

The curious case of an arbitration with two annulment courts: comments on the YPF saga

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ABSTRACT

This article deals with the jurisdictional and substantive issues of a Latin American multi-party, multi-contract arbitration, related to a dispute arising out of a contract for the international sale of natural gas, which contained an arbitration agreement, calling for ICC arbitration in Montevideo. This arbitration agreement contained a clause in which the parties expressly agreed to apply Argentine arbitration law to annulment procedures and granted exclusive jurisdiction to the Argentine courts to hear any challenge to the prospective award. Eventually, there was a debate on the validity of this clause and the Argentine and Uruguayan courts claimed to have exclusive jurisdiction to hear annulment petitions. This article addresses the different approaches under which this issue can be analysed, and concludes that the parties' choice of forum should be respected. Regarding the substantive issues, one part of the case that involved the claimant and two of the respondents was governed by the Contracts for the International Sale of Goods (CISG).¹ Among other aspects, this article explains that the standard to consider an anticipatory breach is very high, so that mere manifestations that the basis of the contract has been affected are not enough to consider such kind of breach. Moreover, it explains that the intention of the breaching party is not a relevant factor to determine compensation, since the CISG is based on an objective regime, in which foreseeability is the relevant factor.

1. INTRODUCTION

1. This article analyses several procedural and substantive aspects of a large multi-party, multi-contract international arbitration involving Latin American parties. The case involved a long-term international contract for the sale of natural gas from Argentina to Brazil as well as a gas transportation contract. During the performance of the gas sale contract, the crisis in Argentina led to the issuance of new regulation on gas exports, which had an impact on the seller's ability to fulfil

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1 The other part of the case that involved the claimant and a third respondent was governed by Argentine law.

its obligations. This generated a dispute on whether the seller had breached the contract, so the parties started several cross-arbitration claims.

2. The merits of the case involving the gas sale contracts were governed by the 1980 United Nations Convention on Contracts for the International Sale of Goods (hereinafter CISG) and the merits of the case involve several interesting issues related to this treaty.² Regarding the seller's liability, the parties debated whether it had committed an anticipatory breach for expressing that the contract had become impossible to perform. Regarding the appropriate compensation for the alleged breach, they debated whether the intention of the breaching party should be given any relevance when determining the quantum of damages. Given that the CISG does not provide an express solution to this aspect, this triggered the discussion on whether domestic law should be applied.
3. In addition to the merits of the dispute, the case involved interesting arbitration-related issues; the main one (and the one analysed in this article) related to the jurisdiction of the courts to review the award. As agreed by the parties in an arbitration agreement concluded in 1998, the seat of the arbitration was Montevideo, Uruguay. However, in the arbitration agreement, the parties expressly chose Argentine law to govern the annulment proceedings and granted exclusive jurisdiction to the Argentine courts to hear such proceedings. Right after the arbitral tribunal rendered a partial award on liability against the seller in 2013 (hereinafter 'Partial Award'),³ the latter filed an application to set it aside before the Argentine courts, what triggered the discussion on whether said choice of court was valid. This debate took place at different fronts, namely, before the arbitral tribunal, the Uruguayan courts, and Argentine courts. In 2014, both the Uruguayan courts and the Argentine courts claimed to have exclusive jurisdiction to control the arbitration.⁴ In addition, the Uruguayan courts ordered the seller to discontinue the annulment proceedings initiated in Argentina,⁵ and the Argentine courts ordered the parties to stay the arbitral proceedings.⁶ In 2015, the Argentine courts annulled the partial award on liability.⁷ In addition to the debate between the courts, the arbitral tribunal rendered a final award on damages against the seller.⁸
4. This article addresses the procedural and substantive issues mentioned above. Instead of following a strict chronological order, Section 2 lays down the background of the case, Section 3 deals with the jurisdictional issues, and then

2 The merits of the case involving the gas transportation contract were governed by Argentine law.

3 Partial Award on Liability, 8 May 2013. Sebastian Perry, 'YPF Loses on Liability in Brazil Gas Exports Case' (30 May 2013) Global Arbitration Review.

4 Montevideo Civil Appeals Tribunal No 2, 20 August 2014 (see Final Award, para 36); Decision of the Federal Court of Appeals on Administrative Matters, Chamber No IV, 7 October 2014 <http://fallos.diprargentina.com>; Last accessed April 21, 2016.

5 See Final Award, *ibid*, para 30 (Sebastian Perry, 'AES Moves to Enforce Argentine Gas Exports Award' (23 May 2016) Global Arbitration Review).

6 Decision of the Argentine Federal Court of Appeals on Administrative Matters, Chamber No IV, 21 October 2014 <<http://scw.pjn.gov.ar/scw/home.seam>>, under docket No 41.255/2013.

7 Decision of the Federal Court on Administrative Matters, Chamber No IV, 22 December 2015. Sebastian Perry 'Lat Am Courts Clash Over Gas Exports Award' (21 March 2016) Global Arbitration Review.

8 See (n 5).

Section 4 deals with the substantive ones. Finally, Section 5 yields some concluding remarks about all the issues analysed.

2. THE BACKGROUND OF THE CASE

5. The case under analysis relates to a dispute arising out of the Uruguayana Project, which took place within the energy integration scheme between Argentina and Brazil. The project involved several parties, mainly, Yacimientos Petrolíferos Fiscales S.A. (YPF), Argentine largest producer and exporter of natural gas, Transportadora de Gas del Mercosur S.A. (TGM), an Argentine transporter of natural gas, as well as AES Uruguaiana Empreendimentos S.A. (AESU), and Companhia de Gás do Estado do Rio Grande do Sul ('Sulgás'), both Brazilian importers of natural gas. It basically consisted on exporting YPF's natural gas, produced in the Province of Neuquén basin in Argentina, to Estado del Río Grande del Sur in Brazil, to be ultimately used as fuel in a thermoelectric plant built by AESU.
6. The project was implemented through a chain of several contracts, with two of them operating as the pillars. First, an international contract for the sale of natural gas, which involved YPF, AESU, Sulgás, and TGM (hereinafter 'Gas Contract'). Pursuant to the Gas Contract, YPF was to sale its natural gas to AESU. Secondly, YPF entered into a transport contract with TGM (hereinafter 'Transport Contract'), under which the latter was to transport the gas to a delivery point agreed with Sulgás. In turn, AESU was to use the gas to generate power in its plant and then sell it to Brazilian electricity distributors, in accordance to a series of power purchase agreements.
7. According to the Gas Contract, YPF was to supply the natural gas and committed to make its 'best efforts' to guarantee its availability. In addition, it was subject to a classic 'deliver or pay' clause, by which it had to either deliver the agreed gas or pay an amount of money equivalent to such gas.⁹ In turn, AESU and Sulgás undertook the obligation of paying the price of the natural gas and the price of the transport, which was included in the price of the natural gas. In other words, upon receipt of the gas price, YPF would cancel the transport price to TGM.
8. Around the year 2002, Argentina went through a very serious economic crisis, so the Government intervened in various sectors of the economy, including the energy market. Due to a shortage of natural gas in the internal Argentine market, the Government took certain measures modifying the legal framework on the export of natural gas. For instance, it restricted the exports¹⁰ and imposed a special tax that would gradually increase.¹¹ These restrictions continued to grow

9 In turn, AESU and Sulgás were subject to a 'take or pay' clause, by which they had to either take the agreed gas or pay an agreed sum.

10 Mainly through Decrees No 180/04 and 181/04, Resolution of the Energy Secretary No 265/04, Disposition No 27/04 of the Fuel Sub-Secretary.

11 For instance, through Decree No 645/04.

in the following years¹² and would eventually affect YPF's ability to comply its delivery obligations under the Gas Contract.

9. In this context, YPF, AESU, and Sulgás entered into several additional agreements aiming at adapting the Gas Contract to the new regulatory framework (hereinafter 'Complementary Agreements'). Despite these agreements, YPF eventually invoked force major, so the parties exchanged a great number of communications regarding the possibility to perform the Gas Contract. In some of its letters, YPF expressed to AESU and Sulgás that it would not be able to comply with its obligations under the new regulatory framework. In this scenario, YPF did neither deliver the entire volume of gas committed, nor pay the agreed sum of money. Based on YPF's statements, AESU and Sulgás suspended the performance of the Gas Contract, alleging that YPF had repudiated it, and they eventually terminated said contract.
10. After the suspension of the Gas Contract, TGM continued to bill the transport fee, but since YPF was no longer receiving payments from AESU and Sulgás, it stopped paying. This caused a debate between YPF and AESU regarding who should cancel such fee. Consequently, TGM also terminated the Transport Contract.
11. As a consequence of the dispute and based on an arbitration agreement contained both in the Gas Contract and the Transport Contract, each party filed arbitral claims against each other related to both contracts: (i) TGM against YPF under the Transport Contract (and YPF filed a counter claim);¹³ (ii) AESU and Sulgás against YPF under the Gas Contract;¹⁴ and (iii) YPF against TGM, AESU, and Sulgás under the Gas Contract and the Transport Contract¹⁵ (TGM filed a counterclaim against YPF, AESU, and Sulgás). Despite when these three arbitral proceedings started the ICC Rules did not provide the possibility of consolidation, but with the agreement of all parties, the ICC allowed their consolidation in one single arbitration.¹⁶

3. IS THE CHOICE OF FORUM IN FAVOUR OF COURTS OUTSIDE THE SEAT VALID FOR ANNULMENT PROCEEDINGS?

3.1 The arbitral proceedings

12. The proceedings were bifurcated into two phases, one on liability and another one on damages, if necessary.¹⁷ The first phase of the arbitration finished with

12 For instance, Resolution No 752/05 of the Energy Secretary obliged YPF to inject more gas in the internal market. This was increased in 2007. Likewise, in 2008, Resolution No 127/08 of the Ministry of Economy increased the export tax in 100%.

