TRENDS IN DEVELOPMENT OF MAIN FORMS FOR PROTECTION OF RIGHTS OF ENTITIES ENGAGED IN ACTIVITIES RELATED TO CONSTRUCTION OF ENERGY FACILITIES

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The number of disputes in the energy sector currently keeps increasing. A significant number of them is referred to disputes related to protection of rights of entities performing activities in the field of construction of energy facilities. Specific character of disputes related to protection of rights of entities performing activities in the field of construction of energy facilities is caused not only by the special legal status of energy facilities, but also by the peculiarities of legal relations arising between the parties to the relations in question. While applying various forms for protection of rights, the parties to the dispute reach an efficient solution using a combination of individual mechanisms, each of which requires a special perception and certain classification and systematization.

In this article, the author makes an attempt to identify certain categories in the subject under study, classifies the forms and methods for protection of rights of the entities performing activities in the field of construction of energy facilities. This study analyzes development trends and application of the main forms for protection of rights, identifies practical and theoretical problems specific to this institution, presents various models for development of existing mechanisms for protection of rights in the field under study, and makes suggestions for improvement of the current laws.

Keywords: *energy law, legal regulation of construction of energy facilities, protection of rights of energy market players.*

Prior to proceeding to identification of trends in development of main forms for protection of rights of the entities engaged in construction of energy facilities, it is necessary to define the notion of the form for protection of rights and classify the relevant forms available to the parties to relations in the field under consideration.

In the scientific literature, the form for protection of rights means a complex of internally agreed organizational measures to protect a legal right implemented by authorized authorities or right holders, and aimed at restoration of the violated right [1].

Other authors, in their turn, characterize the form for protection of civil right as a procedure

established for application of a specific method of protection [2].

For the purpose of analysis of the basic forms for protection of rights of the entities engaged in construction of energy facilities, it is necessary to form a universal notion of the form for protection of rights, which, among other things, can be applied in such a specific branch of national law as energy law.

In the broadest sense, the category of the form for protection of rights includes a set of procedural as well as extra-procedural measures aimed at settlement of a dispute on a right and implementation of a specific method for protection of the right through a certain sequence of legally significant actions taken individually or in combination.

It follows from the above definition that it is also necessary to take into account the differences between the categories of the "form of protection" and the "method of protection" of the rights. It seems that the category of the form of protection is of a wider and more universal nature as compared to the method of protection of the right since it can be independently implemented through individual methods of protection, including those provided for by Article 12 of the Civil Code of the Russian Federation.

Turning to classification of the forms for protection of rights of the entities engaged in construction of energy facilities, it should first be noted that these entities are characterized by the following two main forms of protection of the violated right.

First, it is a jurisdictional form, which is characterized by a rather rigid procedural regulation due to participation of state institutions in dispute settlement and protection of the violated right. This form of protection of the violated right includes the following basic methods of implementation:

general (judicial) procedure for consideration and settlement of cases, which involves application of the entity the rights of which are violated to a competent court established on the basis of the relevant federal law, the activities of which are governed by procedural legislation;

special procedure providing for implementation of the goals of protection of the entity's rights through administrative influence on behavior of the subjects;

as well as a mixed procedure combining the basic features of the judicial procedure with elements of administrative legal methods, where the latter will be a precondition for implementation of the former.

Second, it is a non-jurisdictional form, through which independent settlement of the dispute by the subjects and/or settlement of the dispute with involvement of the third parties is ensured. At the same time, participation of the competent public authorities in settlement of such a dispute is not provided for.

Since contracts for construction of energy facilities differ not only in the specific character of construction projects, but also in high prices, certain initial and final dates, severe penalties [3], upon settlement of disputes arising out of these contracts, it is first necessary to take into account the specifics of the legal status of these facilities as well as the listed features of legal relations arising between the parties.

It seems that ability to promptly overcome a disputable situation with guarantees of efficient implementation of the final decision is of paramount importance for the parties to legal relations related to construction of energy facilities.

No doubt, at present, the jurisdictional form for protection of rights of the parties to relations for construction of energy facilities continues to occupy a dominant position, being the most regulated due to the high level of development of national procedure laws and timely acts of higher courts making it possible to ensure a uniform practice of application of the rules of law.

At the same time, the specific character of legal relations arising between the parties in connection with construction of energy facilities implies use of more and more flexible models for settlement of disputes, which are characteristic of the non-jurisdictional form. For example, the need to reduce the term for consideration of the case, to ensure additional security of confidential information, the possibility of selection of the procedure for settlement of the dispute at one's own discretion encourage the parties to relations concerning construction of energy facilities to use various

methods for settlement of disputes relating to the non-jurisdictional form.

