DISPUTE SETTLEMENT PROCEDURE IN THE ENERGY INDUSTRY

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ON THE EFFICIENCY OF THE JUDICIAL MECHANISM FOR PROTECTION OF THE ECONOMIC RIGHTS OF THE FEC ELEMENTS: WAS IT THE RIGHT DECISION TO ABOLISH THE SUPREME COMMERCIAL COURT OF THE RUSSIAN FEDERATION?

M. I. Kleandrov
Institute of State and Law of the Russian Academy of Sciences. V.A. Musin Research Center for the Development of Energy Law and Modern Legal Science Autonomous Non-Commercial Organization, Moscow, Russian Federation
E-mail: mklean@bk.ru

Abstract. The article notes the essential significance of the fuel and energy complex (hereinafter referred to as the "FEC") for the Russian economy; which means: the worse, the weaker this or that industry of the FEC is, the greater the shortfall in the country's income. This often happens in case of violation of the entrepreneurial rights of such an industry of the FEC. The organizational and judicial mechanism, the arbitration judicial system, providing judicial protection of business rights and legitimate interests of FEC elements, in 2014, after the Supreme Commercial Court of the Russian Federation (hereinafter referred to as the "SCC") has been abolished, according to the author, lost its former efficiency. The consequence of this, according to the author, was the transformation of the SCC of the Russian Federation from an independent judicial system into an autonomous one, and consequently, the loss of its powers of the supreme (supervisory) arbitral judicial instance. In turn, this means that in the supervisory instance, now in the Presidium of the Supreme Court of the Russian Federation, there is an insignificant proportion of commercial law professionals. For FEC companies, this means that, since 2014, the arbitration and judicial policy on disputes with their participation has been determined by criminal, civil, administrative, etc. law professionals, not by arbitrators. The author considers it expedient to revive the SCC of the Russian Federation, in view of the fact that in some foreign countries, for example in the Federal Republic of Germany, there are several completely independent specialized judicial systems, apart from the system of courts of general jurisdiction. The author believes that it would be correct to create in our country four new completely independent specialized judicial systems: for civil cases, for consideration of commercial disputes, for administrative cases and for criminal cases; the system of courts of general jurisdiction must also be preserved, which will include the system of military courts as an autonomous system. Besides, separate federal specialized mono-courts should be created, such as: Patent, Digital Technology, etc. Of course, the Constitutional Court of the Russian Federation will remain.

Keywords: fuel and energy complex elements, entrepreneurial right protection mechanism, absence of an independent supervisory instance in the modern arbitration judicial system.

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ОБ ЭФФЕКТИВНОСТИ СУДЕБНОГО МЕХАНИЗМА ЗАЩИТЫ ЭКОНОМИЧЕСКИХ ПРАВ ЗВЕНЬЕВ ТЭК: НУЖНО ЛИ БЫЛО ЛИКВИДИРОВАТЬ ВЫСШИЙ АРБИТРАЖНЫЙ СУД РФ?

М.И. Клеандров

Институт государства и права РАН. АНО «Научно-исследовательский «Центр развития энергетического права и современной правовой наукиим. В.А.Мусина»,
г. Москва, Российская Федерация
E-mail: mklean@bk.ru

Аннотация. В статье отмечается существенная значимость звеньев топливно-энергетического комплекса (далее – ТЭК) для экономики России. Что означает: чем хуже, слабее хозяйствует то или иное звено ТЭК, тем значительнее недополучение доходов страны. Что происходит зачастую в случае нарушения предпринимательских прав этого звена ТЭК. Организационно-судебный механизм – арбитражно-судебная система, – обеспечивающий судебную защиту предпринимательских прав и законных интересов звеньев ТЭК, в 2014 г., после ликвидации Высшего Арбитражного Суда (далее – ВАС) РФ, по убеждению автора, утратил свою прежнюю эффективность. Последствием этого, как считает автор, стало превращение ВАС РФ из самостоятельной судебной системы в автономную, а следовательно, утрата у ней полномочий высшей – надзорной – арбитражной судебной инстанции. В свою очередь, это означает, что в надзорной инстанции, теперь – в Президиуме Верховного Суда РФ, специалистов именно в сфере экономического правосудия - незначительная доля. Для предприятий ТЭК это означает, что арбитражно-судебную политику по спорам с их участием с 2014 г. определяют специалисты в области уголовного, гражданского, административного и т.п. законодательства, но не арбитражники. Автор считает целесообразным возрождение ВАС РФ, с учетом того, что в некоторых зарубежных государствах, например в ФРГ, есть несколько полностью самостоятельных специализированных судебных систем, не считая систему судов общей юрисдикции. Автор полагает правильным создание в нашей стране четырёх новых полностью самостоятельных специализированных судебных систем: по гражданским делам, по рассмотрению экономических споров, по административным делам и по уголовным делам; также должна сохраниться система судов общей юрисдикции, в которую в качестве автономной войдет система военных судов. Кроме того следует создать отдельные федеральные специализированные моносуды: Патентный, По делам цифровых технологий и др. Разумеется, останется Конституционный Суд РФ.

