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Legal Aspects Of Enforcing The Rights Of Gas Pipeline Title Owners When Performing Works On Land Plots Owned By Others

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Аннотация

This article is dedicated to a complex study of the issues of protection of rights of title gas pipeline holders (gas pipeline owners and gas pipeline operating companies) in performance of engineering works on gas transmission network sections located within the boundaries of land plots owned by others. Considering the special nature of a gas transmission network as a source of increased danger and a hazardous industrial facility, the author believes that one of the priority areas of gas pipeline operation is regular diagnostics and maintenance as well as in-process current (emergency) repair performed to avoid any breakdowns of the normal operation mode of the gas transmission network and causing of damage to lives, health and property of third parties. Taking into account these circumstances and the specifics of legal regulation of gas pipeline operation, the author of the article singles out the legal problem that lies in the ambiguity of approaches to the solution of the issue of provision of the title gas pipeline holder with access to the operated section of the gas transmission network if such facility is located within the boundaries of a land plot not owned by the gas pipeline holder. In order to solve this problem, the author performs a systemic analysis of the applicable laws of the Russian Federation and the legislative practice of some foreign countries and singles out three key concepts of provision of access to a gas pipeline located at a land plot owned by another person; such concepts include an opportunity to establish private or public easement and imperative proclamation of the unconditional right of the gas pipeline holder to unrestricted access to any section of the operated gas transmission network irrespective of the ownership of land plots such sites are located at. The author gives a

systemic evaluation of each of the mentioned conceptual approaches; based on such evaluation, the author brings forward recommendations for improvement of the applicable laws to comply with the proclaimed principle of ensuring energy security of the Russian Federation.

Ключевые слова: energy law, legal support of energy security, gas transmission network, main gas pipeline, gas pipeline operation, provision of access, easement

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1 Against the background of continuous growth of the speed of industrial and technological progress, the gas industry has taken up the role of one of the most important areas of ensuring sustainable functioning and development of the national economy of Russia. Due to the geological and geographical features of the Russian state, the gas transmission system in place in our country is a unique complex that has no analogues across the globe [1].

2 Thus, the Russian Federation is currently operating more than 185 thousand km of main pipelines [2] and the total length of gas transmission networks including gas distribution pipelines is about 1 million km [3]. Each of them is a source of increased danger from the civil law standpoint [4] and a hazardous industrial facility from the standpoint of industrial safety laws [5].

3 These facts directly determine that support of a high level of security of facilities taking part in the natural gas transportation process should be the priority area of operation of gas networks and improvement of the gas transmission industry as well as the fundamental strategic guideline of the state energy policy [6]. Direct confirmation of the above is the principle of ensuring energy security of the Russian Federation (Article 4 of Federal Law No. 69-FZ of March 31, 1999 On Gas Supply in the Russian Federation (the “Gas Supply Law”) legally proclaimed as one of the key grounds of the state gas supply policy of the Russian Federation) [7].

4 One can objectively conclude that achievement of the above stated energy security level is directly linked to the setup of a complex industrial and engineering mechanism of maintenance in a good working order of the linear part, units, equipment, mechanisms and machines of a gas pipeline by the entity operating the gas transmission network.

5 In a real-case scenario, implementation of the indicated task is facilitated by performance of specific events by the gas pipeline owner to prevent, identify and eliminate any violations of the normal gas transmission network operation conditions: from technical diagnostics and servicing (which is the obligation of operating companies

based on the applicable industrial safety rules [8]) to major and current (scheduled and emergency [9]) repair of gas transmission network facilities and section [10]. Each of the work types mentioned above often requires direct access to the gas pipeline string: for external examination of gas pipeline equipment and section, evaluation of the condition of insulation coating at technical diagnostics of the linear part [11], elimination of hole-type damage of tube wells, damage to the insulating layer, etc. in the course of repair works [12]. Thus, due events aimed at maintenance of the good working condition of gas transmission infrastructure facilities seem almost impossible to conduct without probing earthworks.

