scrutiny from investors and other stakeholders on their approach to climate risk and mitigation. The increase in climate-related litigation internationally (for example in the United States, Germany and the Philippines) may prompt similar claims in the English courts, where a number of global energy companies are headquartered.

Decommissioning also continues to be a major issue for debate for oil and gas companies operating in the United Kingdom Continental Shelf (UKCS). In this mature basin, the impact of sustained lower oil prices has prompted some operators to consider bringing forward Cessation of Production as fields become commercially uneconomical. Others are looking to delay incurring decommissioning expenditure in a desire to free up capital available for value generating activities. It has been forecast that approximately £17 billion will be spent on decommissioning in the UKCS between 2017 and 2025.

Given the level of these anticipated costs, there is a significant drive on the part of government and industry to bring down the costs of decommissioning (and in turn the associated tax relief). The OGA has announced its commitment to delivering a reduction of at least 35 per cent in overall decommissioning costs by 2035. The OGA has established an MER UK Decommissioning Board which will be crucial to the delivery of the OGA's Decommissioning Strategy. The Board has identified three primary themes of focus, which include cost certainty and reduction, decommissioning delivery capability and stakeholder engagement. The OGA ultimately believes that the UK's decommissioning sector possess the potential to become a global leader in the sphere of late-life asset management and with time will be able to export this expertise to other regions with maturing fields. With new technology currently being explored by the newly formed Oil & Gas Technology Centre it is hoped that innovation and technological advancement can also pave the way for costs reductions. On 22 November 2017, the Chancellor announced plans to allow the tax history of an oil and gas field to be transferred when it is sold meaning that buyers will be able to claim greater relief on decommissioning. This should help stimulate M&A activity in the North Sea.

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

Every licence issued for the exploration and production of oil and gas will have attached to it detailed terms and conditions, which are set out in model clauses enshrined in secondary legislation under the Petroleum Act 1998. The main ways in which a licence can be obtained are through assignment of licences from an existing licensee with the permission of the OGA, or through competitive licensing rounds that generally take place every year. Before approving the transfer of a licence or awarding licences the OGA must be satisfied that the applicant meets certain criteria that focus on the technical and financial capacity of the prospective licencee. These criteria apply equally to domestic companies as to foreign companies.

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

The UK energy sector is highly regulated and companies are expected to conform to strict health and safety and environmental standards. Unlimited fines for offences under the Health and Safety at Work Act 1974, Environmental Damage Regulations 2009 and related legislation can be ordered by the courts.

The HSE's Energy Divison regulates the risks to health and safety arising from work activity in the offshore oil and gas industry on the UKCS. The OGA separately has the power to issue financial penalty notices of up to £1 million for a failure to comply with a 'petroleum-related requirement'.

The level of fines for health and safety and environmental offences have been steadily increasing, as has the willingness of judges to impose custodial sentences on individuals (including company directors and employers) for serious offences resulting in fatalities in the workplace. New sentencing guidelines set out ranges for fines which apply in respect of breaches of health and safety legislation as well as those payable in the event of a corporate manslaughter conviction from £50–£10 million (for health and safety breaches) and £180,000–£20 million (for corporate manslaughter). The guideline expressly provides that where an offending organisation's turnover or equivalent very greatly exceeds the threshold applicable for large organisations (£50 million), it may be necessary to move outside the suggested ranges in order to achieve a proportionate sentence.

Other

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

There are no actual or anticipated sovereign boundary disputes involving the UK that could affect the energy sector. However, oil and gas exploration in the waters surrounding the Falkland Islands continues to be a source of tension between UK and the islands on the one hand and Argentina on the other.

An UNCLOS treaty was signed between Norway and the UK in 1965 allowing for the joint sharing of proceeds of hydrocarbons for single petroleum fields that extend across the continental shelf boundary. However, an exclusive economic zone has not been agreed between the two countries.

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

The Energy Charter Treaty, which entered into force on 16 April 1998, was ratified by the UK on 13 December 1996.

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

The UK generally provides a stable investment environment for investors in the energy industry. Bilateral investment treaties are in force between the UK and approximately 100 countries. The UK is also a party to the ICSID Convention, the primary purpose of which is to provide facilities and services to support conciliation and arbitration of international investment disputes. The UK is also party to the Energy Charter Treaty that includes provisions on investment protection and creates a legal framework for energy, trade, transit and investment among member states.

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.

Like all organisations, energy companies handle sensitive personal information and face data privacy and security risks as a result. In addition, energy companies also face significant operational and critical infrastructure risks that can arise out of data security incidents and other incidents linked to the use of data and technology.

