SOME THEORETICAL AND PRACTICAL ISSUES OF PROTECTION OF RIGHTS OF BUSINESS ENTITIES IN THE ENERGY SECTOR BY JUDICIAL ARBITRATION AND ANTI-MONOPOLY AUTHORITIES

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Shevchenko Lyubov I.
Acting Head of the Department of Legal Regulation of Fuel and Energy Complex of the International Institute of Energy Policy and Diplomacy of the Moscow State Institute of International Relations (University) of the Ministry of Foreign Affairs of the Russian Federation
(MGIMO University of the MFA of Russia)
Doctor of Law, Professor
Honored Lawyer of the Russian Federation
energylaw@miep-mgimo.ru

The energy strategy of Russia refers creation of favorable economic environment for functioning of the fuel and energy complex, which is impossible without establishing the energy law order ensured by various forms and methods of government regulation and control, including settlement of conflict situations between business entities, to one of the main directions of the state energy policy. V.V. Romanova rightly concludes that the energy law order is an essential component of the public law order representing "law order in interaction of all parties to public relations in the energy sector, indicating that one of the most important elements of content of the energy law order is ensuring compliance and efficient protection of rights and legitimate interests of the parties to the public relations in the sphere of the economy under consideration. One of the most important activities to ensure law order in the energy sector is creation of an efficient mechanism for settlement of disputes arising between business entities upon formation of contractual obligations between them as well as in the course of their fulfillment. No due attention is given to study of the theoretical and practical aspects of settlement of conflicts in this field and ways to resolve them in legal science. This article shows some of the disputable issues regarding consideration of disagreements and disputes arising upon application of norms of energy legislation by judicial arbitration and anti-monopoly authorities, and shows the peculiarities of their settlement.

Keywords: *energy law order, energy law, business entities, protection of rights, settlement of disputes, commercial courts, anti-monopoly authorities.*

The energy strategy of Russia refers creation of favorable economic environment for functioning of the fuel and energy complex, which is impossible without establishing the energy law order ensured by various forms and methods of government regulation and control, including settlement of conflict situations between business entities, to one of the main directions of the state energy policy. It is not accidental that legal scholars proceed from understanding of the energy law order from the standpoint of its relation to the theoretical understanding of the rule of law in general based on: a state of actual order of public relations expressing actual,

practical implementation of the standards of law and the rule of law [1]; a system of public relations regulated and protected by law [2]; it is noted that the law order is used to characterize the state of organization, order of legal relations, which results from their regulation by legal norms and implementation of these norms [3]; order of public relations, which is expressed in the legitimate behavior and actions of their parties [4], as a goal of the legal means of state authority and all its legal activities [5], and, finally, this is a legal result, to which both the state authority and all legal subjects aspire. Therefore, in the general theoretical doctrine of Russia, the law order is defined as an integral component of public relations subject to the law and regulated by law.

In view of the above, V.V. Romanova rightly concludes that the energy law order is an essential component of the public law order representing "law order in interaction of all parties to public relations in the energy sector, indicating that one of the most important elements of content of the energy law order is ensuring compliance and efficient protection of rights and legitimate interests of the parties to the public relations in the sphere of the economy under consideration [6].

Legal regulation of efficient protection of interests of the parties to public relations in the energy sector and settlement of disputes under certain conditions can be ensured both by the commercial courts and by the anti-monopoly authorities.

In the conclusion of contracts, business entities in any economic domain, including the energy sector, seek to form contractual relations subject to the terms and conditions that meet their economic interests, which often leads to disagreements between them to be settled in accordance with the established procedure.

In the settlement of these disputes, a number of problems arises. These problems are of interest from both theoretical and practical point of view. First of all, it is the problem of identifying criteria, on the basis of which the provision to be included in the contract or excluded from it should be determined. If the provision of the contract being concluded, which is the subject of disagreement between the counterparties, is imperatively determined by law, the court shall state this provision on the basis of the relevant requirement of law.

The situation is different when the court establishes the terms and conditions, which according to the law, may be worded by the parties at their discretion. In this case, it is not clear which variant of the terms and conditions proposed by the parties should be preferred if the law allows both of them to be included in the contract, and generally based on what criteria the disputable provision of the contract should be determined.