The use of the non-jurisdictional forms for protection of rights, in general, is mutually beneficial both for the parties to legal relations who realize their economic interests and needs through mechanisms that are convenient for them, and for the authorities implementing the jurisdictional forms of protection since the wider use of the non-jurisdictional forms and their independent and proactive use by the subjects of legal relations reduces overall burden on the authorities that implement the jurisdictional forms of protection and also relieves them of the need to form special structural units within them with a mixed competence to consider specific disputes that are complicated, on the one hand, by the specific nature of the energy facility, and, on the other hand, by relations related to construction and design of these facilities.

The non-jurisdictional form for protection of rights of the entities engaged in construction of energy facilities includes a variety of methods of implementation, which include without limitation, mainly, the following: negotiations, procedure for extrajudicial settlement of disputes in anticipation of an action in the court, mediation, arbitration as well as other methods depending on the specific circumstances of the dispute and legal status of the parties to legal relations.

Currently, one of the main methods of implementation of the non-jurisdictional form for protection of rights of the entities performing activities in the field of construction of energy facilities is a procedure for extrajudicial settlement of disputes in anticipation of an action in the court.

It is noteworthy that the court practice considers the procedure for extrajudicial settlement of disputes in anticipation of an action in the court in a rather narrow sense perceiving it as one of the stages of implementation of procedural law provided to the party within the framework of use of the jurisdictional form for protection of the right. In particular, by Decree of the Tenth Commercial Court of Appeal dated June 13, 2017, in case No. A41-14535/17, it is determined that the procedure for extrajudicial settlement of disputes in anticipation of an action in the court is one of the forms for protection of civil rights, which consists in an attempt to settle disputable issues directly between the alleged creditor and the debtor under the obligation prior to submission of the case to the Commercial Court [4].

However, it should be borne in mind that application of the procedure for extrajudicial settlement of disputes in anticipation of an action in the court is usually preceded by another method for implementation of the form for protection of the violated right: negotiations. Therefore, in practice, there are often difficulties associated with the impossibility of differentiating the essential features characteristic of these two methods.

It appears that the procedure for extrajudicial settlement of disputes in anticipation of an action in the court is a formalized method of negotiation, the mandatory observance of which is established by law or contract, and which, as a rule, is a precondition for submission of the dispute for consideration to judicial agencies.

At the same time, negotiations, as an independent method of implementation of the non-jurisdictional form for protection of rights, are more proactive in terms of behavior of the subjects and are not mandatory like, in most cases, the procedure for extrajudicial settlement of disputes in anticipation of an action in the court, and are not particularly formalized in the process of their use by the parties to legal relations.

It should be noted that, as a rule, compliance by the parties with the procedure for extrajudicial settlement of disputes in anticipation of an action in the court is inextricably linked with the negotiations. Therefore, it can be determined that the negotiations and the procedure for extrajudicial settlement of disputes in anticipation of an action in the court, which are theoretically independent methods for implementation of the non-jurisdictional form for protection of the right, in practice, are applied in inextricable connection, which is designed to ensure efficient implementation of the specified form for protection of the violated right.

The procedure for extrajudicial settlement of disputes in anticipation of an action in the court, as an independent method for implementation of the non-jurisdictional form for protection of rights of the entities performing activities in the field of construction of energy facilities, is also reflected in the Standard State (Municipal) Contract for Design and Survey Works approved by Order

of the Ministry of Construction of Russia dated July 5, 2018, No. 397/пр., which comes into force on July 1, 2019 [5]. In particular, Clause 14 of this Standard Contract specifies that: "The claims of the Parties arising in connection with performance of the Contract, including disputes and disagreements on technical and financial issues (terms and conditions), shall be considered by the Parties by means of negotiations, including execution of a discrepancy report. Unsettled disputes shall be resolved in court. The term for pre-trial settlement of disputes may not exceed thirty (30) days from the date of receipt of a written claim from one of the Parties."

As one can note, in this case, use of the procedure for extrajudicial settlement of disputes arising out of contracts for design and survey in anticipation of an action in the court also includes the need to use negotiation mechanisms, which confirms the thesis on inseparable connection between these two methods for implementation of the non-jurisdictional form for protection of the right.

The main external form of expression and implementation of the procedure for extrajudicial settlement of disputes in anticipation of an action in the court is a formalized document containing individual requirements with regard to the subject of the dispute: the claim.