Ключевые слова: звенья топливно-энергетического комплекса, механизм защиты предпринимательских прав, отсутствие самостоятельной надзорной судебной инстанции у современной арбитражно-судебной системы.

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The importance of the economic activity of the FEC diverse structures and elements in the national economic complex of Russia is exceptionally great, as, by the way, it has been especially great recently, in foreign policy and foreign economic relations. Just recently, V. Kryukov, Director of the Institute of Economics and Industrial Engineering of the Siberian Branch of the RAS, noted: “The FEC generates 35% of GDP, 60% of the state budget, 40 to 50% of investments, 60% of export and 20 to 25% of public employment”. [1]

At least, this means that if the FEC elements work better, all together and each separately, these indicators are higher; if they work worse, the indicators are lower. At the same time, the above "better" or "worse", even slightly in relative terms means literally gigantic indicators in the absolute terms. Besides, it is obvious that whether the FEC elements work better or worse, to a large extent depends on how the arbitration and judicial authorities protect their rights in case of their violation or challenge, whether it is more effective, more just...

Not to mention the importance of the energy security of our country, especially in the modern conditions, and its scientific and legal regulation. [2]

And, of course, any justice, including economic justice, including in relation to the FEC elements, will be more effective and just when it is executed by professional judges in this particular kind of justice. This was the case from 1922 until 2014, when commercial disputes were resolved by public arbitration commissions (until 1931), state arbitration authorities that made up the union-republican three-tier system (until 1992) and commercial courts that also made up an independent judicial system headed by the SCC of the Russian Federation (until 2014). Simultaneously, arbitration tribunals were functioning, resolving commercial disputes, which have now sharply decreased in quantity, but this is a separate issue, and departmental arbitration tribunals (before the collapse of the USSR). And there, commercial disputes were resolved by (mostly) high-level professionals specializing in specific (narrow) categories of cases. The same was in the FEC sphere. For example, V. Zlobnin worked as a departmental arbitrator of the Tyumengazprom association for many years, and after 1995, when the author of these words headed the Commercial Court of the Tyumen Region, began working as a judge of this court (now, unfortunately, he deceased).

And the arbitration judicial system more or less effectively coped with the shortcomings of business laws, including its energy sector. For example, as V.V. Laptev, Academician of the RAS, noted in 2011: "In April 2011, there were interruptions in the supply of gasoline in many regions of our country. This "gasoline crisis" has arisen in a country that occupies a leading place in the world in the production of oil and petroleum products. The reason for it, along with price collusion, is the desire of the owners of oil-production enterprises to export oil abroad, where it can be sold at higher prices. To combat this artificial scarcity, the export duties on oil and petroleum products were significantly increased. But the question arises: wouldn't it be better to provide for systematic regulation of oil exports, priority provision of petroleum products for the domestic needs of the country in the laws? Moreover, such a system was successfully used several years ago, when balance targets were set for oil producers to meet domestic needs and, in accordance with them, resource certificates were issued, without which oil export was not allowed". [3]

And then, in 2014, the situation radically changed for the worse, besides, the number of cases considered by all first-instance courts is constantly growing. On November 29, 2022, at the 10th All-Russian Congress of Judges, it was noted that in 2021 more than 30 million cases were considered.

The constitutional basis for the abolishment of the Supreme Commercial Court of the Russian Federation was the exclusion of Article 127 of the Constitution of the Russian Federation from the Constitution of the Russian Federation in 2014. [4] Simultaneously, the same law partially transformed Clause O of Article 71 of the Constitution of the Russian Federation. Article 71 of the Constitution of the Russian Federation defines what is under federal jurisdiction, and clause O, among other things, before this transformation, defined criminal procedure, civil procedure and arbitration procedure laws. And the above-mentioned constitutional transformation proclaimed the general formula, the "procedure law".

Part 2 of Article 118 of the Constitution of the Russian Federation originally proclaimed that "judicial power is exercised through constitutional, civil, administrative and criminal proceedings," that is, arbitration proceedings were not initially mentioned in this list as an independent type of legal proceedings.

At the same time, the constitutional innovation of 2014, as well as the simultaneous substantive adjustment of seven more articles of the Constitution of the Russian Federation, collectively ensuring the unification of the Supreme and Supreme Commercial Courts of the Russian Federation and proclaiming the further functioning of the new, unified Supreme Court of the Russian Federation (with the corresponding adjustment of more than 30 federal and federal constitutional laws), generally, did not mean the abolishment of the arbitration judicial system of the country, nor the elimination of specialized procedural law regulating the procedure for resolving commercial disputes, nor the dismissal of all or most of the arbitration judges.