13 ICC Case No 16029/JRF.

14 ICC Case No 16202/JRF.

15 ICC Case No 16232/JRF/CA.

16 They were all consolidated into the ICC Case No 16232/JRF/CA, *ibid* (see Partial Award, para 378). This was a very practical solution, which probably served as a practical test for the ICC when it prepared the modification of its Rules to include consolidation.

17 Procedural Order No 2, 6 May 2011.

the Partial Award on liability, in which the majority of the arbitral tribunal¹⁸ decided that YPF was responsible towards all the other parties for breach of contract.¹⁹ It held that YPF repudiated the Gas Contract, and that YPF breach some of its obligations under the Transport Contract.

13. Upon issuance of the Partial Award, YPF filed an application for annulment,²⁰ alleging that such award was arbitrary.²¹ Invoking a quite singular clause of the Gas Contract and the Transport Contract YPF filed the application to annulment before the Argentine courts.²² Under the heading of 'arbitration', those contracts contained a clause providing for any dispute to be resolved by ICC arbitration in Montevideo, Uruguay. Besides, it regulated various aspects of arbitration, including the following:

The arbitral award shall be . . . not subject to recourse, except for the recourses of clarification and/or *annulment provided in Article 760 of the Code of Civil and Commercial Procedure of the Argentine Republic (Special Appeals)* . . . any Special Appeal shall be *filed exclusively before the tribunals and in conformity with the laws of the Republic of Argentina*.²³

3.2 The debate between the parties

14. Despite the parties' clear intention embodied in the arbitration clause, AESU, Sulgás, and TGM²⁴ alleged that the choice of Montevideo as the arbitral seat

18 Composed by Professors Roque J Caivano, Alejandro M Garro, and chaired by Gabrielle Kaufman-Kohler (hereinafter 'Arbitral Tribunal'). All of them were appointed by the ICC. Kaufman-Kohler was appointed after the resignation of Francisco Orrego Vicuña and Antonio Crivellaro (see Partial Award (n 3) paras 13–17). During the course of the arbitration Professor Garro was unsuccessfully challenged by YPF because he disclosed to have accepted an appointment by counsel for AESU and Sulgás in another ICC arbitration over a similar dispute (related to the Argentine measures on the export of natural gas).

19 Professor Roque J Caivano dissented, considering that YPF had not repudiated the Gas Contract, and therefore AESU and Sulgás were responsible for the damages suffered by TGM under the Transport Contract.

20 See Final Award, 20 April 2016, para 26.

21 Arbitrariness has been recognized as an autonomous ground for annulment by a consistent jurisprudence of the Argentine Supreme Court. Nevertheless, YPF challenged the Partial Award on the ground of an alleged serious departure from a fundamental rule of procedure (contained in the art 760 of the Code of Civil and Commercial Procedure). The dispositive part of the Partial Award stated that YPF had caused the termination of the Gas Contract 'in particular' by repudiating it. One of the arguments used by YPF to support its position was that the phrase 'in particular' inevitably implied the existence of other breaches, which the Arbitral Tribunal had not explained those throughout the Partial Award. Following YPF's application for annulment, AESU and Sulgás filed a clarification request before the Arbitral Tribunal, which therefore rendered an addendum to the Partial Award, clarifying some aspects (see Final Award, para 28). YPF alleged that the Arbitral Tribunal took advantage of this opportunity to amend one of its contradictions. Even if this was true, it must be noted that the purpose of the clarification recourse is exactly to clarify vague concepts, so there is not much to criticize to the Arbitral Tribunal in this regard.

22 According to art 760 of the Argentine Procedural Code, the application must be filed before the arbitral tribunal, who shall refer it to the courts. However, pursuant to arts 759, 282, and 283, if the application is rejected, the applicant may file it directly to the courts of appeal; on this basis, YPF filed its application before both forums.

23 Translated by the author (emphasis added).

24 Given that TGM, AESU, and Sulgás defended the same position (regarding the issues analysed in this article), for the sake of clarity, their arguments are treated together.

inevitably called for the application of Uruguayan law to the validity of the choice of forum. Given that Uruguayan law does not allow an arbitration with the seat within its territory to be reviewed by a foreign court, the parties' choice of forum would be invalid. Alternatively, they argued that if Argentine law was applicable, it would trigger the application of the 1998 Mercosur Agreement on International Commercial Arbitration (hereinafter 'Mercosur Agreement'), which was not in force at the time of the conclusion of choice of forum, but was in force at the time of the application for annulment.²⁵ Article 22.1 of the Mercosur Agreement provides that 'the award shall only be challenged before the judicial authority of the State seat of the arbitral tribunal, through an application for annulment'.²⁶

15. For its part, YPF alleged that the Argentine courts had exclusive jurisdiction over any challenge to the award because the parties had expressly agreed so, and party autonomy should prevail over any other legal rule. As to the applicability of the Mercosur Agreement, it argued that the dispute was outside its *ratione temporis* scope, since it was not in force at the time of the conclusion of the arbitration agreement, which contained the choice of forum.²⁷
16. The parties debated these issues at several fronts, namely the Argentine courts, the Uruguayan courts, and before the Arbitral Tribunal. While the arbitral proceedings were on-going, the Argentine and Uruguayan courts reached contradictory decisions.

3.3 The competition between two annulment courts

17. After YPF filed its annulment application before the Argentine courts, the Arbitral Tribunal issued a procedural order by which it stayed the arbitral proceedings for several months, and AESU and Sulgás requested the Uruguayan courts to set aside that procedural order.²⁸ The Uruguayan courts declared (i) to have exclusive jurisdiction to resolve AESU and Sulgás' application for annulment, (ii) that the parties' choice of forum was invalid, and therefore (iii) it set aside the procedural order.²⁹ Later on, AESU and Sulgás moved to request the Uruguayan courts to declare their exclusive jurisdiction over any challenge of an award and to order YPF to refrain from pursuing any judicial proceedings

25 They also invoked other international instruments like the 1889 Montevideo Treaty on International Procedural Law.

26 Translated by the author.

27 In support of this position YPF submitted an expert report by Alicia Perugini Zanetti, who was a representative of Argentina during the negotiations of the Mercosur Agreement.

28 This action is questionable because, in general, procedural orders are not capable of being challenged before state courts. This is because they merely deal with the management of the procedure, which is decided by the arbitrators, unless it violates due process, in which case they may be challenged with the award at a later stage. YPF did not appear before the Uruguayan courts. The Uruguayan courts issued a letter rogatory to the Argentine courts requesting to serve YPF, but there was an ancillary dispute on whether YPF had been duly served.

29 Montevideo Civil Appeals Tribunal No 2 (n 4). YPF argued that this decision was rendered in violation of its right to defence, since it was not formally notified of these proceedings.

- in foreign jurisdictions.³⁰ While the Uruguayan courts granted the second request, the first request is still pending before such courts.³¹
18. Some time later, the Argentine courts declared, by majority, to have exclusive jurisdiction to entertain the annulment recourse filed by YPF.³² The court followed a delocalization approach, concluding that party autonomy should be respected. The Argentine courts considered that an international arbitration is not subject to any particular legal system and that flexibility was one of its essential features. Besides, the Argentine courts analysed their own competence based on the conflict rules contained within the Argentine legal system, where party autonomy is the primary connecting factor, especially for international arbitration.
19. Furthermore, the Argentine courts granted an interim measure, ordering the stay the arbitration until they decided on the admissibility of the recourse.³³ In a separate decision, the Argentinian courts highlighted that any procedural act taken after the interim measure would be null and void, and that non-compliance with such measure would lead to economic and even criminal sanctions.³⁴ It is worth remarking that, while this kind of interim measures are generally aimed exclusively to the parties; in this case, it was also directed to the Arbitral Tribunal. This is a questionable approach, as it jeopardizes the *compétence-compétence* principle and is not in line with the current arbitration practice.

3.4 The attitude of the Arbitral Tribunal

20. While the Argentine and Uruguayan courts were taking contradictory decisions, the Arbitral Tribunal took some unclear procedural decisions. First, the Arbitral Tribunal stated that it was not for it to decide on the validity of the choice of forum, but by for the Argentine courts, by virtue of the *compétence-compétence* principle.³⁵ Regarding the need to stay proceedings, it pointed out that there

30 See Final Award, para 30.

31 Montevideo Civil Court No 18, 27 June 2014 (see Final Award, para 35). The injunction and the request were never formally served to YPF.

32 Decision of the Federal Court of Appeals on Administrative Matters (n 4). The Public Attorney before the Court of Appeals had previously recommended the same solution to the Court (see p 15 of the decision). Therefore, they should decide on the admissibility and eventually the merits of the application for annulment.

33 AESU and Sulgás filed a recourse before the Argentinian courts to reconsider its decision, which was rejected, on the basis that interim measures are not capable of being reconsidered by the same court, but are only subject to appeal (Decision of the Argentine Federal Court of Appeals on Administrative Matters (n 6)).

34 TGM filed recourse before the Argentine Supreme Court against the interim measure, but it was rejected based on domestic procedural rules (Decision of the Argentine Supreme Court, 18 November 2016 <<http://www.csjn.gov.ar>>). The Argentine court then declared the annulment of all procedural steps taken after its interim measure. The latter decision was challenged by TGM and a decision is pending before the Supreme Court.

