THE NARROWED SPECIALIZATION OF ECONOMIC JUSTICE: A BREAKTHROUGH TECHNOLOGY IN PROTECTION OF RIGHTS AND LEGAL INTERESTS OF THE FUEL AND ENERGY COMPLEX ORGANIZATIONS

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The article consistently reviews the problems of intensified specialization of the economic justice mechanism aimed at the assurance of judicial protection of rights and legal interests of energy market participants. It is noted that such specialization assured by commercial courts and, consistently, by judicial collegiums, judicial assemblies and separate judges is not always sufficient. It is postulated that the narrower and deeper specialization, the more effective is justice in specific commercial cases and the more just are judicial acts. A potential commercial procedure in cases involving jury members, especially in disputes involving energy market participants, is able to raise drastically the efficiency of judicial proceedings. It is noted that the institution of commercial court assessors is decaying; the author believes that it should be recreated and further developed.

Keywords: *energy law, fuel and energy complex, protection of rights of energy market participants.*

It is commonly believed that breakthrough technologies in general and their legal regulation in particular is a sphere of real economy: industry, transport, communications, construction, etc., and obviously, the fuel and energy complex. But the legal regulation of the organization and activities of energy market participants, which is rather difficult, unbalanced, insufficiently effective, may potentially have breakthrough technologies.

An important place in the wide range of the mechanism of the legal regulation of organization and activities of fuel and energy complex structures is held by the judicial mechanism of protection of their rights and legal interests. It cannot be called

defective and there is a drastic need it its radical transformation. But hardly any lawyer specializing in such mechanism in the fuel and energy sphere doubts that it is far from being effective.

The two sides of the problem are plain to see: the shortcomings in the legal regulation of public relationships in the fuel and energy complex and the shortcomings in the organizational legal mechanism of judicial protection of rights and legal interests of energy market participants.

This problem is greatly aggravated by the coronavirus pandemic affecting the whole world, the Russian fuel and energy complex, the justice mechanism on a global scale and in our country since the whole world civilization, all its state, economic and social institutions have turned out to be almost completely unprepared for its various consequences. The amendments to the Constitution of the Russian Federation adopted in our country in the middle of 2020 have not corrected this negative trend in the most general terms. That's why the role of the legal science in correction of the outlined situation is now decisive and the range of scientific and legal problems that need to be solved is broad, and they all are important.

One of them is the problem of the improvement of the specialized nature of the economic justice mechanism designed to ensure the protection of rights and legal interests of multiple and varied structures of the Russian fuel and energy complex in the event of violation of their rights and legal interests.

Why is the specialized nature of the economic justice mechanism so important within the framework of the broader problem of the improvement of this mechanism and raising its efficiency?

That is so, because, strictly speaking, any problem can be better, more effectively and reliably solved by an expert in the sphere of such problem as compared to a non-expert, let the latter be an outstanding professional in other spheres, be appointed for solution of this problem by higher authorities, have the powers to solve this problem, and be named by mass media the only hope in the opinion of the society...

But if a true expert, a professional in a particular sphere, has the corresponding means, opportunities, resources, etc. to solve such problem, the success is almost guaranteed, anyway, the chance of success is much higher than it would be if the case were solved by an above-mentioned non-expert. The said is fully applicable to the justice sector.

Today, there are two types of specialized justice in effect in our country: constitutional and economic. The issue of the expediency and necessity of other specialized justice types (criminal, administrative, civil) deserves separate attention. The main postulate here is that the more specialized justice is, the more effective and fairer it is.

The organizational and legal mechanism of justice consists of three constituent parts: the judicial structure, judicial proceedings and the judicial status. The overall specialization of the justice mechanism means that all the three of its constituent parts act separately and independently, i.e. in case of: 1) a mono-court (in the present-day Russia, it is only the Constitutional Court of the Russian Federation and the federal Disciplinary Tribunal that existed for several years before 2014) or an independent judicial system with its own Supreme (Higher) Court as the central body (we have no such courts after the liquidation of the Supreme Commercial Court of the Russian Federation in 2014, while the system of general jurisdiction courts cannot be considered specialized, but some foreign states have a couple of specialized judicial fully independent systems, for instance, there are five of those in the Federal Republic of Germany); 2) a specialized (separate) procedural regulation in the form of the "own" procedural code or the corresponding procedural provisions integrated into the legal act on the specialized court (as in the Federal Constitutional Law On the Constitutional Court of the Russian Federation, provided that some countries, e.g. Belarus, Mongolia, have two different laws: on

the constitutional court and on constitutional proceedings...); 3) "own" judges within the limits of the specialized mono-court or the specialized judicial system: selected to exercise this exact specialized justice, having passed a special qualification examination, advancing their skills in the sphere of specific specialized justice...