In terms of best practice, organisations should always take steps to ascertain whether the data security and cyber-risk preparedness measures they have in place are adequate for the data privacy and security

risks that they are facing. There is growing concern that energy companies are becoming increasingly prone to cyberattacks. In a recent briefing to government, the National Cyber Security Centre highlighted the future dangers of an attack on the UK's critical national infrastructure outlining its recommendations for improving cyber security. In recent years, there have been a number of successful cyberattacks on significant energy infrastructure assets in a range of jurisdictions – see for example the impact that the Shamoon computer virus had on operations at Saudi Aramco in 2012, or the cyberattack on the Ukrainian electricity grid in 2015 which left several hundred thousand people without power for a short period. Trade associations, government and industry are working closely together to promote a greater understanding of how best to manage and effectively deal with cyber risk and this is likely to grow in importance in future as the energy and infrastructure space becomes ever more reliant on the use of networked technologies.

The UK has a substantial body of law governing data privacy and security, much of which is derived from EU law. In particular, the DPA imposes broad obligations on data controllers relating to the processing of data. The DPA requires compliance with eight separate data protection principles, the seventh of which requires that data controllers take 'appropriate technical and organisational measures … against unauthorised or unlawful processing and against accidental loss or destruction of or damage to personal data'. This principle means that a data controller must ensure a level of security appropriate to the harm that might result from the unauthorised or unlawful processing of data, or its accidental loss, destruction or damage. The DPA will be effectively replaced in May 2018 by the GDPR, which contains an equivalent set of principles to the DPA.

As well as imposing a range of specific obligations on data controllers and processors, the GDPR will also make compulsory the reporting of certain data incidents to national data protection authorities, and will give those authorities the discretion to impose heavy fines on organisations that breach their obligations (in some circumstances, up to €20 million or 4 per cent of the organisation's global turnover).

In addition, those active in the energy industry will need to be aware of the anticipated Network Information Security Directive (NISD), which, once implemented in 2018, will impose further obligations relating to network and information security on providers of 'essential services'. A range of organisations in the energy sector will fall within the scope of the NISD. Similarly to the GDPR, organisations that are subject to the NISD will be obliged to report serious network and information security incidents to their national regulator, and non-compliance with the NISD could lead to the imposition of heavy fines.

Finally, recent legal changes in a number of jurisdictions have given rise to an increased risk of litigation arising out of data and cyber risks, most notably in a privacy and data protection context – this applies equally to energy as to other industry sectors. In the US, privacy class actions following large data breaches have been common for some time. More recently, litigation of this type has been growing in other jurisdictions. The English High Court recently recognised that groups of individuals or companies may bring claims for losses caused by breaches of the DPA or in tort for misuse of private information, even where no pecuniary loss has been suffered by claimants. This means that claims can be brought in respect of distress or inconvenience alone. Allied to this is a very recent development in English law which has established that companies can be held vicariously liable for data breaches caused by employees. While this latter decision remains subject to appeal, it highlights the trend towards increased litigation and a more difficult litigation risk landscape in the context of data breaches and similar data or cybersecurity incidents.

NORTON ROSE FULBRIGHT

Neil Q Miller **neil.q.miller@nortonrosefulbright.com**
Holly Stebbing **holly.stebbing@nortonrosefulbright.com**
Ayaz Ibrahimov **ayaz.ibrahimov@nortonrosefulbright.com**

3 More London Riverside
London SE1 2AQ
United Kingdom

Tel: +44 20 7283 6000
Fax: +44 20 7283 6500
www.nortonrosefulbright.com

United States

William D Wood and Lauren W Varnado
Norton Rose Fulbright US LLP

General

1 Describe the areas of energy development in the country.

The United States has a diverse portfolio of energy development, including oil, natural gas, coal, nuclear, wind, geothermal and solar. Fossil fuel development is predominant in the United States, although federal and state governments are beginning to encourage increased development of renewable energy. Shale gas production has grown rapidly due to technological advances in hydraulic fracturing.

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

The United States strongly emphasises private ownership and development of energy resources. Still, there is some government involvement. At the federal level, the Department of the Interior largely oversees the management of natural resources under federal and Indian lands, and includes several departments such as the Bureau of Land Management, which is responsible for domestic production from federal onshore oil and gas wells, as well as coal leasing, the Office of Surface Mining Reclamation and Enforcement, which regulates surface coal mining, the Bureau of Ocean Energy Management, which manages offshore conventional and renewable energy and marine mineral resources, and the Bureau of Safety and Environmental Enforcement, which oversees offshore resource conservation and protection related to energy exploration and development.

The federal government also regulates energy development through a general energy policy to promote domestic exploration and production of energy while also protecting the environment. The Environmental Protection Agency (EPA) serves to protect human health and the environment by creating and enforcing regulations based on US legislation, such as the Clean Water Act (CWA), the Safe Drinking Water Act, the Clean Air Act (CAA), and the Resource Conservation and Recovery Act.

However, state regulation is the primary method of oversight for development of private energy resources. Accordingly, a state may have its own agency that regulates the ownership and development of energy resources. For example, the Texas Railroad Commission and the Oklahoma Corporation Commission govern oil and gas development in their respective states. Most states also have an agency parallel to EPA, which oversees the protection of the state's natural resources.