35 The Arbitral Tribunal also stated that if the choice of forum was valid, then Argentine law should apply, and it would be required to decide on the admissibility of the recourse, as requested by such law. It advanced that, in the event the choice of forum was valid, it rejected YPF's recourse, since it considered that there were no valid grounds that required a judicial review.

was no obligation to do so because, first, although the parties agreed in the arbitration clause that the enforcement of the arbitral award should be suspended until the annulment petition was resolved, the liability award was not enforceable due to its 'partial' nature and the bifurcation of the proceedings; and secondly, neither Uruguayan law,³⁶ nor Argentine law,³⁷ nor the ICC Rules required a stay. Nevertheless, invoking its own discretion, it stayed the arbitral proceedings until the Argentine courts decided on the admissibility of the recourse, and if admitted, decided on its merits.³⁸

21. After some months without having a decision of the Argentine courts, the Arbitral Tribunal resumed the arbitral proceedings, relying on its duty under the ICC Rules to conduct the proceedings efficiently.³⁹ Therefore, all the parties submitted their memorials on damages and participated in the production of documents phase. During this phase, YPF argued, among other things, that no damages should be awarded to the counterparties because the award on liability was null and void, and by continuing with the quantum phase despite the challenged filed by YPF the arbitral tribunal was forcing YPF to assume the validity of that award.
22. The Argentine courts rendered the interim measure after all the memorials were submitted and before the final hearing on quantum took place. When that occurred, the Arbitral Tribunal decided to stay the proceedings again and postponed the final hearing for a few months. In this opportunity the Arbitral Tribunal also urged the parties, specially YPF, to avoid imposing obstacle to the course of the arbitration, including the sanctions, thus revealing its discomfort with the Argentine court's decision. Eventually, the Arbitral Tribunal resumed the proceedings once again and scheduled the final hearing on quantum, disobeying the interim measure. YPF constantly stated that the proceedings shall be suspended and that any further procedural steps would be null and void. Consistent with its position, it did not attend the final hearing (although its experts attended for cross-examination) and did not file a post-hearing brief. TGM did the same. Only AESU and Sulgás attended the final hearing.
23. Some time after the final hearing, the Argentinian courts finally set aside the Partial Award in its entirety.⁴⁰ In spite of this decision, and without expressing any views on it, the Arbitral Tribunal rendered its Final Award, ordering YPF to

36 art 501 of the Uruguayan Procedural Code states that during the annulment recourse the arbitral proceedings shall be suspended.

37 It is worth clarifying that the Argentine Procedural Code does not require to stay the proceedings when the application for annulment is filed, but it does once the recourse is admitted.

38 Procedural Order No 8, 29 July 2013 (see Final Award, para 27).

39 Procedural Order No 9, 17 October 2013.

40 Decision of the Federal Court on Administrative Matters (n 7). Although this article analyses neither the merits of the annulment recourse nor the standard of review applied by the Argentine courts, it is worth mentioning that the annulment decision set aside the Partial Award in its entirety. TGM filed recourse against this decision, arguing, among other things, that the Argentina courts acted *extra petita* because YPF challenged only one specific point of the dispositive part referring to the Gas Contract, but not the dispositive part referring to the Transport Contract under which TGM mainly based its case. Therefore, there was no need to set aside the Partial Award in its entirety. YPF, on the contrary, sustained that the Argentine courts did not act *extra petita* because it requested the annulment of the award in its entirety. The recourse filed by TGM was rejected by the Argentine Court of Appeals. AESU also filed recourse to

pay its counterparties a total amount of more than USD 500 million in damages, plus more than 5 million in costs. Upon issuance of the Final Award, YPF filed a new application for annulment before the Argentine courts. It based its application on different grounds, including the violation of the interim measure. This application is still pending.

3.5 Which are the main aspects to resolve this question?

3.5.1 How to analyse the validity of the choice of annulment courts?

3.5.1.1 Characterization of the discussion.

24. The court judgments issued in the case under analysis made it clear that under Argentine law the choice of forum is valid,⁴¹ whereas under Uruguayan law it is not.⁴² This section does not intend to revise those decisions under neither of those laws, but rather to analyse which of the solutions is more appropriate, based on the current status of the theory and practice of international arbitration.
25. In order to correctly characterize the debate, it is necessary recalling that in an international arbitration typically various sets of rules come into play. This includes, *inter alia*, the law governing the arbitration agreement and the law governing the arbitral procedure (*lex arbitri*), which sometimes may be the same, but are conceptually different.⁴³ While the first one governs the validity of the submission of the dispute to arbitration (ie consent), the second one governs matters of procedure (ie constitution of the tribunal, interim measures, and recourses against the award).
26. The parties may include in their arbitration agreement some rules of procedure, either directly (drafting a specific rule) or indirectly (through the choice of institutional rules). In such a case, the validity of the parties' agreement on procedural matters is governed by the *lex arbitri*.
27. In the case under analysis, the validity of the arbitration agreement was never contested by the parties; instead, the debate focuses on the procedural rule agreed by them, regarding challenges to the award. The wording of the arbitration agreement shows without a doubt that the parties' intention was to apply Argentine arbitration law (at least regarding the challenges to the award),⁴⁴ as well as to grant exclusive jurisdiction to the Argentine courts.⁴⁵ They could have not been clearer about this intention. Thus, the key question is which should be

set aside the decision setting aside the Partial Award, which was also rejected by the Argentine Court of Appeals.

41 The choice of forum is valid under art 1 of the Argentine Procedural Code, which has been confirmed by the new Civil and Commercial Code (art 2605).

42 This solution arises from art 2403 Uruguay Civil Code.

43 In addition to the substantive law governing the merits.

44 The author is unaware of whether the Arbitral Tribunal have previously applied Uruguayan law to other aspects of the arbitration, but if it did, it would mean that the parties had accepted that (therefore, impliedly agreeing to such application to certain aspects). This would be like having a *dépeçage* over the arbitral procedure, which despite being rare is not prohibited.

45 TGM alleged that the clause should be interpreted in the sense that it refers to the recourse provided in the Argentine Procedural Code, but the Uruguayan courts should entertain it. This position simply does not stand.

the legal consequence of such a bargain. To answer this question, it is important to determine which law governs the arbitral procedure, the main options being Uruguayan and Argentine law, due to their connection with the case.

28. The first answer that comes to mind is that it should be the law of the seat, ie Uruguay. However, there is a current debate about the relevance of the arbitral seat. While some authorities consider that it is a concept carrying legal effects, others argue that it is a mere geographical choice without much legal relevance. This debate has implications on many aspects of international arbitration, such as the enforcement stage, and it also has impact on the question at stake in the case under analysis. In general, a great part of the debate lies in the construction of the underlying intention of the parties, since they usually do not characterize their choice of the seat either as geographical or legal. However, in the case under analysis the parties clearly deprived the seat of any legal effect with respect to annulment proceedings, so the question is whether they were entitled to do so or not. The following sub-sections explain that irrespective of the approach adopted regarding the arbitral seat, the choice of forum should be respected.

3.5.1.2 *Delocalization of arbitration.*

29. In private international law operates the general principle by which, the procedure is governed by the *lex fori*. When it comes to international arbitration, this territorialist approach entails that an award necessarily draws its force and validity from the legal regime of the seat, so the courts of the seat would hold a special controlling authority.⁴⁶ However, as pointed out by the Argentine court, this principle does not necessary apply in international arbitration.
30. The Argentine courts followed a delocalization approach, according to which an international arbitration is detached from any legal system⁴⁷ and comes from a different legal order,⁴⁸ therefore elevating the status of the resulting award.⁴⁹ This approach takes as its starting point the autonomy of the parties, which is the primary principle, since it is their agreement to arbitrate that brings the proceedings into existence.⁵⁰ In this sense, international arbitration is considered as ‘supranational’, ‘a-national’, ‘transnational’, or ‘delocalized’, resulting in a ‘floating award’.⁵¹

46 Donald F Donovan, ‘Preclusion and the New York Convention: Article V(1)(e) and Converse-Article V(1)(e)’ in Stavros L Brekoulakis, Julian DM Lew and Loukas A Mistelis (eds), *The Evolution and Future of International Arbitration* (Kluwer International 2016) 235.

47 See Julian DM Lew, ‘Achieving the Dream: Autonomous Arbitration’ (2006) 22(2) *Arbitration International* 179; Thomas Kendra, ‘The International Reach of Arbitral Awards Set Aside in their Country of Origin - A Turning Point?’ (2011) II *Yearbook of International Arbitration* 153.

48 This has been confirmed in the recent case *Société Ryanair Ltd et Société Airport Marketing Services Ltd v Syndicat Mixte des Aéroports de Charente (SMAC)*, Cour de Cassation, 8 July 2015.

49 Kendra (n 47) 160.

50 See Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff, 2010); Thomas Clay, ‘Arbitrage et modes alternatifs de règlement des litiges’ (2006) *Recueil Dalloz* 3026.

51 Nigel Blackaby and Constantine Partasides and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) ss 3.76–78.

31. This approach also implies that the arbitral seat is selected for mere practical (rather than legal) convenience.⁵² Consequently, arbitrators are considered to have no forum because they do not derive their authority from the state in which they have their seat, but rather from the sum of all the legal orders (or even transnational rules) that under certain conditions recognize the validity of the arbitration agreement and the resulting award.⁵³ Actually, not only the parties are free to choose the seat of the arbitration, but there is no requirement for such seat to have any link whatsoever with the dispute. In this sense, the seat cannot impose any rules to the parties, since it cannot claim to have a greater interest than them; actually, the courts of the place of enforcement have a greater interest than the courts of the seat in controlling the resulting award.⁵⁴ In fact, according to general rules of private international law, it makes sense that the effect of the foreign judgment setting aside the arbitral award will depend on the law of the place of enforcement.⁵⁵
32. The delocalization theory was proposed many years ago, and although it is still quite controversial, it gradually gains more support from scholars, practitioners, arbitrators, and courts. The French courts are probably the most loyal advocates in favour of this theory.⁵⁶
33. The main practical consequence of this approach is considered to be related to the enforcement of foreign awards, in the sense that the courts of the seat should not have precedence over the enforcement courts.⁵⁷ Similarly, this lack of relevance of the choice of the seat should allow the parties to choose the controlling courts. As explained by the Argentine courts, following this theory, the choice of forum of the case under analysis should be deemed valid.
34. Given that some Latin American courts are not always so eager to give deference to arbitral tribunals⁵⁸ and to respect party autonomy,⁵⁹ the adoption of this approach by the Argentine courts should be celebrated as a positive step within the regional context.