Thus, in the settlement of the issue of acceptability of inclusion of a disputable provision in the contract, determination of the provision of law, on which this condition is based (its imperativeness or dispositiveness) is not insignificant.

Meanwhile, it is not always obvious how the rule of law should be perceived: as a norm allowing or prohibiting (limiting) inclusion of one or this or that into the contract.

Such ambiguity arose, in particular, when the commercial courts applied clause 75 of the Rules for Operation of Retail Electricity Markets approved by Decree of the Government of the Russian Federation dated August 31, 2006, No. 530, which stipulates that the energy supply contract concluded for a specific period shall be deemed extended for the same period and subject to the same terms and conditions if prior to the expiry of its term, neither party notifies of its termination or amendment or conclusion of a new contract.

The energy supply contracts usually concluded for one year, from January 1 to December 31, often include a provision that the contract is valid until the end of the year, and it is deemed annually renewed unless one month prior to the end of the term, one of the parties informs of repudiation of the contract for the next year (or of conclusion of the contract subject to other terms and conditions, of introduction of amendments and supplements into it).

The court and arbitration practice reflected two approaches regarding the legality of these terms and conditions of the contract. In accordance with the first of them, the provision of the contract on the need to notify of extension of the contract one month prior to the expiry of the term

conflicts with the said provision of clause 75 of the Rules for Operation of Retail Electricity Markets, which should be understood as the norm allowing filing of such an notice until the last day of the term of the contract. According to the second approach, this provision of the contract complies with the said clause of the Rules for Operation of Retail Electricity Markets since it provides for the possibility of termination of the contract prior to its expiry [7].

The first approach on acceptability of inclusion in the energy supply contract of the provision on termination of the contract in any period until its expiry may seem more justified. In the second approach, according to which the parties can reach an agreement on termination of the contract only within a certain period prior to its expiry, the meaning of the said provision of clause 75 of the Rules is actually lost: in its absence, the parties could also include a provision on the particular period, during which the termination of the contract is permitted, in the contract.

At the same time, the Presidium of the Supreme Commercial Court of the Russian Federation took the second position, having reflected it in Decree dated March 1, 2011, No. 11318/10. According to the Presidium, inclusion in the energy supply contract of the provision that a notice of repudiation of the contract may be given within certain time limits prior to its expiry and not during the entire term of the contract until its expiry results from the fact that prior to termination of the contract, it is necessary for the energy supplying organizations to settle issues related to the forthcoming redistribution of electricity becoming available, if needed, its sale in the subsequent period, conclusion of new contracts with other consumers or amendments to the contracts with them already in force.

Therefore, in the consideration of a dispute concerning inclusion in or exclusion from the contract to be concluded of the provision that the contract is deemed annually renewed unless at a certain time prior to the end of the term, one of the parties informs of repudiation of the contract for the next year, the commercial courts should still take into account the specified position of the Supreme Commercial Court of the Russian Federation on acceptability of this provision. Thus, in the settlement of the parties' disagreements on the content of the contract to be concluded, as already mentioned, it is necessary to determine the imperativeness or dispositiveness of the applicable rule.

Civil law allows the parties to include provisions in the contract to be concluded at their discretion when the rule provided by it is accompanied by the remark "unless otherwise provided for by the contract" or contains a different reference to the agreement of the parties. For example, clause 70 of the Rules for Operation of Retail Electricity Markets establishes that *unless otherwise provided for by the contract*, the buyers (consumers) shall pay to the guaranteeing supplier for a half of the contractual amount of electricity and capacity consumption by the 15th day of the month, in which electricity was consumed. The said provision was of decisive importance in the consideration by the court of disagreements with regard to the terms and conditions of the energy supply contract [8].

It should be noted that the same terms and conditions of the contracts concluded in practice (relating to the same aspect of the contractual relations) differ considerably among themselves. Therefore, the highest courts did not comment on the issue of validity of most of them. The decrees of the Presidium of the Supreme Commercial Court of the Russian Federation contain information only on the terms and conditions, which are most frequently included in the contracts.