Commercial/civil law – substantive

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

Common standard-form contracts include joint operating agreements (JOAs), oil and gas leases, farmout agreements, assignments and surface use agreements, although the terms may be negotiated. The most commonly used JOAs are based on the American Association of Professional Landmen (AAPL) Form 610, the Association of International Petroleum Negotiators (AIPN) International Model (2012), AAPL Form 710 and the AIPN International Model (2014).

Other commonly used model contracts are created by the American Petroleum Institute, the International Association of Drilling Contractors, an industry group including producers, manufacturers and suppliers of oilfield equipment and services, and the North American Energy Standards Board (NAESB). Commodity transactions are often conducted using forms promulgated by the International Swaps and Derivatives Association (ISDA).

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

Generally, there is no federal contract law; instead, states determine rules of contract interpretation. Some states have adopted the Uniform Commercial Code (UCC) for disputes related to the sale of goods, while others follow general common law contract rules. All states generally follow common law rules for other contracts such as JOAs or contracts in manuscript form.

Under both rules, contractual terms are given their plain and ordinary meaning, interpreted as a reasonable person would understand them. In most states, the parol evidence rule prevents parties to a written contract from using extrinsic evidence to aid in the interpretation of the contract. If the language of the contract is unambiguous, courts will enforce the contract as written. If the contract's terms are ambiguous, they are construed against the parties who draft the contracts. Accordingly, in disputes among landowner-lessors and energy-company-lessees, ambiguous contracts are often construed against lessees as the scriveners of the contract.

Under common law, other considerations may be relevant, such as previous dealings between parties, the course of performance of the contract, and industry norms. However, under the UCC, these considerations may only explain or supplement, not contradict, contractual terms.

5 Describe any commonly recognised industry standards for establishing liability.

Subsurface oil and gas are subject to the common law rule of capture: a landowner has the right to oil and gas under his or her property, even if the oil and gas migrated from adjacent tracts of land. The first person to extract oil and gas from the land is its owner. A landowner who extracts hydrocarbons from a well on his or her land will not be liable for draining adjacent tracts of land. However, this right of appropriation does not cover negligence and waste (eg, letting gas escape). In some states, the common law rule of capture is modified by regulatory rules such as well-spacing requirements, forced pooling and unitisation.

As for production matters, oil and gas lessees are held to a reasonably prudent operator standard, rather than a fiduciary standard. They must consider both their own interests and those of their lessors.

Lessees may also be subject to implied contractual covenants, which vary from state to state. The most common implied covenants are to reasonably develop the leasehold; to protect the leasehold against drainage; to market oil and gas as a reasonable and prudent operator; and to manage and administer the lease.

Industry contracts in the commodity marketing and trading sector from the ISDA, the NAESB and other organisations regularly limit liability for incidental, consequential, indirect or punitive damages, or for lost profits. Indemnity agreements may also offset liabilities between parties.

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?

US contract law is generally hostile to concepts excusing performance during periods of commodity price or supply volatility. Under common law and the UCC, unless otherwise agreed, price increases and supply volatility are considered foreseeable risks and do not excuse contract performance.

Force majeure clauses are common in energy contracts but they only excuse contract obligations when performance is prevented by unforeseeable events. Force majeure generally will not excuse performance due to predictable risks. Absent contrary language in an oil and gas lease, some states recognise the temporary cessation of production doctrine, which provides that circumstances causing a well to cease production temporarily will not automatically terminate a lease. While generally not applicable to strictly economic circumstances, courts have applied this doctrine to a wide variety of reasons for stoppage.

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?

Energy companies confront US nuisance suits with varied success. Common law, as interpreted and developed in each state, governs private nuisance claims. Generally, an activity is a nuisance if it unreasonably interferes with the enjoyment and use of one's property. Because this question focuses on reasonableness, outcomes in nuisance suits are largely determined by the trier of fact on a case-by-case basis. For example, in *Crosstex North Texas Pipeline, LP v Gardiner*, the plaintiffs brought a nuisance suit under Texas law alleging that the defendant's pipeline activities, specifically operation of a compressor near the plaintiffs' land, caused noise pollution. The jury found for the plaintiffs, but the appellate court reversed and remanded, citing factual insufficiency in light of the care shown by the defendant in building and maintaining the compressor. Contrastingly, in *Parr v Aruba Petroleum*, plaintiffs won a US$3 million dollar jury verdict for a private nuisance claim that alleged the plaintiffs were affected by the defendant's emissions and spills. However, on appeal the court reversed and rendered a take-nothing judgment upon a finding that the plaintiff failed to establish that the defendant actually intended or desired to create the alleged interference.

In the United States, there is no privity requirement to bring nuisance or negligence lawsuits. Anyone affected by energy development activities, such as homeowners, may have standing to bring such lawsuits if they allege damages caused by these activities.

8 How may parties limit remedies by agreement?

Parties have wide latitude to limit their remedies by contract. Although the limitation of remedies must adhere to a standard of conscionability, and exclusive contractual remedies must not fail their essential purpose, parties may limit remedies to liquidated damages, replacement or refund, or exclusion of or caps on some damages (eg, consequential).