3.5.1.3 *The legal effects of the choice of the seat.*

35. Despite the growing acceptance of the delocalization theory, this position has been heavily criticized as well.⁶⁰ Nevertheless, in order to solve the case under

52 Emmanuel Gaillard, 'The Enforcement of Awards Set Aside in the Country of Origin' (1999) 14 ICSID Review – Foreign Investment Law Journal 16, 18.

53 *ibid* 18, 45.

54 *ibid* 45.

55 *ibid* 39. William W Park, 'Why Courts Review Arbitral Awards' in *Recht der Internationalen Wirtschaft und Streiterledigung im 21. Jahrhundert: Liber Amicorum Karl-Heinz Böckstiegel*, Heymann, Köln (2001) 595, 599.

56 *Société PT Putrabali Adyamulia v Société Rena Holding et Société Mnutogita Est Epices* (2007) *Rev Arb* 514.

57 Gaillard (n 52) 19.

58 Yas Banifatemi, 'La regla de prioridad: una prioridad en América Latina?' in Emmanuel Gaillard and Diego P Fernández Arroyo (eds), *Cuestiones claves del arbitraje internacional* (UR/CEDEP 2013) 81.

59 María Mercedes Albornoz, 'Choice of Law in International Contracts in Latin-American Legal Systems' (2010) 6 *Journal of Private International Law* 23, 43–48.

60 See, for instance, Albert J van den Berg, 'Should the Setting Aside of the Arbitral Award Be Abolished?' (2014) 29(2) *ICSID Review* 263; Kendra (n 47) 157; Park (n 55).

analysis, it is not necessary to go as far as considering an autonomous legal order. On the opposite side of the delocalization theory are those who consider that the arbitral seat is not a mere geographical concept, but a legal one.⁶¹ According to this position, the choice of the seat has two core legal effects; first, it determines the law applicable to the arbitral procedure (so its mandatory rules operate as a limit to party autonomy), and secondly, it determines the jurisdiction of the courts to control the arbitration.

36. Consequently, it is generally considered that the courts of the seat are the ones with primary jurisdiction to control the arbitration, including the arbitral award.⁶² Admittedly, this is a very well-established default rule, which makes sense because, from a mere private international law point of view, the seat is a strong enough connecting factor. The question arising from the case under analysis is whether the parties can departure from this default rule and grant controlling jurisdiction to courts outside the seat.
37. Much has been discussed about the possibility of the parties to agree on having the arbitral procedure governed by a law different than the one of the seat (ie different than the law of the controlling courts). However, most of the discussion took place in the academic field, with not many reported cases on the specific topic. In general, it has been concluded that the parties are free to make such a choice, although this would not be convenient, as it might complicate the procedure.⁶³ Actually, various state courts have confirmed that this is theoretically possible.⁶⁴
38. If, in theory, the parties can allocate the first element (the choice of the procedural law) outside the seat, there is no reason why they could not do the same with the second element (the jurisdiction of the controlling courts). Even if this was not convenient, nothing impedes this choice.⁶⁵ The parties' intention should override any contrary requirement in a national legislation, particularly when they are sophisticated parties who are capable of managing their own risks.⁶⁶
39. Given that sometimes the parties choose the arbitration seat for mere practical convenience, they might not intend to have the local courts intervening in the

61 Blackaby and Partasides and others (n 51) s 3.56.

62 Gary B Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (Kluwer Law International, 5th edn, 2016) Ch 3, s 66.

63 Born, *ibid*, s 97. If the procedural law of a particular country different than the seat is either so attractive or so familiar to the parties that they wish to adopt it, they would do better to locate their arbitration in that country. Blackaby and Partasides and others (n 51) s 3.67.

64 *Naviera Amazonia Peruana SA v Compania Internacional de Seguros del Peru* (1988) Lloyd's Rep 1 116; *Union of India v McDonnell Douglas Corporation* (1993) Lloyd's Rep 2, High Court, England 48, 50; *International Standard Electric Corp. v Bidas Sociedad Anonima Petrolera, Industrial y Comercial*, 745 F Supp 172 (decided 1990) = YBCA XVII (1992) 639 (US District Court for the Southern District of New York, USA).

65 See Blackaby and Partasides and others (n 51) ss 10.25–26, who explain that party autonomy may trigger an exception to the rule of the seat.

66 Roman Khodykin, 'National Court Review of Arbitration Awards: Where Do We Go From Here?' in Brekoulakis, Lew and Mistelis (eds) (n 46) 269–86.

arbitral procedure.⁶⁷ Thus, in theory, nothing prevents conceiving a non-territorial regime allowing national courts to exercise jurisdiction over an arbitral procedure held outside their territory.⁶⁸ Some courts have upheld their jurisdiction to review foreign awards.⁶⁹ While, arguably, this solution jeopardizes the arbitration regime, it is no so if the parties, as in the case under analysis, expressly agree so. Hence, when the parties enter into such an agreement it should be respected since a contrary solution would affect arbitration as a dispute resolution mechanism.

40. Actually, opting for an arbitration law and the courts of a place other than the seat might be more effective. According to basic principles of private international law, a state court always applies its own procedural law, which in the case of an annulment court will include the grounds for annulment.⁷⁰ Thus, if the law applicable to the procedure is different than the one of the annulment court, there might be potential inconsistencies. On the one hand, the arbitrators will have to respect the arbitration law, but on the other hand, they should respect the law of the annulment court to avoid the risk of having their award set aside. In this sense, having both elements connected with the same country (though different than the seat), would eliminate this risk of inconsistencies.
41. Furthermore, if, by hypothesis, one were to say that the choice of Montevideo as the seat of the arbitration and the Argentine courts as the controlling body, clash so heavily that they cannot coexist, that would not render the choice of forum should be invalid *ipso iure*.⁷¹ Instead, it would be necessary to determine which of the choices should supersede the other. Otherwise, the parties would be imposed a solution that they did not envisage. However, this cannot be done after a dispute arose and the proceedings are ongoing, when the parties are not likely to reach an agreement, so it is necessary to construe their real intention. In the case under analysis, various reasons indicate that it should be the choice of forum.⁷² First, the parties were much detailed as to such choice, showing how relevant it was. Secondly, besides the choice of the Argentine courts, they chose, not

67 Wang Shengchang and Cao Lijun, 'The Role of National Courts and Lex Fori in International Commercial Arbitration' in Julian DM Lew and Loukas A Mistelis (eds), *Pervasive Problems in International Arbitration* (Kluwer International 2006) 180.

68 Christophe Seraglini and Jérôme Ortscheidt, *Droit de l'arbitrage interne et international* (Montchrestien 2013) 856; Eric Loquin, *Journal de Droit International* (2005) 1175, 1176. See also Hossein Abedian, 'Judicial Review of Arbitral Awards in International Arbitration – A Case for an Efficient System of Judicial Review' (2011) 28(6) *Journal of International Arbitration* 579.

69 The Indian courts have done this before. *Bhatia International v Bulk Trading S.A.* and *Venture Global Engineering Case v Satyam Computer Services Ltd.* This position has now been abandoned. *Bharat Aluminium Co. et al. v Kaiser Aluminium Technical Service, Inc. et al.*, Supreme Court of India, YBCA XXXVII (2012) 244–49.

70 The annulment court may also consider the application of the *lex arbitri*. Similarly, the New York Convention requires the enforcement court to take into consideration the *lex arbitri*, since art V(1)(d) considers whether the procedure was in accordance with the agreement of the parties, what includes the *lex arbitri* chosen by them.

71 The situation is similar to a commercial contract, which the parties call 'property rent', but its provisions provide for one party to sell and the other to receive goods; then it constitutes a sales contract, not a rental. The labels cannot defeat a clear intention of the parties.

72 A separate question is whether the Argentine courts would have decided in the same manner if the situation was absolutely the other way around.

only Argentine arbitration law (procedural code), but specific provisions of such law. Besides, considering the nationality of the parties, it could be said that the choice of the seat aimed at having a neutral venue.

42. YPF alleged that its consent to arbitration was subject to the condition of granting jurisdiction to the Argentine courts over annulment proceedings. Although it is not possible to verify with certainty whether this is true, many elements make it quite likely. If that were the case, and one considers the choice of the annulment forum to be null and void, then under most arbitration laws the arbitration agreement (and therefore the entire arbitration process) would be invalid for lack of consent.
43. In spite of the above analysis, it is not desirable that the parties choose a procedural law or courts different than the ones of the seat because it may potentially create practical problems, as it happened in the case under analysis, where it was not efficient. National courts will likely refuse to uphold a choice of forum clause that violates applicable mandatory law or overriding public policy of the forum.⁷³ Thus, many national courts, like the Uruguayan courts, are reluctant to allow foreign courts to entertain challenges to awards made within their jurisdiction.⁷⁴ However, the general rule provided by private international law principles is that the chosen court should decide whether such agreement is valid or not.⁷⁵ Given that each court begins the analysis from its own law (with different connecting factors), they might reach contradictory decisions. Although not desirable, this is almost inevitable consequence of the sovereignty of states.