6 The applicable laws give the main gas pipeline owner and the main gas pipeline operating company a right to probing within the protected gas pipeline zone to perform gas pipeline maintenance and repair works (Paragraph 3, Subclause (a), Clause 19 of the Main Gas Pipeline Protection Rules) [13] for the purpose of comprehensive implementation of the above listed events.

7 However, the Main Gas Pipeline Protection Rules make the opportunity to actually exercise this right dependent on the preliminary notification of owners or other lawful holders of land plots, within the boundaries of which such protected zone lies, on such works (at least five days prior to the start of the works). The stated facts make it absolutely impossible to start any urgent (or even quick) maintenance or repair of a gas transmission network section located within the boundaries of a land plot owned by another person. This challenging issue is not so critical in case of planned technical diagnostics or scheduled major repair of a gas pipeline; however, if there is a need to perform an emergency (unscheduled) repair of a gas pipeline section due to any failure of normal functioning (or immediate threat of such failure), any delay can be fatal and create a potential risk of a significant environmental, property damage, damage to the life and health of people at large.

8 In the described circumstances, the problem of access of the operating company to a land plot owned by another person, within the boundaries of which the protected zone of the gas pipeline is located, becomes significant in terms of organization of scheduled preventive and emergency maintenance and repair of gas transmission infrastructure facilities.

9 One of the mechanisms (seemingly the most obvious one) that is able to ensure access of the title gas pipeline holder to other persons' land plot for probing aimed at pipeline maintenance and repair is the institution of restricted use of a land plot owned by another person (easement).

10 In accordance with Clause 1, Article 274 of the Civil Code of the Russian Federation (the "CC RF"), the real estate (land plot, other real estate) owner may request the owner of the adjacent land plot and the owner of yet another (adjacent) land plot (where required) to give a right of restricted use of the adjacent land plot (easement). Easement may be established to ensure passage and travel across the adjacent land plot, construction, reconstruction and (or) operation of linear facilities that make no obstruction to the permitted land plot use or other needs of the real estate owner if the same cannot be ensured without easement establishment [14]. The opportunity to apply easement that is stipulated by provisions of the civil laws and got the name of a private

one, to relations in the gas transmission sphere has been repeatedly confirmed in the legal doctrine [15] and the law enforcement practice of judicial authorities of the Russian Federation [16]. This institution is often used to ensure functioning of gas transmission network facilities in foreign countries: the USA [17], New Zealand [18], countries of the European Union [19] and others.

¹¹ At the same time, it is worth mentioning that the key feature of private easement is its predominantly contractual character: as follows from Clause 3, Article 274 of the CC RF, such easement is generally established based on an agreement between the entity requiring easement and the land plot owner, and only if no agreement on easement establishment or easement conditions is reached, it may be established by court order based on the claim filed by the entity requiring easement.

¹² However, it seems justified that regulation of relations in the gas transmission sphere (including some relations associated with provision of access to gas transmission network facilities) is (as already noted in this article) a strategic area of the state energy policy and cannot be based on purely private law origins. In view of the above, on September 1, 2018, the Land Code of the Russian Federation (the “LC RF”) was amended to stipulate the opportunity to establish public easement for the purposes of construction, reconstruction, operation, major repair of linear gas supply system facilities (Subclause 1, Article 39.37 of the LC RF) [20].

¹³ As follows from the name of the respective federal law [21] and the explanatory note to it [22], such amendments were aimed at simplification of construction, reconstruction, major repair and (or) operation of linear facilities by using administrative mechanisms based on resolutions of government or local self-government authorities.

¹⁴ However, although the public easement concept is widely applied outside the Russian Federation [23] and has strong positions in the Russian law enforcement practice [24], it appears to be associated with the will (although limited by the established administrative and regulatory requirements) of a third party (public authority) that is in charge of making a decision on the opportunity to establish public easement, which still cannot fully ensure unconditional stability of the energy complex of the country in terms of operation of gas transmission facilities.

¹⁵ As a result, neither private not public easement is able to ensure due level of legal certainty corresponding to the fundamental principles proclaimed by the Gas Supply Law and other federal regulations. Mechanisms of combination of the mentioned legal institutions proposed by some researchers to ensure safe operation of gas transmission networks [25] cannot solve the existing contradictions either.