In order to overcome uncertainties and distinguish between the claim and other documents typical for implementation of other negotiation mechanisms, the court practice developed a universal definition of the claim. In particular, in its Decree No. 18АП-13856/2014 dated February 3, 2015, the Eighteenth Commercial Court of Appeal established that a claim should mean an interested person's requirement sent directly to the counterparty to settle the dispute between them by voluntary application of the method for protection of the violated right provided for by the law. Herewith, the court ruled that the said requirement (claim) shall be executed as a written document containing clearly worded requirements, the circumstances on which the requirements, evidence supporting them (with reference to the relevant laws), the amount of the claim and its calculation (if it is subject to monetary evaluation), and other information required to settle the dispute [6].

The new wording of Part 5, Article 4 of the Arbitration Procedure Code of the Russian Federation and the current practice of its application suggests, on the one hand, tightening of the requirements to the form of the claim, but on the other hand, the courts allow certain relaxation of the existing legal regime on a number of procedural issues.

Thus, for example, in its Decree dated January 18, 2018 in case No. A24-1809/2017, the Commercial Court of the Far Eastern District established that the absence of the specific amount of losses in a claim submitted in order to comply with the procedure for extrajudicial settlement of the dispute in anticipation of an action in the court is not a basis for leaving the claim without consideration [7].

In its Decree dated April 20, 2018, No. Ф05-813/2018 in case No. A40-70243/2017, the Commercial Court of the Moscow District concluded that the document should be recognized as a claim, even if it is titled differently, for example, as a notice of termination of the contract with the requirement to return the advance payment [8].

Arbitration proceedings also continue to be essential among other methods for implementation of the non-jurisdictional forms for settlement of disputes in the field of construction of energy facilities.

It seems that as a result of centralization and subsequent consolidation of arbitration institutions caused by the reform of the arrangements for the activity of national Commercial Courts, the authority of the existing institutions increased, including through creation of special structural units within these institutions bringing together the most authoritative experts in a particular field. For example, in the Arbitration Center of the All-Russian Public Organization Russian Union of Industrialists and Entrepreneurs, a board on disputes in the field of construction was created. It includes leading experts in the field of energy law [9].

Thus, settlement of disputes in the field of construction of energy facilities by arbitration institutions has significant advantages: in addition to being able to elect arbitrators having the relevant specialization in such a complex industry as energy law at one's own discretion, the parties reduce the terms of proceedings, and the dispute itself

ends with a binding on the parties and final decision. Herewith, in the course of the proceedings, confidentiality is preserved, and the parties to the dispute acquire the opportunity to directly enforce a court decision in the territory of another state, which is especially important for the parties to relations concerning construction of energy facilities complicated by a foreign element.

Meanwhile, centralization of national arbitration institutions and consolidation of their structures, in a sense, limited access to arbitration proceedings for the parties to legal relations due to the following circumstances.

As of May 13, 2019, on the official website of the Ministry of Justice of Russia, there are only five arbitration institutions that have deposited the arbitration rules and are capable of carrying out arbitral proceedings in full [10]. Such an insignificant number of arbitration centers is caused, first of all, by the strict requirements imposed for creation of such centers and their functioning. In these conditions, it becomes extremely difficult to form sectoral arbitration centers, arbitration proceedings in which could be the main methods for implementation of the non-jurisdictional form of settlement of disputes in the field of construction of energy facilities. At the same time, the existing arbitration centers combining leading experts in various sectors rightly establish a fairly high arbitration fee, which, however, may be excessive for small contracting organizations executing certain work at energy facilities.

In the presence of these conditions, it is advisable to consider other methods for implementation of the non-jurisdictional forms of settlement of disputes in the field of construction of energy facilities.

Since 2010, the system of self-regulation in the field of construction has been successfully operating in the Russian Federation. It replaced licensing previously applied in the industry.

There are currently more than four hundred operating self-regulatory organizations in the field of construction, design, and surveys.

The activity of these self-regulatory organizations is regulated by Federal Law dated December 1, 2007, No. 315-ФЗ On Self-Regulatory Organizations and Chapter 6.1. of Town Planning Code of the Russian Federation, and it is aimed at coordination of entrepreneurial activity of the members and protection of their property interests, prevention of damage, improvement of quality of work, and ensuring that the members fulfill their obligations under contracts concluded using competitive methods for determining the suppliers (contractors).