3.5.1.4 *The guidance of the New York Convention.*

44. Even though the New York Convention is mainly relevant at the enforcement stage, it provides some guidance for various aspects of arbitration, so it is sound to take it into consideration. The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter 'New York Convention') supports the conclusion that the choice of forum at stake is valid for many reasons.
45. First, Article V(1)(d) states that recognition and enforcement of an award may be refused if 'the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place'. This wording clearly shows that the *lex arbitri* (which governs the annulment recourse) shall be the one chosen by the parties, and only in the absence of such a choice, the law of the seat.
46. This idea is complemented by Article V(1)(e), which states that recognition and enforcement of an award may be refused if it 'has been set aside or suspended by a competent authority of the country in which, or *under the law of which*, that award was made'. The New York Convention does not provide much guidance on what this phrase means; it can be interpreted in a negative fashion as limiting

73 Born (n 62) ch 4, s 9. Actually, the question remains as to whether the Argentine court would have decided the same if the situation was the other way around.

74 Julian DM Lew, Loukas A Mistelis and others, *Comparative International Commercial Arbitration* (Kluwer International 2003) s 25.16.

75 See for example, 2012 Brussels 1 Recast, art 31.

the courts in which an award may be challenged or in a positive fashion as manifesting the potential for challenging an award in a place other than the place of arbitration.⁷⁶ Although there are arguably three possible laws 'under which the award was made', it is understood as referring to the law governing the arbitral proceedings.⁷⁷ Thus, Article V(1)(e) envisions the possibility that the parties may agree to a place of arbitration in one country and the application of the procedural law of another country.⁷⁸ In such case, the courts of the country whose procedural law was selected by the parties should have jurisdiction to control the arbitration.

47. Both provisions make clear the importance of party autonomy.⁷⁹ In the case under analysis, the parties made an express choice to Argentine law regarding the annulment recourse. It would make no sense to agree on certain annulment courts (which will apply their own grounds for annulment) and consider that award should be rendered under a different law.
48. Secondly, the New York Convention does not exclude the possibility of enforcing a delocalized award.⁸⁰ It is true that the seat of the arbitration provides its nationality to the award (which the winning party will invoke to seek its enforcement under the New York Convention), so it might have a legitimate interest in supervising it. Nevertheless, the New York Convention does not specify how to determine the nationality of the award (what is typically governed by domestic law), so an award may have dual nationality (according to the law of different places).⁸¹ Besides, the interest of the seat cannot be greater than the interest of the parties. For this reason, some legal systems allow waiving the annulment recourse even when they are giving nationality to the award.⁸² Following the same rationale, there should be no problem with the parties if, instead of waiving the recourse, grant jurisdiction to a foreign court.
49. Uruguayan courts consider that their jurisdiction to control arbitrations with their seat in Uruguay constitutes a public policy principle.⁸³ This position is not only legitimate, but also understandable since Uruguay still has a very old-fashioned legislative framework in private international law, including arbitration. It is in general very conservative, particularly regarding party autonomy. However, its position clashes with the rules of the New York Convention outlined above, which expressly admits an agreement to the contrary. By accepting

76 Lew, Mistelis and others, (n 74) s 25.16.

77 van den Berg (n 60) 263; Nadia Darwazeh, 'Commentary to Article V(1)(e)' in Herbert Kronke, Patricia Nacimientto and others (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer International 2010) 321.

78 Darwazeh, *ibid* 321; *International Standard Electric Corp.* (n 64).

79 The 1975 Panama Convention on International Commercial Arbitration, also invoked by AESU, Sulgás, and TGM, provides the same solution in its art 5. They also invoked other international treaties, such as the 1889 Montevideo Treaty (art 34), Mercosur Cooperation Protocol No 5/92, and the 1979 Inter American Convention on Efficacy of Judgments, but they are not relevant since they are not specifically for these matters, and are quite old fashioned, so they do not reflect the modern developments in private international law and specifically in arbitration.

80 Shengchang and Lijun (n 67) 180. For instance, Swedish law admits this solution.

81 Lew, Mistelis and others (n 74) s 25.20.

82 For instance, Swiss Private International Law Act, art 192.

83 The purpose of this article is not to analyse Uruguayan law.

the New York Convention, Uruguay it has accepted to enforce awards subject to the control of an annulment court outside the seat.

3.5.1.5 *The applicability of the Mercosur Agreement.*

50. In the case under analysis, the Mercosur Argeement also came into the picture, since it is part of the Argentine and Uruguayan legal systems. The Mercosur Agreement entered into force in 2002 and constitutes a *lex specialis*.
51. The debate between the parties was (i) whether this treaty was applicable *raitone temporis*, and in case it was, (ii) whether its Article 22.1 was mandatory or not. This provision states: 'the award shall only be challenged before the judicial authority of the State seat of the arbitral tribunal, through an application for annulment'.⁸⁴
52. Regarding its applicability, YPF alleged that the Mercosur Agreement was not applicable, while its counter parties alleged that it was. The key question is which is the moment that determines its applicability, since it entered into force after the conclusion of the choice of forum in question.⁸⁵ Except for Article 26, the Mercosur Agreement does not establish its applicability *ratione temporis*, so the question is open to interpretation. It should be interpreted in light of the 1969 Vienna Convention on the Law of the Treaties. Due to the non-retroactivity principle embodied in Article 28 of such treaty, the provisions concerning arbitration agreements should be considered to affect only those agreements concluded after its entry into force.⁸⁶ In the same vein, procedural provisions should only apply to proceedings (including challenges to the award), arising out of arbitration agreements concluded before the entry into force of the Mercosur Agreement. Otherwise, procedural aspects (including challenges to the award) would be governed by the Mercosur Agreement, while other aspects, as the validity of the arbitration agreement would not. This solution cannot be accepted as it would create inconsistency in the applicable rules.
53. Although the discussion between the parties focused on the Mercosur Agreement, the parties' choice in favour of Argentinian courts can be hardly considered (as such) as an arbitration agreement but as a choice-of-court agreement. In fact, parties did not select an arbitral tribunal as competent body to adjudicate annulment proceedings but a judicial court. Under such rationale, it might be argued that the choice is not governed by the Mercosur Agreement but by another Mercosur instrument, namely the 1994 Buenos Aires Protocol on International Jurisdiction on Contractual Matters, whose basic rule is party autonomy.

84 Translated by the author.

85 The court analysed the possibility of requesting an advisory opinion to the Mercosur Permanent Court of Revision, but it concluded that it was not necessary. One of the judges dissented, saying that the court should request such advisory opinion on: (i) whether the Mercosur Agreement was applicable to disputes arising out of contracts concluded before its entry into force; and (ii) whether its art 22.1 was mandatory. Although the author considers that the solution of the majority was correct, he acknowledges that it would have been a good opportunity to requests an advisory opinion and shed light on the issue.

86 María B Noodt Taquela, *Arbitraje Internacional en el Mercosur* (Ciencia y Cultura 1999).

54. Regarding the nature of Article 22.1, YPF alleged that it was not mandatory, while its counterparties considered that it was, based on the use of the term ‘shall’ and ‘only’.⁸⁷ Despite this terminology, there is no reason to understand this provision as a limit to party autonomy. The Argentine courts concluded that the Mercosur Agreement was not mandatory because, pursuant to its Article 3(c), the parties can opt out of the treaty when the contract has some objective—legal or economic—contact with a Contracting State and the arbitral tribunal has its seat in one of the Mercosur’s Member States. Although this article does not analyse the merits of this argument, it is worth mentioning that rules of private international law generally allow the parties to opt out the default regulation, unless it is considered mandatory, but the mandatory nature of an instrument (or a particular provision) is typically stated therein. In the case of the Mercosur Agreement, there is no indication of its mandatory nature, as a whole, let alone of Article 22.1 in particular. Besides, given that party autonomy is the main principle in international arbitration, there would be no reason for the Mercosur states to desire limiting the parties’ choice of procedural law or the jurisdiction of the courts.
55. In the hypothesis that the Mercosur Agreement was applicable and its Article 22.1 mandatory, rendering the choice of forum invalid after its conclusion would have further consequences. It would be fair for the parties to have the opportunity of adapting such agreement. In the case under analysis, if the choices of the seat and the annulment courts are incompatible, the parties should decide which of said choices should prevail and which one should be modified. The Mercosur Agreement obviously does not provide any guidance for such a specific scenario, but as a matter of principle, the parties’ intention should be determinant. As explained above (Section 3.5.1.3), in this case, the choice of forum should prevail.

3.6 Which should be the impact of the annulment proceedings on the arbitral proceedings?

56. Since there is no supranational court to settle the conflict between the Argentine and Uruguayan courts, the Arbitral Tribunal had to live with the existence of their contradictory decisions. Admittedly, it was in a very hard position, which included interim measures rendered in the Argentine proceedings.
57. According to the principle of *compétence–compétence*, each international tribunal has the prerogative of deciding on its own jurisdiction.⁸⁸ Therefore, the Arbitral Tribunal had no authority to decide which was the competent annulment court. However, in practice, a tribunal in this situation has to adopt a position for itself, as to which is the court that it will respect. While this would have no binding effect on the parties, let alone on the courts, it is paramount to understand how the tribunal will react throughout the proceedings. The parties have the right to understand the rationale on which the tribunal’s procedural conduct is based. In fact, the authority of the controlling court and the arbitral law would have no

87 According to YPF, the term ‘only’ (*solo*) refers to the type of remedy (annulment) and not to the court.

88 Save for the case of the analysis of indirect jurisdiction, for instance, in an enforcement action.

relevance if not because they are expected to be respected by the arbitral tribunals.