The definition of certain kinds of damages is often subject to dispute. For example, consequential damages often denote damages unaccounted for by contract that result naturally but not necessarily from a breach of contract. However, parties often dispute whether their contracts contemplate naturally resulting damages, a prerequisite for recovery. If the damages are contemplated, they are recoverable. See *McKinney & Moore, Inc v City of Longview*.

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

Courts apply strict liability standards to activities that are deemed abnormally dangerous or ultra-hazardous. In deciding whether an activity is abnormally dangerous, most courts apply a balancing test based on the following factors:

- the existence of a high degree of risk of some harm to the person, land, or chattels of others;
- the likelihood that the harm that results will be great;
- the inability to eliminate the risk by exercise of reasonable care;
- the extent to which the activity is not a matter of common usage;
- the inappropriateness of the activity to the place; and
- the extent to which its value to the community is outweighed by its dangerous attributes.

Generally, US courts find that traditional activities in the energy industry are not abnormally dangerous, and strict liability standards are seldom used. However, some pockets of strict liability exist. The Oil Pollution Act imposes strict liability for oil pollution on owners and operators of vessels. The Trans-Alaska Authorization Act imposes strict liability on owners of the Trans-Alaska Pipeline right of way for all damages resulting from activities along or near the right of way. Moreover, oil tankers carrying Alaskan oil transported through the pipeline are also strictly liable for pollution damage. Some states also impose strict liability on oil and gas operators for any surface damage caused (eg, New Mexico's Surface Owner Protection Act).

The recent boom in hydraulic fracturing has spurred litigation on whether such activities are abnormally dangerous. Though the applicability of strict liability is a question of law to be decided by judges, recent litigation suggests that judges are unwilling to decide this issue without a developed record of facts. See *Ely v Cabot Oil & Gas Corp; Kamuck v Shell Energy Holdings GP, LLC* (refusing to decide on the pleadings whether fracking is abnormally dangerous, but rather deciding to wait until the close of discovery).

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?

US courts look to the reasonableness of the venue when comparing conflicting choice-of-forum clauses. Jurisdiction must be met for the specified venues, and then the court considers whether the venue selected by the plaintiff is reasonable, based on factors such as costs, witness location, and segregation of claims into multiple venues. Some jurisdictions, such as Texas, follow the 'dominant jurisdiction doctrine', which applies when a suit involving identical subject matter is filed in different courts. The court where the suit was first filed retains the dominant jurisdiction.

If a conflict between choice-of-law provisions arises, courts generally apply the conflicts of law principles of the forum court. Still, the false conflict doctrine allows for a court to avoid the choice-of-law inquiry where the laws of the involved states would result in the same decision. Some jurisdictions require that the presumptive local law apply, whereas others apply the law of the interested state.

When the mode of dispute is at issue, courts examine provisions regarding alternative dispute resolution. If language is broad enough to encompass the issue in dispute, the courts will generally find that the clause is enforceable.

If an arbitration clause conflicts with the applicable forum laws, a court may invalidate an arbitration provision that allows for arbitration in another state when the contract performance occurred in the forum state. See *Keystone v Triad Sys Corp* (holding that California arbitration provision violated public policy because Montana had greater interest in dispute); but cf *Cahill v Alt Wines, Inc; Allen v World Inspection Network Int'l, Inc* (holding that the Federal Arbitration Act pre-empted state legislation, nullifying certain choice-of-forum provisions).

When there is a conflict between agreements and their choice-of-law or choice-of-forum clauses, some jurisdictions follow the most recent contract if there is no language therein referencing the first contract. Other jurisdictions may rescind both contracts if there is a mutual mistake by the parties drafting the conflicting provisions. If the conflicting provisions can be defined by scope, the court may try to enforce the provision by the subject it covers, such as when one contract's choice-of-law provision governs torts and the other's applies to breach of contract.

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

While both split and stepped up dispute clauses are used in the United States, the stepped up dispute clause is standard in energy disputes. A stepped up dispute clause requires a single issue to travel through various steps, such as an internal company reporting system or mediation, prior to litigation. A split dispute resolution clause involves an

agreement to have separate issues resolved through separate means; for instance, contracting parties may agree that a dispute arising from an event of default should be referred to arbitration and all other disputes subject to litigation.

These clauses are generally enforced when clear and drafted as a condition precedent to subsequent procedures in the dispute-solving scheme. These clauses will not likely be enforced if ambiguous, vague or used for delay.

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

Federal Rule of Evidence 702 governs the admissibility of expert-witness testimony. A qualified expert may offer opinion testimony if it is reliable and relevant, meaning the testimony must be helpful, based on adequate data or facts, supported by trustworthy methods and principles and based on a reliable application of the methods and principles to the specific facts at issue.

The leading US Supreme Court case *Daubert v Merrell Dow Pharmaceuticals, Inc*, places judges in the role of gatekeepers to determine whether expert evidence meets Rule 702 before testimony is introduced to a jury.