These self-regulatory mechanisms would also be advisable to use for settlement of disputes regarding protection of rights of the entities performing activities in the field of construction of energy facilities.

First of all, this is due to the current trends in formation of national self-regulatory organizations in the construction industry by type of the contractor's activity in a particular industry, including individual energy sectors.

For example, a system of self-regulatory organizations currently operates. It unites the parties to construction relations in the nuclear industry (SRO SOYUZATOMSTROY, SRO SOYUZATOMPROEKT, and SRO SOYUZATOMGEO [11]), in the oil and gas industries (SRO SOYUZNEFTEGAZPROEKT [12], SRO Union of Design Organizations Rosneft [13]), and even in the electric power industry (SRO Union of Designers EOE [14]).

If there are similar trends in the sectoral association of entities engaged in activities in construction of energy facilities, it seems necessary to develop additional methods for implementation of the non-jurisdictional forms of dispute settlement that could be used by the subjects independently and proactively within the sectoral self-regulatory association, including through the use of existing mechanisms.

A mechanism for application by the self-regulatory organization of disciplinary measures against its members is currently considered as one of the available methods of influence of this organization on the behavior of its members and settlement of individual disputes. It can be conventionally referred to the methods for implementation of the non-jurisdictional form of dispute settlement.

Certain intracorporate sanctions for unlawful conduct of business entities are deemed disciplinary measures. These measures usually include a warning, an order, a fine, suspension of the right to execute work, and expulsion of the guilty

entity from the members of the self-regulatory organization.

By virtue of the provisions of the current laws on urban development, a self-regulatory organization in the field of construction is obliged to consider complaints and applications received in respect of its members. Herewith, these complaints and applications are considered through a certain strictly regulated procedure, in which representatives of the parties to the dispute participate. Upon consideration of such complaints and applications, the self-regulatory organization may, and in some cases, must apply relevant disciplinary measures.

Meanwhile, the mechanism for application by the SROs of disciplinary measures cannot be defined as a universal method for implementation of the non-jurisdictional form of dispute settlement since it has only precluding character and cannot fully restore the violated right of the concerned party.

An indirect mechanism for protection of rights of the entities performing activities in the field of construction of energy facilities can also be implemented through a system of powers and functions of a self-regulatory organization. This mechanism is implemented through the authority of the self-regulatory organization to challenge, on its own behalf, any acts, decisions and/or actions (omission) of the public authorities of the Russian Federation, the public authorities of the constituent entities of the Russian Federation, and the municipal authorities that infringe the rights and legitimate interests of its members or create a threat of such a violation as specified in clause 2, Part 3, Article 6 of the Federal Law *On Self-Regulatory Organizations*.

This mechanism has the nature of indirect protection due to the fact that the self-regulatory organization actually acting in favor of third parties acts on its own behalf in the relevant procedural status and incurs certain procedural risks as well as expenses associated with implementation of protection of its members in disputes arising out of public relations. Due to the said specific features, such a mechanism can hardly be referred to universal methods for protection of rights.

It is noteworthy that until September 1, 2016, the Federal Law *On Self-Regulatory Organizations* also contained a provision, pursuant to which a self-regulatory organization, while performing its functions, had the right to form Arbitration Courts to resolve disputes arising between the members of the self-regulatory organization as well as those arising between such members and the consumers of goods (work, services) produced by the members of the self-regulatory organization, other persons, in accordance with the laws on Commercial Courts.

However, during the reform of the laws on arbitration, this provision was actually unenforceable and it was promptly excluded by the legislator. At the same time, no alternative mechanisms that allow the use of the resource of the self-regulatory organization to settle disputes between its members and/or the third parties have yet been worked out.

It seems advisable to consider the issue of returning to the model of functioning of the mechanism of arbitration within the existing self-regulatory organizations, taking into account the existing public law powers of the self-regulatory organizations as well as taking into account the general innovations introduced into the system of arbitration proceedings.

Herewith, given the proper level of organization of processes within this model, it is highly probable that the level of efficiency of protection of rights of the entities performing activities in the field of construction of energy facilities would be improved, including due to the presence of a vertical system of self-regulatory organizations of the building complex, where the highest levels are national associations of self-regulatory organizations with regulatory and supervisory powers in relation to ordinary self-regulatory organizations.

The proposed measure will also allow the parties to the dispute to independently form competent arbitration authorities to settle disputes from among the leading industry professionals who will act as experts in certain issues and will be able to sustainably exercise their powers within the framework of a self-regulatory association. Herewith, the proposed solutions are economically feasible since the projected model for protection of rights of the entities performing activities in the field of construction of energy facilities will be able to function, including at the expense of mandatory

contributions of a non-profit organization that has the status of a self-regulatory organization.