58. As to which court's jurisdiction the Arbitral Tribunal should have respected, the solution is even easier than for each of the courts involved. As opposed to state courts that are bound by their own law, an arbitral tribunal has no forum (and therefore no *lex fori*), so is not guardian of the public policy of any state in particular. Thus, the starting point of its analysis must always be the will of the parties, which in the case under analysis clearly pointed to the Argentine courts. Therefore, according to the decisions of the Argentine courts, the Arbitral Tribunal should have stayed the proceedings.⁸⁹
59. If the Arbitral Tribunal considered that the Argentine courts were competent, it should have respected their decision to stay the proceedings and then the annulment of the Partial Award. Conversely, if it considered that the Uruguayan courts were competent, it should have not stayed the proceedings in the first place. However, the Arbitral Tribunal did not take a clear position. Instead of taking one of those paths, it acted with hesitation, by staying the proceedings for a while and then resuming them, a sequence that was repeated without identifying any concrete legal basis.⁹⁰ Ultimately, it disregarded the jurisdiction of the Argentine courts, but again, without making a clear determination, and after recognizing that those courts were competent to determine the validity of the choice of court agreement.
60. In its Final Award, the Arbitral Tribunal stated that it would not comment on the annulment judgment, but that it would render the award because the judgment was not yet binding. Again the Arbitral Tribunal took a probably convenient, but certainly inappropriate decision. The binding/non-binding effect of the annulment decision has no relevance; instead, what matters is whether the Argentine courts had jurisdiction or not and if that jurisdiction had been properly asserted, because if that was the case, then the mere existence of the proceedings would have required the Arbitral Tribunal to stay the arbitral proceedings (even before a judgment). There are situations in which an arbitral tribunal may (or must) go ahead notwithstanding courts decisions, but in such situations a concrete, clear explanation of the reasons underlying the decision of the arbitral tribunal is required. The autonomy of arbitration should not prevent arbitral tribunals to avoid contradictory decisions as much as is possible.

3.7 A saga to be continued: are the awards enforceable after the annulment decision?

61. As if this saga had not enough aspects to discuss, it is likely to continue with several new chapters. For instance, there are still pending appeals before the Argentine Supreme Court, and AESU initiated an enforcement action before the

89 Since Argentine law was applicable, it should have been stayed, not since YPF filed the recourse, but since the Argentine court admitted it. Thus, the Arbitral Tribunal should have analysed the formal requirements and, if they were fulfilled, then forward it to the Court of Appeals.

90 On the basis that neither the Argentinian law nor the Uruguayan one say anything about staying the proceedings when there is an application for setting aside an award on liability, the Arbitral Tribunal decided that the answer was under its discretionary power.

New York courts that afterwards was voluntarily dismissed as a result of a settlement agreement between YPF, AESU, and Sulgás, but TGM is still in a position to initiate enforcement actions in New York or other jurisdictions.⁹¹

62. The New York Convention governs the enforcement of foreign arbitral awards in a vast majority of states. A number of scholars consider that, according to the New York Convention, an award that had been set aside is subject to the rule *ex nihilo nil fit*: nothing follows out of nothing.⁹² However, the enforcement of annulled awards is a current issue in international arbitration, which despite not being settled acknowledges well-established positions. The current debate is focused on the degree of deference (if any) that the enforcement courts should give the findings of an annulment court.
63. The French courts have developed a consistent case law by which they do not hesitate to enforce annulled awards.⁹³ They do not give any consideration at all to the reasons given in an annulment decision⁹⁴ and they rely on Article VII of the New York Convention to apply their own domestic law.⁹⁵ Some courts (eg in Switzerland and Germany) simply reject that approach.⁹⁶
64. Although there are some precedents where other courts have also enforced annulled awards,⁹⁷ it is worth highlighting that they have done it under different basis. Some courts apply the New York Convention, but rely on the discretion granted by the permissive wording of Article V, which states that enforcement 'may' be refused under certain circumstances. Likewise, some other courts consider that for Article V.1(e) to apply, the foreign judgment that set aside the arbitral award must be firstly recognized under the normal rules of private international law for the enforcement of foreign judgments. On this basis, some courts, like the US courts, seem to find a middle ground. In principle, they respect the authority of the annulment courts,⁹⁸ unless the annulment decision

91 It is worth to mention at this point that although the claims against YPF amounted to more than 1.8 billion US dollars, YPF was finally condemned to pay around 500 million US dollars.

92 Marike RP Paulsson, *The 1958 New York Convention in Action* (Kluwer International 2016) 202. See for instance a recent case, where the Brazilian courts refused enforcement of an ICC award vacated in Argentina <<http://kluwerarbitrationblog.com/2016/03/08/brazil-refuses-recognition-of-an-icc-award-set-aside-in-argentina/>>. Donovan (n 46) 235.

93 *Société Hilmarton v Omnium de Traitement et de Valorisation*, French Supreme Court, 19 December 1991, *Rev Arb* (1993) 300; *République arabe d'Égypte v Société Chromalloy Aeroservices*, Cour d'appel de Paris 14 January 1997, *Rev Arb* ((1997) 395, note Fouchard.

94 Gaillard (n 52) 27.

95 *Norsolor S.A. v Pabalk Ticaret Sirketi S.A.*, Cour d'appel de Paris, 19 November 1982. This case determined that art VII of the Convention can be applied even in situations related to art V.1.e; nevertheless, there was not a final resolution of the issue in the case because the Vienna court of appeal reverted the decision of the lower court setting aside the awards.

96 Kendra (n 47) 157.

97 Gaillard (n 52), citing Brussels Tribunal of First Instance of 6 December 1988, *YBCA XV* (1990) 370; *J Trib* (1993) 685; *Bull ASA* (1989) 213; Kendra (n 47) 155–58.

98 See *Creighton Limited v The Government of the State of Qatar (Ministry of Public Works)*, District of Columbia, *YBCA XXI* (1996) (USA 197) 751, where the US courts refused enforcement under art V(1)(e) due to the annulment proceedings in Paris, the seat of the arbitration. In *Chromalloy Aeroservices and the Arab Republic of Egypt*, 939 F Supp 906 (DC Cir 1996), the US courts relied on art VII of the New York Convention to state that refusing enforcement would violate the country's public policy in favour of enforcement of binding arbitration clauses. The US courts have recently refused enforcement of

affects the most fundamental principles of justice (eg if the annulment court was corrupt, biased).⁹⁹

65. The case under analysis is likely to bring another issue to the discussion, namely which are the competent courts to entertain an application for annulment. For courts following the French approach, the enforcement of the YPF award would not be different than other cases. However, it might make a difference for courts following an intermediate approach, which assess the annulment decision.

4. THE MAIN ASPECTS ON THE MERITS OF THE CASE

66. The merits of the case under analysis are also very interesting. The substantive issues are mainly related to the dispute between AESU and Sulgás on one side, and YPF, on the other, regarding the Gas Contract.¹⁰⁰
67. The Arbitral Tribunal considered that the choice of law clause contained in the Gas Contract, which pointed to Argentine law, also triggered the application of the CISG, pursuant to its Article 1.1(b), what was not contested by the parties.¹⁰¹ It should be noted that, otherwise, the CISG would not have been applicable, given that at the time of the commencement of the arbitral proceedings Brazil was not a Contracting State. The parties equally relied on the 2010 UNIDROIT Principles of International Commercial Contracts (hereinafter 'UNIDROIT Principles'), as complementary to the CISG, a position that is in line with the current practice in contracts for the international sale of goods.¹⁰²
68. The following sections analyse two core aspects of the merits of the case, namely the liability for anticipatory breach (related to the Partial Award), and the determination of compensation (related to the Final Award).

the *Getma* award, which was previously set aside. See <http://www.lexology.com/library/detail.aspx?g=71b6593c-ee22-4783-9b81-8b45ca132207&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2016-07-01&utm_term=>>.

- 99 *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v Pemex-Exploración y Producción*, No 10 Civ 206 (AKH), 2013 WL 4517225 (SDNY 23 August 2013). The court did not rely on the New York Convention since the case was governed by the 1975 Panama Convention, which does not contain a similar provision. See also *Baker Marine (Nig.) Ltd. v Chevron (Nig.) Ltd.*, 191 F 3d 194 (2d Cir 1999). *TermoRio S.A.E.S.P. v Electranta S.P.*, 487 F 3d 928 (DC Cir 2007), where the US courts refused enforcement of an arbitral award set aside by the courts of the seat, Colombia. This was also the position shown by the UK courts in a recent case in which they admitted enforcement of an award which annulment was pending before the courts of the seat due to extreme delays in the annulment proceedings. *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* (No 3), English Court of Appeals Civ 1144 and 1145, 10 November 2015. See Paulsson (n 92) 202.
- 100 The termination of the Transport Contract was a consequence of the former.
- 101 This solution only extended to the issues arising out of the Gas Contract, but not the ones related to the Transport Contract, which was governed by Argentine domestic law.
- 102 Alejandro M Garro, 'The Gap-filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG' (1994/1995) 69 Tul L Rev 1149; Stefan Vogenauer and Jan Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles on International Commercial Contracts* (OUP 2009) 56ff; Diego P Fernández Arroyo, 'The Growing Significance of Set of Principles to Govern Trans-boundary Private Relationships' in Eppur si muove: *The Age of Uniform Law. Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday* (UNIDROIT 2016) 251, 268–69. The UNIDROIT Principles may be helpful, for instance, regarding the degree of certainty in which the damages must be proven by the injured party; while the CISG is silent about this, the UNIDROIT Principles require a 'reasonable' degree of certainty (art 7.4.3).