Federal Rule of Evidence 403 works in conjunction with Rule 702 to safeguard against evidence that is irrelevant, prejudicial, confusing or causes delay. This Rule may exclude expert evidence when the testimony falls within the common understanding of the jury, when expert testimony would complicate an issue, or when the evidence is otherwise unduly prejudicial.

Conversely, state courts vary on the stringency of admitting expert testimony. The majority, including Texas and Oklahoma, follow *Daubert*. The minority follow a 'general acceptance' test from *Frye v US*. The *Frye* test sets a lower bar for expert-testimony admissibility, requiring that the expert witness' methods are 'generally accepted' by the relevant scientific community. In practice, a jurisdiction following *Frye* may allow expert testimony based solely on the expert's education, even regarding a specialised matter. A jurisdiction following *Daubert* would require more, such as experience in a specialised field, as well as the additional criteria discussed above.

For example, a court applying *Daubert* excluded testimony about the operation of a specialised computer program used to track well casing when an expert witness had years of experience in the field, but no specialised knowledge about the program (see *Express Energy Servs Operating v Hall Drilling*). Conversely, under the same *Daubert* test, a court allowed expert testimony on an oil rig's defective design when the expert was a licensed mechanical engineer with almost two decades of experience and worked with similar rigs (see *Smith v Central Mine Equip*). Notably, an expert may be qualified under *Daubert* to testify in one area and prohibited from addressing others, even within the same trial (see *In re Laurel Valley Oil Co*).

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

Writs of mandamus, interim orders, temporary restraining orders, and injunctions are available options for interim and emergency relief. A writ of mandamus may be sought by a party before final judgment has been entered, when the party disagrees with the judge's ruling regarding a matter of law. The party appeals to the appellate court to issue an order to correct the lower court judge's decision; however, granting a writ of mandamus may be authorised only under exceptional circumstances. Temporary restraining orders, temporary injunctions, and permanent injunctions prevent an entity or individual from acting in a certain manner for a designated period of time.

For example, an injunction can be used in some states to access another's land or receive revenue payments while a mineral dispute is pending. See *Cason v Chesapeake Operating; Genesis Producing Co v Smith Big Oil Corp*. A writ of mandamus may be used in some states to request that an agency issue a drilling permit (see *Devon Corp v Miller*).

An emerging trend in energy disputes involves requests for emergency arbitration, which may be filed with the arbitral tribunal even before a request for arbitration is filed. This mechanism is sometimes used when there is a need for immediate interim relief for emergency situations, such as an interruption of gas supplies needed for energy creation or the withdrawal of a licence by the state.

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

Foreign arbitral awards are governed by the New York Convention, also known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The enforcement of an arbitral award issued under the New York Convention is governed by the Federal Arbitration Act, and applies only to the signatories. Enforcement depends on reciprocity, requiring that the jurisdiction of the foreign arbitral award be a party to the New York Convention.

The United States also ratified the 2005 Hague Convention on Choice of Court Agreements in 2009, whose purpose is to promote security in international business transactions through the cooperation of enforcing foreign judgments and to unify jurisdictional rules on international transactions and enforce foreign judgments for those who have ratified the agreement.

Federal courts will follow state law in recognising and enforcing foreign judgments and awards. Thirty-two states, including Texas, Oklahoma and Pennsylvania, follow the Uniform Foreign Money-Judgments Recognition Act (UFMJRA), agreeing to enforce foreign money judgments. This enables enforcement by extending the Full Faith and Credit Clause of the US Constitution to specific foreign judgments protected under the UFMJRA.

Other states follow the Restatement (Third) of Foreign Relations of the US – as do states with foreign judgments that are not recognised under UFMJRA – which permits enforcement of foreign judgments that involve money, a person's status or a property interest. Although only in a minority of states, reciprocity may play a factor in enforcement. Some courts require reciprocity between its court and the foreign jurisdiction where the judgment was issued.

To enforce a judgment or arbitral award, the party seeking enforcement must file in a court with proper jurisdiction. Typically, little evidence is required in support. The party bringing the action must present proof of a final foreign judgment against a US defendant, or a certified copy of the arbitration agreement and award for an arbitral award. A jury and trial are not required and resolution typically occurs within weeks or months.

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

There are no energy-specific arbitration institutions; however, there are several institutions – national, regional and local – that support US energy disputes. Notably, the American Arbitration Association, International Institute for Conflict Prevention and Resolution and JAMS provide administrative support structures to host mediation and arbitration. States that focus on energy have some energy-specific centres, like the Center for American and International Law in Texas, but most arbitration centres provide a wide array of mediators or arbitrators qualified in various fields.

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

There is a mildly growing preference for domestic arbitration in the energy sector, rather than cross-border and international arbitration. Domestically, there is still a preference for litigation to solve energy disputes; however, some companies are trending towards arbitration first because of its potential cost savings and faster resolutions. Obtaining an arbitrator experienced in energy-specific customs is preferable when resolving complex energy disputes that raise difficult technical questions.