Summing up, it should be noted that the trends in development of the main forms of protection of rights of the entities engaged in activities in the field of construction of energy facilities are currently associated primarily with increasing role of the non-jurisdictional forms of dispute settlement due to the fact that these forms have certain advantages over the traditional jurisdictional forms.

National legislation provides for a sufficient number of methods for implementation of the non-jurisdictional form for protection of rights of the entities performing activities in the field of construction of energy facilities. However, the practical application of individual methods is hampered due to the lack of regulatory detailing of specific procedures of a particular method as well as the insufficient degree of elaboration of the theoretical basis of the phenomenon in question.

It should also be noted that for further efficient development of the mechanisms for protection of interests of business entities, it is necessary to consider possibility of creation of additional institutions that will ensure efficient interaction between the subjects within the existing and successfully functioning model of self-regulation. ■

References

1. Zhivikhina I.B. Forms of Protection of Ownership // Civil Law // textbook. 2010. No. 1. P. 27.
2. Civil Law. General Part: Textbook: in 4 volumes / V.S. Em, N.V. Kozlova, S.M. Korneev et al.; edited by E.A. Sukhanov. 3rd edition, revised and enlarged. Moscow : Wolters Kluwer, 2010. Volume 1.
3. Romanova V.V. Article on Problem Aspects of Implementation of Judicial and Extrajudicial Forms for Protection of Rights of Entities Performing Entrepreneurial Activity in the Field of Construction of Energy Facilities. Moscow : Yurist Publishing House 38-41 2012 .
4. Decree of the Tenth Commercial Court of Appeal dated June 13, 2017, in case No. A41-14535/17 // URL: http://kad.arbitr.ru/PdfDocument/a2f736b9-41f8-48e7-ab5c-c37db96e137b/dee8fc79-187f-4ca1-b813-32ef1f39da9d/A41-14535-2017_20170613_Postanovlenie_apelljacionnoj_instancii.pdf;
5. Order of the Ministry of Construction, Housing and Utilities of the Russian Federation dated July 5, 2018, No. 397/пр On Approval of the Standard State (Municipal) Contract for Execution of Design and Survey Works, and Information Card of the Specified Standard Contract registered in the Ministry of Justice of the Russian Federation on October 10, 2018. Registration No. 52384;
6. Decree of the Eighteen Commercial Court of Appeal dated February 3, 2015 No. 18АП-13856/2014 // URL: http://kad.arbitr.ru/PdfDocument/da0a5143-da5b-48c8-8fde-e671486d6f6a/e133ab51-f81b-42ee-874c-661f07de003b/A76-16106-2014_20150203_Postanovlenie_apelljacionnoj_instancii.pdf;
7. Decree of the Commercial Court of the Far Eastern District dated January 18, 2018, in case No. A24-1809/2017 // URL: http://kad.arbitr.ru/PdfDocument/a503b88a-2341-4b32-b94d-2960b14137b3/5a8e593c-446a-4b79-b0be-c0eaa830ea03/A24-1809-2017_20180118_Postanovlenie_kassacionnoj_instancii.pdf;
8. Decree of the Commercial Court of the Moscow District dated April 20, 2018, in case No. A40-70243/2017 // URL: http://kad.arbitr.ru/PdfDocument/77ea6bfa-fc1c-47a1-8892-f7a47645b87d/c7f69913-210c-4853-92c0-efa9d1000bc5/A40-70243-2017_20180420_Reshenija_i_postanovlenija.pdf;
9. Appendix 3 to the Provisions on the Arbitration Center of the Russian Union of Industrialists and Entrepreneurs // URL: https://arbitration-rspp.ru/documents/rules/statute/#pr3;
10. Deposited Arbitration Rules. Official website of the Ministry of Justice of Russia // URL: https://minjust.ru/ru/deyatelnost-v-sfere-treteyskogo-razbiratelstva/deponirovannye-pravila-arbitrazha;
11. Official portal of self-regulatory organizations of the nuclear industry // URL: http://atomsro.ru/;
12. Official website of SRO Soyuzneftegazproekt // URL: http://www.npsngp.ru/;
13. Official website of SRO Union of Design Organizations Rosneft // URL: http://rn-sro.ru/;
14. Official website of SRO Union of Designers EOE // URL: http://www.npeoe.ru/.