Thus, in Decree dated April 14, 2009, No. 15747/08, the Presidium of the Supreme Commercial Court of the Russian Federation recognized the provision of the gas supply contract on the advance payment for consumed gas as being legally valid (as indicated by the Presidium, having assessed the files of the case, having analyzed the content of the gas supply contract, and proceeding from the provisions of the regulatory legal acts regulating relations in gas supply, the courts of first and appeal instances rightfully established that the terms and conditions of the contract on introduction of penalties for a failure to use gas, the mode of gas consumption, and the advance payment for the consumed gas may not be qualified as a violation of anti-monopoly

laws), which, however, is also true for the contracts relating to supply of other types of energy and energy resources, especially, electricity. The mentioned legal position of the Presidium cannot be understood categorically: court and arbitration practice shows that in some cases the contractual provisions on advance payment should be regarded as unacceptable, for example, when it is included in the contract along with the provision on direct payment. With this in mind, it is possible to clarify the existing approach: the provision of the energy supply contract on advance payment for consumed energy resources alone is valid.

It should be noted that the disagreements of the parties about inclusion in the contract of a disputable provision arise most often upon mandatory conclusion of the contracts. This is due to the fact that one of the parties may not refuse to conclude it, whether or not it agrees with the proposed terms and conditions, while the other party, having the opportunity to force its counterparty to conclude the contract, may insist on its wording of the disputable provisions (Article 445 of the Civil Code).

However, it should be borne in mind that, by agreement of the parties, disputes with regard to the terms and conditions of the contracts, in respect of which no obligation to enter into them is provided for by law, may be submitted to court (Article 446 of the Civil Code). Therefore, cases when the court should settle the issue of choice of the provisions to be included in the contract concluded at the discretion of the parties are not excluded.

The problem of lack of clear criteria making it possible to determine the content of the contract in the event of a dispute between its parties directly concerns the anti-monopoly authorities.

While complaints related to disagreements with regard to the content of the contracts concluded between business entities were initially considered by an arbitral tribunal and later by the commercial courts, upon creation of a system of anti-monopoly authorities in the Russian Federation, these complaints started to be considered by these authorities. Moreover, in many cases the parties to property relations began to give preference to applying to the anti-monopoly authorities since the support of these authorities is considered as strengthening the position of the applicants in disagreements on conclusion of the contract with the counterparty, including in subsequent consideration of cases challenging the decisions and orders of the anti-monopoly authorities issued in favor of the applicant, in court [9].

The legal basis for settlement of disagreements on the terms and conditions of the concluded contracts by the anti-monopoly authorities is formed by the provisions prohibiting imposition of contractual terms "unfavorable for it or not related to the subject matter of the contract..." contained in clause 3, Part 1, Article 10 of the Law on Protection of Competition (as amended by Federal Law dated October 5, 2015, No. 275-ФЗ). If a decision is taken to commit such a violation, the anti-monopoly authority shall specify in the order to eliminate such a violation how the disputable contractual terms should be amended. Thus, upon consideration of the complaint of one of the counterparties regarding disagreements arising upon conclusion of the contract, the anti-monopoly authority, as well as the court, actually assess the content of the contract.

The court and arbitration practice until 2008 proceeded from the fact that the anti-monopoly authorities should not interfere with relations concerning conclusion of contracts that are of a purely civil law nature, even if the parties holding a dominant position in the market are involved in these relations, thereby substituting the commercial court. Therefore, the conclusion about unacceptability of interference of the anti-monopoly authorities in civil law relations usually served as a basis for invalidating their orders in the arbitration process. This approach was changed in the adoption by the Plenum of the Supreme Commercial Court of the Russian Federation of Decree dated June 30, 2008, No. 30 *On Some Issues Arising in Connection with Application of Anti-Monopoly Laws by Commercial Courts*. Thus, in clause 1 of this Decree, the Plenum specified that "the decision or the order of the anti-monopoly authority may not be invalidated (and the anti-monopoly authority may not be denied satisfaction of its claims) only on the basis of the qualification of the relevant legal relations involving

the business entity, to which the order of the anti-monopoly authority is issued or against which this authority filed a lawsuit, as civil law relations".