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

Federal Rule of Evidence 408 governs compromise offers and negotiations. Settlement and negotiation discussions involving an offer or acceptance of an offer as an attempt to compromise over the claim are confidential, undiscoverable, inadmissible as evidence, and otherwise without prejudice – except in criminal cases – if entered as evidence to prove the validity or amount of a claim in dispute, or to impeach a witness by a prior inconsistent statement or contradiction. A majority of states have enacted a similar rule regarding settlements and offers.

Confidentiality of mediation discussions is less clear. While some states such as California, Texas and Louisiana have enacted statutes

to broadly protect communications in mediation, federal courts do not have a mediation-specific statute except Rule 408. This protection does not expand to discussions that may be used to prove bias or prejudice of a witness.

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

The Uniform Trade Secrets Act provides remedies to help protect trade secrets and confidential data, including seismic data, well logs, fracture designs, and land and lease files. Courts may also grant a protective order for discovery proceedings, conduct in-camera hearings, seal the relevant records, and require court approval before a party can disclose information regarding the trade secret. Such protections have been adopted by all but two states: New York and Massachusetts. They instead use a multi-factor common law test to define trade secrets.

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

The Federal Rules of Evidence, Federal Rules of Civil Procedure, federal and state common law, and American Bar Association Rules all govern the attorney–client and work product privileges.

Federal Rule of Evidence 502 provides that attorney–client privilege is held by the client and protects confidential communications involving legal advice between the party and his or her attorney. In a business context when the business is the client, communication with employees may also be protected if it is clear the communication was for the primary purpose of securing legal advice. This privilege can be waived (eg, providing privileged information to a testifying expert witness).

Under Rule 502 and Federal Rule of Civil Procedure 26(b)(3), work product privilege protects materials created in preparation for discovery, such as attorney-created documents and tangible items. The party claiming the privilege has an obligation to show the privileged information was prepared in preparation for anticipated discovery and litigation. The work-product privilege is waivable, including by disclosure to a non-party or by court order, when the requesting party shows a substantial need and undue hardship caused by its non-production. Unlike attorney–client privilege, waivability of the work-product privilege belongs to the attorney.

Inadvertent disclosures of privileged material do not qualify as a waiver when the privilege holder reasonably tried to prevent disclosure and took reasonable measures to correct the disclosure. US courts are split on whether waiver requires the disclosure to be intentional and whether inadvertent disclosure waives the privilege for the single communication or the whole subject matter of that communication.

State courts have generally adopted similar rules to the above. For example, in *In re ExxonMobil Corp*, a Texas court held that Exxon had waived its attorney–client privilege over title-opinion documents when contract landmen from outside the company viewed title opinions drafted by in-house counsel, even though the landmen were subject to confidentiality agreements. Conversely, the court also found that the attorney–client privilege was not waived when in-house attorneys sent drafts of a unit operating agreement to employees to review that were intended to be distributed to outside parties. Instead, the court found that privilege was not waived because the documents were not actually distributed to persons outside the company, even though it was the ultimate intent.

Rule 1.6 of the American Bar Association's Model Rules of Professional Conduct provides that an attorney will not share information regarding the representation of his or her client without consent or unless an exception applies, such as disclosure to prevent death, commission of a crime, or to establish a defence in a malpractice claim. Such protection also exists at the state level.

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

Some agencies have exclusive, primary and concurrent jurisdiction over certain energy matters, meaning sole authority, initial priority or joint authority, respectively. For example, the Federal Energy Regulatory Commission (FERC) has exclusive jurisdiction over the transmission of electric energy in interstate commerce and primary jurisdiction when there is some special expertise in the field. A FERC administrative action must be issued before the matter can be taken to either federal or state courts.

Compare this to the concern of concurrent jurisdiction shared by FERC and the US Commodity Futures Trading Commission (CFTC). Unlike FERC's administrative action, the CFTC can bring criminal and administrative actions against a violator. The entities' authority overlaps over issues like prohibiting manipulation. While the entities work to share information, there may be conflict over which entity may pursue action first.

For example, in *US Commodity Futures Trading Commission v Amaranth Advisors, LLC*, FERC and CFTC clashed over FERC's jurisdiction to challenge the defendant's activities in commodity markets. CFTC has exclusive jurisdiction to regulate trading of natural gas futures contracts, but FERC brought an administrative action based on the effect the manipulative actions had on FERC-jurisdictional transactions. As recommended by the court, these agencies continue to work together to coordinate investigations and communicate information.

State agencies may also enjoy primary or exclusive jurisdiction. For example, the Oklahoma Corporation Commission has exclusive jurisdiction over issues such as oil and gas conservation, field operations and exploration. It has primary jurisdiction in cost-overrun disputes arising from a pooling order.