4.1 Liability for anticipatory breach

4.1.1 *The debate between the parties*

69. As explained above, since the dispute arose, the parties exchanged many letters expressing their views. In some of those letters, YPF stated that it would be impossible to perform the contract as originally expected. At the same time, it invited its counterparties to renegotiate the Gas Contract.
70. Based on such statements, TGM, AESU, and Sulgás alleged that YPF had repudiated the Gas Contract, and therefore committed an anticipatory breach under Articles 72 and 73 of the CISG.
71. YPF alleged that it had done its best efforts to maintain the availability of gas, denying to have repudiated the Gas Contract. Besides, it alleged that the real reason why AESU and Sulgás terminated the Gas Contract was that, since they had to pay an export tax that was extremely high, and were unable to transfer this price to their clients, the profitability of their business was devastated and wanted to get rid of the Gas Contract.

4.1.2 *The Tribunal's decision on anticipatory breach*

72. Following the arguments advanced by AESU and Sulgás, the Arbitral Tribunal analysed the common law concept of 'repudiation'. It understood this concept as one party's rejection of its obligations under a contract, being it because such party expresses to the other party that it will incur in a fundamental breach of the contract, or because its conduct makes it clear that it will not fulfil its obligations. It considered that this concept was embodied in Article 72 of the CISG.
73. In interpreting this provision, it considered that for an anticipatory breach, there is no need for an express manifestation of the allegedly breaching party, but it suffices if the breach is evident. As to the standard for assessing when it is evident, the Arbitral Tribunal analysed some CISG precedents and concluded that a reasonable doubt that one party will breach the contract is not enough to constitute an anticipatory breach, and that there must be almost absolute certainty. It stated that it must be clear that said party totally repudiates the contract and will not change its opinion. It also pointed out that the degree required by Article 72 to avoid the contract is higher than the one in Article 71 to suspend it.
74. Arguably, sometimes it can be difficult to identify the difference between an anticipatory breach and an attempt to renegotiate the contract. In its Partial Award, the Arbitral Tribunal analysed whether YPF's conduct fell within one or the other category, and, by majority, decided that, taken cumulatively, YPF's letters amounted to an anticipatory breach of the Gas Contract in the terms of Article 72 (1) and (3) of the CISG. It particularly focused its analysis on the wording of YPF's letter, in which it stated that the new circumstances had 'pulverized' the basis of the Gas Contract and, therefore it needed to be renegotiated. Likewise, the Arbitral Tribunal considered that part of the repudiation was YPF's request to AESU and Sulgás to pay natural gas royalties. Furthermore, it

- considered that the anticipatory breach was shown in YPF's rejection of certain payments claimed by AESU and Sulgás under the 'deliver or pay' clause.¹⁰³
75. Having determined the existence of an anticipatory breach, the majority of the Arbitral Tribunal concluded that the suspension and later avoidance of the Gas Contract by AESU and Sulgás, as well as the termination by TGM of the Transport Contract, were lawful. Consequently, it decided that YPF was liable and should compensate its counterparties for any damages caused.
 76. Despite the existence of some impediments to fulfil its obligations, the Arbitral Tribunal considered that there was no force major that would limit YPF's liability for its breach, since it considered that YPF could have overcome such impediments.
 77. It is curious how in an award of more than 500 pages, it took only a few lines for the Arbitral Tribunal to conclude that YPF had committed an anticipatory breach. While the theoretical explanation of the Arbitral Tribunal was accurate, the facts outlined in the award do not seem enough to meet the standard for an anticipatory breach.¹⁰⁴ The concept of anticipatory breach and its standard of application are very strict, and YPF's attitude can hardly be considered to have reached such extreme. In this sense, Professor Roque J. Caivano in his dissenting opinion, stated that Article 72 of the CISG should be interpreted in a restrictive fashion and that several factual aspects of the case prevented triggering such provision. Thus, he concluded that AESU and Sulgás were neither entitled to suspend the Gas Contract, nor to terminate it.¹⁰⁵
 78. For instance, the Arbitral Tribunal made it clear that there were other causes, apart from YPF's repudiation, that had already made AESU's business no longer viable. The Argentine Government had substantially increased the gas export tax, which had been contractually assumed by AESU and Sulgás, and AESU was not able to pass-through such increase to the Brazilian distributors.
 79. Regarding the wording of YPF's letters, they simply expressed that the original purpose of the Gas Contract had been frustrated, but invited AESU and Sulgás to renegotiate its terms and, in fact, they conducted concrete negotiations, acknowledging the existence of a contract. Actually, it is undisputed that terms like 'pulverization' were also used by YPF in other letters, prior to the date in which the Arbitral Tribunal considered that the anticipatory breach took place.
 80. Regarding YPF's conduct, the Arbitral Tribunal expressly stated that partial deliveries of gas would prevent an anticipatory breach. It is undisputed that even after the date in which the Arbitral Tribunal considered that the anticipatory breach occurred, AESU and Sulgás requested further gas, which was delivered by YPF.¹⁰⁶ These partial deliveries defeat any possible consideration of

103 This is a typical provision in contracts for the sale of gas, by which the seller undertakes to either sell the required volume or pay its value, so that the buyer can acquire it from an alternative supplier.

104 This is irrespective of the implications that this might have or not on the merits of annulment recourse.

105 Regarding the Transport Contract, Professor Caivano agreed with his fellow arbitrators, concluding that YPF should compensate TGM, although stating that it had a right to eventually seek reimbursement from AESU and Sulgás.

106 This was noticed by Professor Caivano, who pointed out in his dissent that further requests of gas by AESU and Sulgás, and deliveries by YPF demonstrated the vitality of the Gas Contract.

anticipatory breach. Furthermore, even after the date in which the Arbitral Tribunal considered that the anticipatory breach occurred, YPF requested and received from AESU and Sulgás the price of the transport service to be paid to TGM, what is another demonstration of how alive such contract was.

81. Regarding YPF's refusal to pay some amounts under the 'deliver or pay' clause, it seems that a mere dispute on whether payments are due, does not qualify as an anticipatory breach; instead, it looks like a normal debate between commercial parties. Besides, the Arbitral Tribunal finally stated that AESU and Sulgás were not entitled to claim those payments. Regarding YPF's request to AESU and Sulgás to pay the export tax, this condition was freely agreed by them.
82. It is true that a party who, at certain point of time, is fulfilling a contract may still declare that it will no longer do so in the future. However, the terms of YPF's letters, its conduct, and AESU and Sulgás' reaction to such conduct do not seem to reach the high bar set by Article 72 of the CISG.
83. The fact that the Arbitral Tribunal decided that there was no force major does not mean that, under the circumstances of the case, YPF was not under a genuine understanding that such force major might have existed. Even though during the course of the arbitral proceedings YPF fell under the control of the Argentine Government, this was not the case at the time of the measures that affected YPF's performance of the Gas Contract, so it may have legitimately believed that those measures constituted force major events.

4.2 Which damages may be awarded under the CISG?

4.2.1 *The debate between the parties*

84. The act that the Arbitral Tribunal declared in its Partial Award that YPF was liable towards its counterparties does not automatically generate its obligation to compensate them. This section does not refer to the quantification of damages, but rather to the heads of damages that can be awarded under the CISG regime. Despite the parties' agreement on the application of the CISG, there was a debate regarding several aspects of the calculation of compensation. Article 74 of the CISG requires the injured party to prove that: (i) the damages were foreseeable by the breaching party at the time of the conclusion of the contract; and (ii) there is a link between the breach and the damages. These two requirements are cumulative.
85. Regarding the link between the damages claimed and the breach, YPF alleged that there was no such link between its breach and the damages suffered by its counterparties. The Arbitral Tribunal confirmed that according to the Gas Contract, although YPF was to pay the export tax, in case it increased, it was able to transfer such tax to Sulgás. YPF alleged that this increase of the export tax caused the termination of the power purchase agreements with the Brazilian distributors, rendering AESU and Sulgás' business non-profitable. Since YPF had not caused the termination of the power purchase agreements, it argued that the damages claimed were not caused by its breach.
86. Regarding the assessment of the foreseeability requirement, AESU and Sulgás alleged that the foreseeability should be assessed at the time of the conclusion of

the Complementary Agreements to the Gas Contract, and not at the time of the conclusion of the latter, because the parties had re-assigned the risks of the contract.

87. Regarding the extent of the damages, the parties debated on whether domestic Argentine law should apply to certain issues not governed by the CISG, namely YPF's intention to breach the contract. This debate had a practical impact since, under Argentine law, an intentional breach of contract triggers a higher compensation, including consequential damages. The Arbitral Tribunal deferred to the second phase of the arbitration, not only the quantification of damages, but also the determination of whether YPF's breach was intentional or not. AESU and Sulgás stated that in the absence of any specific provision in the CISG, Argentine contract law should govern this aspect. In this sense, they claimed that YPF had deliberately stopped delivering gas and decided not to make its best efforts. Besides, they alleged that the repudiation is intentional by nature. For its part, YPF alleged that it is not that the CISG does not cover this issue, but it simply does not attach any relevance to the intention, thus establishing an objective rather than a subjective regime.
88. The parties also debated whether the CISG allowed a claim for damage to the goodwill and moral damages.

4.2.2 *The Tribunals decision on damages*

4.2.2.1 *Link between the breach and the damages.*

89. Despite the fact that the link between the breach and the damages constitutes a paramount requirement,¹⁰⁷ neither the CISG nor the UNIDROIT Principles set forth a standard to assess it, so it is considered to be left to the discretion of the adjudicator.¹⁰⁸ In the case under analysis, the Arbitral Tribunal considered that the damages claimed were caused by YPF. This decision seems to clash with the Partial Award, where the Arbitral Tribunal categorically stated that there were other factors (different than the anticipatory breach) that caused the non-profitability of AESU and Sulgás' business; one attributable to the Argentine Government (the increase of the export taxes which cost AESU and Sulgás had agreed to bear), and another to the Brazilian Government (the impossibility to transfer the increase in the cost of the Argentine export tax on gas to the price of electricity charged by Brazilian distributors to end customers in Brazil).
90. The CISG does not admit the generation of an unjust enrichment of the injured party, by obtaining compensation higher than what it would have gained if the

107 It is reflected in art 7.4.2 of the UNIDROIT Principles. See also Djakhongir Saidov, 'Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods' (2002) 14 *Pace International Law Review* 344; Bruno Zeller, *Damages under the Convention on Contracts for the International Sale of Goods* (OUP 2009) 96.