The instructions of the Plenum of the Supreme Commercial Court of the Russian Federation set forth in clauses 1 and 4 of this Decree are still relevant. Being guided by these instructions while settling disputes in the energy sector, the commercial courts currently also proceed from the fact that the court or the anti-monopoly authority shall be entitled to recognize other actions (omission), except for those established by Part 1, Article 10 of the Law on Protection of Competition, as a violation of anti-monopoly legislation since the list given in the specified part is not exhaustive. The requirements of anti-monopoly legislation apply to civil law relations. While assessing these actions (omission) as abuse of a dominant position, one should take into account the provisions of Article 10 of the Civil Code of the Russian Federation, Part 2, Article 10 and Part 1, Article 13 of the Law on Protection of Competition and, in particular, it is necessary to determine whether these actions were performed within acceptable limits for exercise of civil rights or they impose unreasonable restrictions on the counterparties or unreasonable terms and conditions are set for exercise of their rights by the counterparties [10].

At the same time, with regard to the issue of determining the content of the contract, special attention should be given to the practice of consideration by the commercial courts of not only cases concerning disagreements on the terms and conditions of the contract, but also of cases on challenging the decisions of the anti-monopoly authorities on imposition of the terms and conditions of a contract and their orders to eliminate this violation.

According to the practice, upon settlement of both civil law and anti-monopoly disputes relating to the content of the contracts concluded by the parties, the commercial courts proceed from their ideas about terms and conditions proposed by the parties as well as formulated by anti-monopoly authorities that are fair and consistent with the normal practice of contracting. Therefore, upon settlement of disagreements of the parties on the content of the contract to be concluded, the following should be considered: the condition proposed by the party should not: 1) conflict with the law and other legal acts; 2) deprive the counterparty of rights and be clearly burdensome (for example, deprive of the rights normally granted under the contracts of this type; exclude or limit liability of this party for violation of the obligations).

The Law on Protection of Competition prohibits imposing on the counterparty the terms and conditions of the contract that are unfavorable to it or not related to the subject matter of the contract. Meanwhile, as already noted, in conclusion of contracts, each of the parties proceeds from its own economic interests and, therefore, the disputable terms and conditions of the contract, as a rule, will always be more beneficial for one party and less beneficial for the other. Thus, specifying the unfavorable conditions being imposed in the Law on Protection of Competition is not quite appropriate because based on this criterion, it is possible to recognize any entity subject to the said Law as violating the anti-monopoly laws if it objects to the terms and conditions offered by its counterparty and insists on its variant of these terms and conditions.

Similar doubts also arise with regard to such a feature as relevance of the disputable provision to the subject matter of the contract. Taking into account the fact that the type of contract and, accordingly, its subject matter are determined by the parties, the dispute between them regarding relevance of the disputable provision to the subject matter of the contract may be related to the dispute about the type of the contract to be concluded: if the offeror is interested in one contract, and its counterparty, in another one.

The terms and conditions included in the contract may often not be related to the subject matter of the contract in general, but may concern those aspects of the contractual relations that are commonly agreed upon when concluding contracts, for example, the dispute settlement procedure. It hardly makes sense to check them for relevance to the subject matter of the contract. Herewith, one should agree with the position of the authors who consider that relevance to the subject matter of the contract, like the advantageousness of the terms and conditions, seems

to be an inappropriate criterion for assessment of the content of the contract. In this case, it would be more appropriate and reasonable to proceed from the criterion of the apparent inconvenience of the proposed terms and conditions of the contract to be concluded [11].

