

Energy & Natural Resources - Argentina

Impact of Civil and Commercial Code on energy and natural resources sector

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Environmental standards Liability

On October 1 2014 Congress passed Law 26,994 approving the new Civil and Commercial Code, which abrogated several laws and modified others, including the Companies Law and the Consumer Protection Law. Law 26,994 came into effect on August 1 2015. This update focuses on those parts of the code that affect claims in the energy and natural resources sector.

Environmental standards

Under the new code, energy and natural resources are considered "things", as they are resources for people. The most significant reforms to the energy and natural resources sector concern environmental matters, which are similar to the criteria set out in the Supreme Court's decision on the protection of the environment in *Riachuelo-Cuenca Matanza*, a leading case for environmental claims.

The code imposes limits and minimum standards on:

- environmental protection;
- access to environmental information; and
- participation in environmental decisions.

A distinction is made between individual and collective rights under Sections 41 and 43 of the Constitution on the protection of environmental and collective rights as well as by the Supreme Court decision in *Halabi* on February 24 2009.⁽¹⁾

The new code recognises the environmental role of contracts and individual rights. The right to an undamaged environment is considered to be collective and the abuse of individual rights that affect the environment is prohibited. Thus, individual rights yield to the protection of collective rights. All parties and companies have a duty to avoid damage to the environment, the extent of which is greater depending on their knowledge and expertise in foreseeing potential damage.

Judges are empowered to adopt measures to avoid the negative effect of any abusive act and to reinstate the previous status of victims by setting compensation for damages if required. Compensation must return the victim to the same position that he or she was in prior to suffering the damage.

The new code also provides for the right to seek an injunction as a new procedural mechanism aimed at avoiding damage and the aggravation of damage already caused. This new mechanism will likely be used by plaintiffs to request the temporary stay of activities considered harmful to the environment.

Environmental claims against energy and natural resource companies are filed together with claims for damages and injunctions to stay activities until measures to avoid risks or the aggravation of damages are adopted. Injunctions are temporary and can be lifted if the cause of the potential danger subsides. Nonetheless, the decision of judges in a claim for injunctive relief can be final or provisional and judges should order measures in the least restrictive, but most effective manner.

Liability

The owner or custodian of an asset that causes damage to the environment may be held liable. Likewise, if an asset has a hidden defect and is transferred, the transferor may be held liable for damages after the transfer.

Further, the owner and user of a hazardous object or substance may be held liable for any damage to the environment on a strict liability basis. Likewise, persons or companies that perform harmful activities or benefit from them may be held liable for damage to the environment as a consequence of

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such activity. They may be excused from liability only in the case of *force majeure* or when a third party or victim has contributed to damaging the environment.

The new regulations on liability are consistent with the provisions on liability for collective environmental damage set out in the National Environmental Policy Law (25,675). Pursuant to this law, tort liability that arises from collective environmental damage caused by legal entities can be extended to managers, directors, statutory auditors and/or other officers who participate in the company's decision-making process, depending on their level of participation. This is the most common way in which environmental claims are made against companies that carry out their activity in the oil and gas and mining industries. Further, if damage to the environment is produced by several parties, they may be held jointly and severally liable.

Under the new code, when the polluter is unknown, joint liability may be assessed, unless it is shown that a party did not contribute to the environmental damage. If a group performs or benefits from a hazardous activity, joint liability may be assessed and individual members may be excused from liability if it is shown that he or she was not part of the group. If the damage is caused by several parties and has a sole cause, joint liability may be assessed, but several liability is applied if damage arises from several causes.

Regarding the statute of limitations, it could be construed under the new code that the term applicable to environmental claims for damages is in principle three years. Case law has set out specific rules on calculating this period for environmental claims.

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(1) Ernesto c/ PEN ley 25,873 y decreto 1563/04 s/ amparo.

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