108 Ingeborg Schwenzer, Pascal Hachem and Christopher Kee, *Global Sales and Contract Law* (OUP 2012) ss 41–142.

contract was fully performed.¹⁰⁹ In order to achieve this, any benefit arising out of the breach must be deducted from the compensation.¹¹⁰ It goes without saying that if there is no link between the breach and the damages, the injured party would be receiving an unjust enrichment.

91. Although this aspect is conceptually separated, in this case, it was analysed in connection with the link between the breach and the damages. A substantial part of the damages claimed by AESU and Sulgás do not arise out of YPF's conduct, but from the Argentine Government measures (export tax), and Brazilian regulations (the impossibility to pass-through the cost of the Argentine tax increase to the price of electricity paid by the end consumer in Brazil). Therefore, compensation would constitute an unjust enrichment, as they would have not received the benefits they originally expected from the Gas Contract. This situation would constitute some kind of 'reverse' efficient breach of contract, in the sense that the breach of an obligation turns out to be beneficial to the creditor of such obligation. If the business was to give losses to them, they should not be compensated just because YPF breached the contract. On this basis, the liability of YPF should have been limited.
92. The Arbitral Tribunal did not go deep into the analysis of the concept of unjust enrichment under the CISG. The Arbitral Tribunal considered that YPF did not demonstrate that AESU and Sulgás' business would not be profitable, so it rejected the argument. It also said that its previous statements in the Partial Award regarding the lack of viability of AESU's power generation business due to the increase of the Argentine gas export tax were preliminary; but it had re-assessed the situation and concluded that AESU and Sulgás' business would have been profitable because, even though they were to pay the increase in the export taxes, the Brazilian regulatory framework would have allowed AESU to transfer the import tax to the distributors. In addition, it assumed (contrary to opposite experiences evidenced throughout the proceeding) that the distributors would have received the Brazilian Government's financial assistance to deal with such increase in the export taxes.

4.2.2.2 *The relevance of the intention of the breaching party.*

93. Regarding the extent of the damages, the Arbitral Tribunal agreed with YPF that under the CISG, the intention of the breaching party is irrelevant to determine the quantum of compensation. This solution was deliberately adopted in the CISG. This is shown, for instance, by the fact that the CISG departs from the French law (one of its principal sources) because the latter attaches importance to the intention of the breaching party.¹¹¹ It is not that there is a vacuum to be filled with external sources (eg Argentine domestic law); instead, the CISG adopts a more objective rule of limitation through the foreseeability of the damages.

109 CISG Advisory Council, Opinion No 6. The same solution is provided by art 7.4.2.1 of the UNIDROIT Principles.

110 The same idea is reflected in art 7.4.2(1) of the UNIDROIT Principles.

111 Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer, Commentary on the United Nations Convention on the International Sale of Goods (CISG)* (3rd edn, OUP 2010) 1018.

94. Hence, the Arbitral Tribunal correctly decided that there was no need to resort to the domestic law, which instead of fertilizing would contaminate the CISG. In any case, the Arbitral Tribunal also pointed out that even in the case of aspects not expressly regulated by the CISG, pursuant to its Article 7(2), it should apply the principles that inform the CISG, one of them being the principle of objective liability. Only if these principles cannot be identified, as a last resort, one should recourse to the conflicts of law rules, which in this case pointed to the Argentinian substantive law.
95. The CISG establishes an objective standard of foreseeability in Article 74.¹¹² It is necessary to analyse the situation from the perspective of a reasonable person in the shoes of the breaching party would have considered, when the contract was concluded, that the breaching conduct would generate such damages.¹¹³ The rationale of this rule is that when concluding the contract the parties were able to consider the potential damages that a breach could cause.¹¹⁴ Likewise, the parties analyse whether the benefits that they expect out of the contract are worth taking such risk.¹¹⁵ In the same vein, the CISG requires that a party who envisages that a breach by the other party would cause extraordinary damages, shall inform this to the other party.¹¹⁶
96. Since the foreseeability must be analysed from the point of view of the breaching party, in this case the key question was whether YPF had foreseen the damages caused by its breach of contract. Besides, it was necessary to determine whether the relevant moment to assess the foreseeability was at the conclusion of the original Gas Contract or the Complementary Agreements. The Arbitral Tribunal said in its Partial Award that YPF was liable due to its breach of the Gas Contract, not the Complementary Agreements, so that one should be linked to foreseeability. It also understood that the modifications related to very specific and limited aspects. Therefore, the conclusion of the original Gas Contract was the relevant point in time. Applying this foreseeability test, the Arbitral Tribunal considered that the damages claimed were foreseeable for YPF at the time of the conclusion of the Gas Contract. However, the compensation granted by the Arbitral Tribunal was quite lower than the original amount claimed.

4.2.2.3 *Damages to goodwill and moral damages.*

97. The CISG is considered to admit compensation for damages to the commercial goodwill.¹¹⁷ As explained by the Arbitral Tribunal in the case under

112 The foreseeability requirement is also contained in art 7.4.4 of the UNIDROIT Principles.

113 Cesare M Bianca and Michael J Bonell, *Commentary on the International Sales Law* (Giuffrè 1987) 546; Saidov (n 107) 340.

114 Djakhonjir Saidov, *The Law of Damages in International Sales: The CISG and other International Instruments* (Hart 2008) 118ff.

115 Peter Schlechtriem and Claude Witz, 'Les contrats de vente internationale de marchandises' (2008) Dalloz s 390.

116 *ibid.*

117 *ibid.*, s 397; CISG Advisory Council, Opinion No 6, s 7.1.

analysis, this compensation is admitted provided that certain requirements are met, in addition to the general requirements of Article 74. In particular, it mentioned that the aggrieved party must prove the previous status of its goodwill and how it changed after the breach. However, it considered that in the present case those requirements were not verified.

98. Conversely, as decided by the Arbitral Tribunal, moral damages are not considered to be capable of compensation under the CISG.¹¹⁸ Given that the UNIDROIT Principles expressly provide for this head of damages,¹¹⁹ this may look like a contradiction. However, it must be recalled that the UNIDROIT Principles are only necessary/useful when the CISG fails to cover certain aspects. This is not the case regarding moral damages because, as the Arbitral Tribunal explained, the CISG does not ignore this concept, but it implicitly excludes it as a head of compensation. AESU and Sulgás seemed to claim moral damages as a ‘civil penalty’, but as also explained by the Arbitral Tribunal, the aim of the CISG is to compensate the aggrieved party, not to punish the breaching party.¹²⁰

5. CONCLUDING REMARKS

99. Throughout this article, I have addressed various interesting (and controversial) aspects of the YPF saga, some related to arbitration, while others related to the CISG regime. I have analysed the debates between the parties, the position of the Arbitral Tribunal and, where appropriate, of the courts involved. As to each of those aspects, I have expressed a respectful, but critical, opinion, based on the current status of the theory and practice of arbitration and the CISG.
100. As to the theory and practice of arbitration, I have used in this article the YPF saga as a very specific example to discuss the delocalization theory. It presented a very complex situation with two state courts invoking their own jurisdiction, putting the arbitral tribunal in a very difficult position. The opposing decisions of the state courts involved, as well as the attitude of the Arbitral Tribunal help understanding the different views that exist on the topic. Despite the legitimate reasons for a different view, I consider that the parties’ agreement to grant controlling jurisdiction to courts outside the seat should be respected. This conclusion is reached, not only following a delocalization approach, but also by admitting the legal effects of the choice of the seat. Although from a practical point of view this is not a wise decision, as it might create practical problems, when the parties exercise their party autonomy in this sense, it should be respected.
101. Admittedly, courts may reach different solutions because their own law, which may clash with the parties’ intention, binds them. However, there is no doubt that arbitral tribunals should always take party autonomy as the first step of their analysis because it is the primary source of their authority and, as opposed

118 CISG Advisory Council, Opinion No 6, s 7.1.

119 art 7.4.2(2) refers to ‘emotional distress’.

120 CISG Advisory Council, Opinion No 6, s 9.5.

to courts, they are not bound to any specific legal regime. Moreover, this case may add an interesting aspect to the debate on the enforcement of annulled awards. This is because an enforcement court would need to, not only analyse whether to give deference to the annulment court, but previously figure out which is the appropriate annulment court.

102. In addition, I have addressed various aspects of the CISG regime. For instance, the consideration of the UNIDROIT Principles as a proper complement to the CISG. As to liability issues, I have analysed the applicability of Article 72 on anticipatory breach, particularly explaining that it requires a high degree of certainty to consider that a party has incurred in such kind of breach.
103. I have also tried to give some guidance on the CISG regime for damages compensation. I have specifically pointed out the need to rely on the basic rules, such as the necessary link between the breach and the damages in order to trigger the breaching party's obligation to compensate and the prohibition of unjust enrichment.
104. Regarding the extent of the compensation, I have reminded that the CISG does not attach any relevance to the intention of the breaching party when determining the quantum of compensation, providing instead for an objective system, in which foreseeability operates as the relevant factor. Besides, I have also reminded that while damages to the commercial goodwill are recoverable, moral damages are not.