¹⁶ In the described conditions, the only legal regulation means facilitating solution of the problem raised in this study can be imperative proclamation of the unconditional right of the title gas pipeline holder to unlimited access to any section of the gas transmission network it operates irrespective of the legal ownership of land plots, within the boundaries of which they are located.

¹⁷ Provisions of Article 42 of the LC RF serve as the main regulatory prerequisite that enables implementation of this legal mechanism; according to Paragraph 9 of this article, starting from January 1, 2019, land plot owners and persons that are not land plot

owners are obligated not to obstruct the company that owns a gas supply system facility, oil pipeline or oil product pipeline or a company authorized by it to perform maintenance and repair of gas supply system facilities, oil pipelines and oil product pipelines, ammonia pipelines located on the land plots and (or) underneath the land plot surface, to prevent emergencies, liquidate consequences of accidents, catastrophes [26], i.e., this paragraph consolidates the concept of the so-called “legal easement” arising “according to the imperative procedure based on the provisions of Art. 42 of the LC RF at the absence of a preliminary or subsequent expression of will by interested parties or a court ruling” [27]. It should be noted that the Gas Supply Law had a wording with a similar meaning before (before January 1, 2019) (Part 6, Article 28).

¹⁸ Let’s pay special attention to the fact that the land owners’ obligation to grant title gas pipeline holders access to the maintenance territory, which is consolidated in the LC RF, is not conditional upon and does not imply and notifications to be submitted by the operating company. Thus, keeping the need for preliminary notification of lawful land plot owners for access to probing works for maintenance of the entrusted gas pipeline section in Clause 19 of the Main Gas Pipeline Protection Rules, appears to be non-conforming to the requirements for uniformity of the law-making practice and purposes of unconditional and efficient ensuring energy system security in the process of operation of gas transmission networks.

¹⁹ In view of the above, the following recommendations for improvement of the applicable laws in the energy industry and industrial safety sphere are proposed as a conclusion to this study: to amend Paragraph 3, Subclause (a), Clause 19 of the Main Gas Pipeline Protection Rules by excluding the following wording: “*with the preliminary notification of owners or other lawful holders of land plots, within the boundaries of which such protected zone lies, on such works (at least five days prior to the start of the works)*”, or taking into account the need to preserve the balance of interests of the parties to the reviewed legal relation, it is proposed to supplement the original (current) wording of Paragraph 3, Subclause (a), Clause 19 of the Main Gas Pipeline Protection Rules with the following words: “*and without such notification in case of emergency works*”.

²⁰ Along with that, as security arrangements of performance of obligations stipulated by Clause 9, Article 42 of the LC RD by land users, it seems necessary to establish administrative liability similar in terms of sanctions to an administrative offense lying in the failure to comply with the procedure for performance of works in protected zones of main pipelines (Article 11.20.1 of the Administrative Offense Code of the Russian Federation (the “AOO RF”) [28]); to achieve that, it is suggested to amend Paragraph 1, Article 11.20.1 of the AOO RF to read as follows: “*Performance of actions prohibited by the laws of the Russian Federation in protected zones of main pipelines or performance of works in protected zones of main pipelines without the respective permission from or notification of the pipeline transmission company or obstructing the company that owns a gas supply system facility, oil pipeline or oil product pipeline or a company authorized by it to perform maintenance and repair of gas supply system facilities, oil pipelines and oil product pipelines, ammonia pipelines located on the land plots and (or) underneath the land plot surface, to prevent emergencies, liquidate consequences of accidents, catastrophes*”, and stipulate a

complex of specific remedies in cases on such administrative offenses in provisions of the AOO RF (including by amendment of Chapter 27).

²¹ It seems justified that the adoption of the above listed amendments can make a favorable impact on the level of protection of rights and legal interests of the title gas pipeline holder in terms of support of stable, efficient and safe operation of gas transmission networks along the entire gas transmission cycle.

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