Regulatory

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

At the federal level, the Department of Energy has large responsibilities regarding US policy. Additional regulatory bodies handle specific aspects of the energy industry including safety regulations and enforcement. These include: FERC, the EPA and the Department of Transportation. Many states also have their own agencies like the Texas Railroad Commission, that work with the federal government to regulate the energy sector and may impose supplementary requirements. Additionally, all energy-related operations located on federal and Indian lands must work with the federal Bureau of Land Management.

FERC regulates and oversees markets for natural gas, oil, coal, electric power, interstate pipelines, renewable energy and hydropower projects. Each state has its own public utility commission that works with FERC to regulate energy operations and safety. State public utility commissions regulate the following: retail sales of electricity and natural gas, construction of energy facilities and local pipelines, abandoned oil facilities, local and regional power systems and cooperatives, electric transmission and reliability, nuclear power plants and pipeline safety.

The EPA writes and enforces environmental regulations, sets national standards, and educates states, industry and individuals. The EPA is responsible for regulating a broad range of energy exploration, development and production, as required under federal statutes such as the CAA, the CWA and the Comprehensive Environmental Response Compensation and Liability Act. States also have their own environmental regulatory agencies such as the Texas Commission on Environmental Quality and the Oklahoma Department of Environmental Quality.

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

New entrants into the US market have rights to access natural gas pipelines. Interstate pipelines must offer access to their transportation infrastructure to all other market players equally, referred to as 'open access' to the pipelines. This requirement allows marketers, producers, end users and local distribution companies to contract for transportation of their natural gas via interstate pipeline, on an equal basis. State laws also require open access for those facilities that are constructed under the power of eminent domain. However, there are gathering pipeline systems available for use by non-utilities that are not open access.

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?

Federal and state administrative agencies have the power to make decisions that give or deny benefits, issue licences and impose obligations.

Entities wanting to appeal those decisions may request an administrative hearing. At the hearing, an administrative law judge will review the case and make a ruling.

A party may appeal the administrative law judge's ruling with a court, unless a statute specifically forbids such action. The case will then be heard at an appropriate state or federal court. However, before filing an appeal to the ruling, it is essential to first exhaust all of the available administrative remedies. For example, before a party may file for relief in court in Texas for the denial of a drilling permit, the party must first apply to the Railroad Commission, request and hold a hearing before two examiners (typically one engineer and one attorney) who issue a report to the Commissioners, and, if necessary, request a rehearing.

On appeal, the court will presume that the government agency's decision was correct. The burden of proof is on the contesting party to show that the agency's decision is invalid because it is unreasonable, unlawful, arbitrary, unsupported or wrong. The court will use evidence from the administrative record to determine if the agency was acting within its authority, complying with statutes and not acting arbitrarily. New evidence and witnesses are usually precluded.

Upon a showing that the agency acted in violation or unlawfully, the reviewing court may reverse, modify, vacate or remand the agency's action. The court can also issue a mandate requiring the agency to issue a certificate, comply with a statute or regulation, or conduct proceedings.

If the appeal is unsuccessful, another appeal may be requested. However, further judicial review is discretionary. An appeals court may choose not to hear an appeal when a lower court has already reviewed an administrative agency's decision.

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

The United States is open to hydraulic fracturing for natural gas recovery. The EPA works with states to provide oversight, rulemaking and guidance. In some states, energy companies are required to disclose the chemicals used in the hydraulic fracturing process. Specific hydraulic fracturing activities may be challenged in state or federal courts. Some states, such as Vermont and New York, and some municipalities such as Fort Collins, Colorado, have banned or placed moratoriums on the practice. However, the constitutionality of such prohibitions is currently being litigated in both state and federal courts. The Texas legislature, for example, has expressly preempted the authority of municipalities and other political subdivisions to regulate hydraulic fracturing.

25 Describe any statutory or regulatory protection for indigenous groups.

The United States has the following statutes to protect indigenous groups: National Historic Preservation Act, Native American Graves Protection and Repatriation Act, American Indian Religious Freedom Act, National Environmental Policy Act, and Archaeological Resources Protection Act of 1979. These acts may require government agencies to consult with relevant indigenous groups before issuing an approval and set procedures for handling discovered cultural items.

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

The United States is open to investment and imposes few impediments to foreign ownership in energy development. The United States does not discriminate between nationals and foreign individuals in the operation of private companies and the procedure for establishing an energy business is the same for US and foreign investors.

However, the Committee on Foreign Investment may review any transaction or investment that could result in control of a US business by a foreign company that involves critical infrastructure or national security concerns. For example, in 2012, a Chinese-owned corporation was ordered to remove itself from four small wind farm projects located near a US Navy facility. While the decision to block or permit foreign investment turns on a host of factors — mostly related to national security — a project is unlikely to be blocked as a result.

Update and trends

The Texas Supreme Court, in *Lightning Oil Company v Anadarko*, recently held that drilling a horizontal well through the mineral interest of another to produce oil and gas from a lease held by the driller does not constitute a trespass. This holding significantly reduces the liability exposure of oil and gas producers in the state, especially given the increasing use of horizontal drilling techniques.