Economic justice aimed at ensuring protection of rights and legal interests of parties to economic relationships has not been fully specialized in our country since 2014: there are separate judicial proceedings (the Commercial Procedure Code of the Russian Federation), we have a body of arbitrators (about 4 thousand people), but there is no fully independent commercial judicial system, since although there are three links of this system (commercial courts of the constituent entities of the Russian Federation (84 courts), commercial courts of appeal (21 courts) and cassation commercial courts (10 courts)), there is no supreme judicial authority fully specializing in economic justice. It means that the commercial judicial system is not fully independent (it may be called autonomous, being part of the general judicial system headed by the Supreme Court of the Russian Federation), it is autonomous, specialized but only in part as the final judgments in specific economic disputes are adopted by the Presidium of the Supreme Court of the Russian Federation where arbitrators are intentionally a minority.

However, everything discussed above relates to the general problem of specialization of economic justice. The true interest lies in the specialization of economic justice on the lowest level being the commercial courts of the constituent entities of the Russian Federation, as it is mainly exercised there while just about 13 per cent of economic disputes are referred to the court of appeal.

It is well known that the structure of the commercial court of any constituent entity of the Russian Federation implies two collegiums: the one resolves economic disputes arising out of civil relationships, the other resolves economic disputes arising out of administrative relationships. This dichotomy may on quite a justified basis be called specialization as it is quite natural that after several years of work in the civil case collegium (reviewing private law cases) an experienced arbitrator quickly and correctly solves ordinary (easy) as well as difficult cases. However, being transferred to the administrative collegium of the same court (where public law cases are reviewed) for operational reasons (or sometimes on other grounds), an arbitrator exercises economic justice at a lower degree of efficiency and performance.

Both judicial collegiums of commercial courts of the constituent entities of the Russian Federation contain a (permanent) panel of judges that are specialized even more. One panel of judges of the civil collegium reviews economic disputes arising out of relationships in major construction, another one those arising out of cargo transportation, etc. One panel of judges of the administrative collegium respectively reviews tax cases, another one bankruptcy cases, etc. And the transfer of an arbitrator from one panel of judges to another within one judicial collegium affects their specialized professional level, although the procedure for transfer of a judge from one panel of judges to another within one judicial collegium is much easier than a transfer between judicial collegiums. Each judicial collegium has its own, narrower and deeper specialization in solution of economic disputes that consequently results in more effective and high-performance economic justice.

And finally, the lowest and narrowest specialization level in commercial courts of the constituent entities of the Russian Federation is represented by arbitrators. With rare exception, each arbitrator is assigned an extremely narrow economic dispute category for review within the category assigned to the panel of judges and, of course, within the specialized judicial collegium. Thus, the longer a specific judge works in one panel of judges primarily solving a narrow economic dispute category, the higher his professional level is, and not only

in the narrow specialization issues, but on a broader scale since absolutely all challenging economic justice issues are interrelated. In this case, such judge knows the substantive, procedural and legal ground of regulation of relationships within the narrow specialization and in dynamics (and sometimes foreign grounds as well), knows judicial practice (including practice of international judicial authorities), knows scientific publications on this issue, sometimes delivers reports and speeches at scientific conferences, sometimes publishes articles in scientific journals, while some arbitrators prepare and defend theses.

And such arbitrator is a serious expert, high-level professional, although predominantly in a narrow economic justice sphere. But this is exactly what our society, state, economy need, as it is the level where more fair judicial acts can be adopted.

But the real life, its landmarks and strategic tasks, legal regulation of public relationships, law enforcement practice including judicial, etc. are constantly changing, which often takes place suddenly, rapidly, on the so-called "large front", effecting huge spheres of the life of the society (the coronavirus pandemic alone counts for a lot). Besides, the human mind is not limitless in terms of perception of information and we are not talking about a judge burning out due to extreme pressure.

An ordinary (I mean, not outstanding) arbitrator cannot (due to a number of reasons) keep an eye in a due manner on constant and at times significant changes of "his" statutory base and judicial practice in full. And arbitrators do not know at all the actual industrial practice where the corresponding legal provisions are interpreted in their own way, the corresponding judicial practice and the spheres where professional slang (jargon) is used. So, what we get is as follows: a narrow specialist being an arbitrator and narrow specialists being representatives of disputing parties in a commercial procedure seem to be speaking different languages, and some do not know, the others do not understand various technicisms widely used in the business sphere in general and consequently in the sphere where the corresponding disputable relationships appear. And if it comes to technical drawings...

The structure of the Russian fuel and energy complex includes various branches, each with its own statutory base of organization and operations, technical development history, business customs, etc., as well as peculiarities of the law enforcement practice.

In days past, during the Soviet period, each economic ministry,, including the ones that at that time were parts of the fuel and energy complex had departmental commercial courts (usually being a part of a legal division with a departmental commercial court) that sometimes consisted of three levels: the union, union republic, regional (territorial...) ones. Economic disputes were solved by departmental arbitrators that were well aware of the specifics of legal relationships in their ministry or department, but they solved disputes only between economic authorities being subordinate to their ministry. It means that such economic dispute solution mechanism was effective.