The Law on Protection of Competition (clause 5, Part 1, Article 10) prohibits an economically or technologically unjustified refusal to enter into a contract with certain buyers (customers) or evasion of the same in the event it is possible to produce or supply the relevant goods as well as in the event that such refusal or evasion is not expressly provided for by the federal laws and other legal or judicial acts. However, in order to make a conclusion about unjustified evasion by the business entity of conclusion of the contract, it is necessary to proceed from the requirements of the Civil Code of the Russian Federation. The provisions of Article 445 of the Code as well as the norms of anti-monopoly laws are aimed at protection of interests of the economically weaker party, and are designed to ensure the opportunity to participate in relations with a strong party, including those that hold dominant position in the market, subject to equal by granting additional rights to the weaker party and imposing additional obligations on the strong party. At the same time, if Article 445 of the Civil Code of the Russian Federation provides for mandatory conclusion of the contract and determines the civil law consequences of failure of the stronger party to comply with it (for example, recovery of damages), the Law on Protection of Competition is limited to public law consequences, in particular, a ban on the company acting as the monopolist to violate such an order under the penalty of application of public sanctions (in particular, collection of an administrative fine), without establishing any other procedure for mandatory conclusion of the contract.

Therefore, while wording anti-monopoly prohibitions related to violations of the counterparties in the determination of contractual terms, it would be more correct to use the criteria for assessment of the content of the contract set forth in civil laws.

Decree of the Constitutional Court of the Russian Federation dated April 28, 2019, No. 19-п *On the Case of Verifying Constitutionality of Clause 6 of the Rules of Non-Discriminatory Access to Electric Power Transmission Services and Rendering Thereof in Connection with the Complaint of Joint-Stock Company Verkhnevolgoelektromontazh-NN*, which contains the legal position of the Constitutional Court of the Russian Federation on the issues of application of the provisions of the Rules of Non-Discriminatory Access to Electric Power Transmission Services and Rendering Thereof approved by Decree of the Government of the Russian Federation dated December 27, 2004, No. 861 in the system of current legal regulation [12], is of paramount importance for settlement of disputes related to rendering by the electric power entities of the services to the consumers of electric power. The current law grants the right to render paid services for transmission of electric power to territorial grid organizations providing these services on the basis of the contract for provision of paid services for transmission of electric power and the tariff established by the authorized executive authority. By Decree of the Government of the Russian Federation dated February 28, 2015, No. 184, the owners of power grid facilities are referred to territorial grid organizations that must meet certain statutory criteria. An organization that ceased to meet the specified criteria for classifying it as the territorial grid organization and has not taken action to restore this status shall become the consumer of electric power. Upon loss by the organization of the status of the territorial grid organization, any previously effected technological connection of power receivers of other consumers of electric power to the facilities of its power grid shall become an indirect connection. In this case, one should proceed from the fact that the prohibition to demand payment for electricity crossflows provided for by clause 6 of the Rules for Non-Discriminatory Access to Electric Power Transmission Services and Rendering Thereof means not only the prohibition for the owners (possessors) of the grid facilities, through which power receivers of other consumers are indirectly connected to the power grids of the grid organization, to earn income from such activities, but also a ban on reimbursement of expenses, which they incur upon

its implementation. This understanding of the contested statutory provision is reflected in the court practice [13]. The Constitutional Court of the Russian Federation has repeatedly stressed in its judgments that such an approach is related to the public importance of power grid facilities owned (possessed) by the territorial grid companies, the consumers of electric power, and the specific character of their activities (for example, Ruling dated June 23, 2015, No. 1463-O and dated November 23, 2017, No. 2639-O).

Having analyzed the existing regulations in the field of legal regulation of the relations in the electric power industry under consideration, the Constitutional Court of the Russian Federation concluded that clause 6 of the Rules of Non-Discriminatory Access to Electric Power Transmission Services and Rendering Thereof does not comply with the Constitution of the Russian Federation, its preamble, Articles 8, 19 (Parts 1 and 2), 34 (Part 1), 35 (Part 1), and 55 (Part 3), to the extent that in the system of current legal regulation, it excludes the opportunity of the owner (possessor) of power grid facilities, through which the power receivers of other consumers are indirectly connected to the grids of the territorial grid organization, to reimburse for expenses incurred by it in connection with ensuring the flow of electrical energy to its consumers, with which it concluded the contracts for technological connection while acting as the territorial grid organization (organization that set an individual tariff for provision of paid services for electric power transmission).

Therefore, the doctrinal and legal feasibility study of the peculiarities of protection of the contested rights and legitimate interests of the business entities in the energy sector is aimed at solving problems of improving legislation and strengthening the rule of law in the most important sphere of the Russian economy. ■

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