The deregulatory efforts of the EPA have faced frequent court challenges, and that trend will likely continue given the Trump administration's commitment to reducing the regulatory burden on the energy industry. Environmental groups have successfully challenged regulatory rollbacks under the Administrative Procedure Act, which requires government agencies to undergo certain evaluative steps before repealing current regulations. The year ahead will likely see an increase in these disputes as the EPA and other agencies fill vacancies and further pursue the administration's deregulatory goals.

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

A company must comply with both state and federal health and safety regulations or face fines. The Occupational Safety and Health Administration is the federal agency that sets out the safety standards and rights and responsibilities of employers and employees. Compliance safety and health officers carry out inspections and assess fines for regulatory violations.

Energy companies must also comply with state and federal environmental laws, violations of which are generally civil offences, resulting in monetary penalties and civil sanctions such as injunctions. For example, for a violation of the Clean Air Act, an administrator may assess a civil penalty up to US$37,500 per day of non-compliance for each violation. Many environmental laws also provide for criminal penalties for egregious violations including those that are wilful, or knowingly committed. A court conviction can result in fines or imprisonment for the owners, employees, directors or officers of a company. Anyone involved in the violation may be held personally liable for civil penalties and under statutes like the Clean Water Act, and could face up to five years in prison.

Other

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

The United States has an exclusive economic zone that extends 200 nautical miles from its territorial sea baseline. Within the zone, the United States has sovereign rights to natural resources. Historically, the United States and Mexico had a moratorium on exploiting resources near the US–Mexico boundary line in the Gulf of Mexico. In 2012, the United States and Mexico signed the US–Mexico Transboundary Hydrocarbons Agreement, which lifted the moratorium and created options for joint development of transboundary resources. The US–Mexico agreement does not, however, resolve disputes between the United States, Mexico and Cuba. Progress in this area is increasingly likely because the United States and Cuba formally resumed diplomatic relations in 2015, and the three countries met in July 2016 to discuss the unresolved maritime boundaries.

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

Although the United States is not party to the Energy Charter Treaty, it has observer status to the charter. The United States, along with Canada and Mexico, are parties to the North American Free Trade Agreement (NAFTA), which contains a chapter on Energy and Basic Petrochemicals. This NAFTA chapter dictates free trade principles that the party countries must comply with. The United States also entered into the Transit Pipeline Treaty with Canada that reinforces both countries' commitments to a natural gas pipeline traversing both countries' territories.

Additionally, the United States is party to several treaties that involve the nuclear energy sector, including agreements entered into

pursuant to section 123 of the US Atomic Energy Act. This act requires the United States to enter into agreements with other countries before any kind of nuclear cooperation may occur. These agreements require other countries to commit themselves to nuclear non-proliferation principles.

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

Federal and state law protects investors from burdensome and unjustified use of governments' eminent domain and condemnation powers. Under the US Constitution, the federal government cannot take private property for public use without just compensation. States, however, may generally make their own determinations for public use, and just compensation is regularly interpreted to mean fair market value.

Companies that sell their securities on public exchanges, regardless of sector, must regularly disclose information about their financial condition, operations, and various other areas of their business to the public and to the companies' shareholders. These disclosure regulations are enforced by the US Securities and Exchange Commission, which may bring enforcement actions and punish companies that issue false, incomplete or misleading information. Additionally, the US Clean Energy Loan Guarantee Program authorises the Department of Energy to guarantee loans for projects that employ new and improved energy technologies and avoid or reduce air pollutants or greenhouse gasses. The availability of loan guarantees for clean energy projects fluctuates significantly based on the policies of the current political administration.

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.

The US energy sector has a strong record of developing cybersecurity best practices. In 2015, the Department of Energy released a guide to help the energy sector establish and align cybersecurity practices to meet the objectives of the National Institutes of Standards and Technology's voluntary Cybersecurity Framework. This framework was created through industry and government collaboration, and provides high-level, strategic recommendations for managing cybersecurity risks. The Department also provides the Cybersecurity Capability Maturity Model, or C2M2. This model organises cybersecurity competency into 10 domains and provides a structured set of cybersecurity best practices for each domain. The practices recommended are organised in a progressive fashion such that an organisation can begin using the model regardless of its current state of cybersecurity efforts. The Department has also created an industry-specific version of the C2M2 for the electricity subsector and the oil and natural gas subsector. Additionally, the North American Reliability Corporation, an enforcement arm of FERC, promulgates the Critical Infrastructure Protection Guidelines, which detail cybersecurity requirements for the most crucial assets on the energy grid.

NORTON ROSE FULBRIGHT

William D Wood **william.wood@nortonrosefulbright.com**
Lauren W Varnado **lauren.varnado@nortonrosefulbright.com**

1301 McKinney Street, Suite 5100
Houston
Texas 77010
United States

Tel: +1 713 651 5151
Fax: +1 713 651 5246
www.nortonrosefulbright.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
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
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
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
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
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
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
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-Private Partnerships
Public Procurement
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
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

ISBN 978-1-912377-43-5