Later on, in the post-Soviet economic and legal environment, departmental commercial courts liquidated nationwide were replaced with specialized commercial courts also ensuring some kind of specialization. However, specialization of commercial courts has been lost after almost complete liquidation of such courts (only four commercial courts remain in the whole Russia, and they are all of general jurisdiction ones). And, as has been said above, there is now no institution left to ensure the required degree of such specialization in the state commercial as well as arbitration proceedings.

In general, an acute demand in deep (special) knowledge (in a narrow segment) on the dispute subject in the commercial judicial procedure, including disputes, involving fuel and energy complex organizations, arises. And such real opportunity is available only in economic justice, but only as a prespect. I am referring to the institution of commercial court assessors of commercial courts of the

constituent entities of the Russian Federation. It originated long ago, was widely used in commercial courts of the Russian Empire, dates back to more than a hundred years in a number of Western European countries where it is very common and effective (to the extent that some large businessmen indicate an expert judge of a commercial state court as the first line in the long list of their positions on business cards, which means that the government trusts them in exercising justice).

In the Soviet historical period, the USSR including the RSFSR had just one institution of associated judges, the people`s ones, and there was no institution of jury trial or commercial court assessors (most probably, due to class and political reasons). Today, the situation is the opposite, the two institutions (of jury trial and commercial court assessors) are functioning. But the efficiency of the level of functioning is generally insufficient, for instance, judgments of acquittal issued with the involvement of jury members (although the spreading of this institution on the regional level should be encouraged by all means) are cancelled in 90 per cent of cases, meaning that its organizational, legislative and law enforcement bases require substantial improvement. And the said necessity increases manifold considering that this institution of people's representatives performs a critical function in exercising of justice: it liquidates the mental gap between the court and the society.

But I am not referring to the institution of jury trial functioning exclusively (for now?) in criminal proceedings, rather to the institution of commercial court assessors that directly exercise economic justice along with commercial courts. How efficient is it now, how does it ensure the protection of rights and legal interests of business entities, primarily in such a large and multi-profile economic structure as the fuel and energy complex?

Today it functions badly, not enough, to be more specific. It originated in our country in 1995, and its legal appearance was preceded by a serious practical legal experiment – a phenomenon almost unique for our country: such experiment was held in 14 commercial courts of the constituent entities of the Russian Federation (including in the commercial court of the Tyumen region governed at that time by the author of this article) based on the Provision on the Experiment on Review of Cases with the Involvement of Commercial Court Assessors approved by the Resolution of the Plenum of the Supreme Commercial Court of the Russian Federation of September 5, 1996.

As a result, Federal Law No. 70-ФЗ of May 30, 2001, On Commercial Court Assessors of Commercial Courts of the Constituent Entities of the Russian Federation (hereinafter referred to as the "Federal Law on Commercial Court Assessors") was developed and adopted based on the generalization of the practice of this experiment.

The institution of commercial court assessors was functioning relatively well during the performance of the above-mentioned experiment as well as in the first years after the adoption of the Federal Law on Commercial Court Assessors. Most importantly, commercial court assessors in a specific commercial case procedure with the authorities equal to those of an arbitrator, correctly selected from the organizational and procedural standpoint to participate in that exact procedure, had much greater professional knowledge on the subject of that specific economic dispute as compared to the arbitrator acting as the presiding judge in such procedure. This was also reflected in educational publications. [1]

However, the institution of commercial court assessors then started to "decay": the parties began to use its powers to drag on disputes, procedurally avoid liability, etc.; of course there was the corresponding reaction from the federal legislator, and the named Federal Law on Commercial Court Assessors started to be amended and supplemented to solve a particular tactical task that strategically resulted in reduction of the opportunities for the use of this institution, primarily by arbitrators themselves.

This issue (within the framework of the essence of this institution) is reviewed in

scientific articles among other scientific publications. [2]

By now, after ten years of amendments (the latest was introduced on November 28, 2018 [3]), the Federal Law on Commercial Court Assessors of 2001 has in fact lost the record of the essence of this institution, its basic function. The main attention is now paid to the issues of who cannot be a commercial court assessor at all due to "biographical details" or in view of the origination of a conflict of interests; how lists of commercial court assessors are made, what are the grounds and procedures for termination of authorities of a commercial court assessor including the premature one, etc.

Everything said above allows us to come to the following conclusion: there are potential opportunities for deep specialization of the panel of a commercial court of a constituent entity of the Russian Federation in review of a specific economic dispute between or with the involvement of business organizations of the fuel and energy complex by introduction of commercial court assessors who have deeper special knowledge as compared to the arbitrator presiding in such panel and, consequently, are able to ensure a fairer court judgment in such case, in the panel of judges. But they remain potential, the real opportunities are in fact reduced to nothing.

However, the 2020 constitutional reform is a flicker of hope in this pessimistic situation. In 2020, Part 2 of Article 118 proclaiming four types of proceedings was supplemented with the fifth one, commercial court proceedings. It has been existing for a long time, including during the period of rule of the Soviet government, but its constitutional legalization allows hoping for serious reinvigoration of the legislative procedure of consolidation of all constituent parts of the economic justice mechanism. This will affect the institution of commercial court assessors as well and cannot be done without the corresponding scientific and legal research. ■

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