Since the establishment of the system of commercial courts in our country in 1992, they resolved (which is clearly regulated by the relevant judicial and procedure laws) two categories of commercial disputes and cases; those arising from administrative law relations and those arising from civil law relations. There is a situation in which commercial courts resolve commercial disputes of both these groups (administrative and civil), guided by the Commercial Procedural Code of the Russian Federation. The courts of general jurisdiction in their judicial activities are guided by the Civil Procedure Code

of the Russian Federation when resolving civil cases, and the Code of Administrative Judicial Procedure of the Russian Federation when resolving administrative cases. But this has been since March 2015, when the Code of Administrative Judicial Procedure of the Russian Federation came into force, before that administrative disputes in the jurisdiction of courts of general jurisdiction were resolved according to the rules of the Civil Procedure Code of the Russian Federation (Chapters 24 and 25).

However, since 2014, after the abolishment of the Supreme Commercial Court of the Russian Federation, economic justice in Russia is provided (on the final stage) by a single judicial supervisory instance, the Presidium of the new Supreme Court of the Russian Federation, where the cases of supervisory proceedings are transferred by the Chamber for Commercial Disputes of the Supreme Court of the Russian Federation. Since Article 126 of the Constitution of the Russian Federation as amended on February 5, 2014 proclaims: "The Supreme Court of the Russian Federation shall be the supreme judicial body for civil, commercial disputes, criminal, administrative and other cases under the jurisdiction of courts formed in accordance with the federal constitutional law, shall carry out judicial supervision over their activities according to procedural forms provided for by federal laws and provide explanations on the issues of court proceedings."

What happened as a result of the abolishment of the SCC of the Russian Federation? Externally, nothing critical happened. All the arbitrators retained their positions, with the exception of the judges of the SCC of the Russian Federation, of which only 1 or 2 persons joined the Supreme Court of the Russian Federation, its Chamber for Commercial Disputes, the rest resigned. All commercial courts also remained unchanged, both the courts of the subjects of the Russian Federation, and court of appeal, and court of cassation, again with the exception of the SCC of the Russian Federation.

But if we take into account that the organizational and legal mechanism of national justice is three-part, it has judicial, procedural and judiciary components, then the abolishment of the Supreme Commercial Court of the Russian Federation has radically changed two components.

The judicial component: The independent arbitration judicial system turned into an autonomous arbitration judicial system, part of the general judicial system headed by the Supreme Court of the Russian Federation (which does not include the Constitutional Court of the Russian Federation), and thus was equated to the system of military courts of the Russian Federation. By the way, in terms of the number of judicial bodies, both of these autonomous judicial systems are approximately equal, but in terms of the number of judges, the difference in them is impressive, about one to six in favor of arbitrators.

The procedural component: The abolishment of the supervisory instance is fundamental here. Since it cannot be in the autonomous arbitration judicial system, and the function of judicial supervision over commercial disputes is now assigned to the Supreme Court of the Russian Federation, which is now enshrined in Part 2 of Article 19 of the Federal Constitutional Law on the Judicial System of the Russian Federation and in Part 2 of Article 2 of the Federal Constitutional Law on The Supreme Court of the Russian Federation, and the Federal Law on Commercial Courts in the Russian Federation does not mention the supervisory function at all. This function is now performed by the Presidium of the Supreme Court of the Russian Federation, as provided for in Sub-Clause 1 of Clause Article 7 of the Federal Law on the Supreme Court of the Russian Federation. That is, the final judicial award in commercial disputes, especially, when passing all three previous arbitration judicial instances, including cases involving FEC elements, is issued by the Supreme Court of the Russian Federation.

Of course, all, without exception, judges of the Supreme Court of the Russian Federation are high-level professionals, not to mention their moral, ethical and other qualities; especially the judges who are members of the Presidium of the Supreme Court of the Russian Federation, its supervisory instance. No wonder, they are personally approved for this position by the Federation Council on the nomination of the President of the Russian Federation, based on the proposal of the Chairman of the Supreme Court of the Russian Federation and in the presence of an affirmative opinion of the Higher Judges' Qualifications Board of the Russian Federation.

But even these judges, each of them, cannot be high-level professionals in all types of legal proceedings. In particular, with regard to the consideration of commercial disputes in the supervisory instance, just as the state of human rights observance in a country can be determined depending on ensuring the rights of one person, the efficiency of economic justice can be determined based on the level of competence of the judges of the supervisory instance in this very economic justice.

Therefore, by definition, only a few judges who are members of the Chamber for Commercial Disputes of the Supreme Court of the Russian Federation, including the Chairman of this Board, the Deputy Chairman of the Supreme Court of the Russian Federation, have the appropriate high level of competence in commercial disputes as part of the supervisory instance for such disputes in the Presidium of the Supreme Court

of the Russian Federation. And almost certainly, judges of Judicial Chambers for administrative, civil, criminal cases and military cases do not have a high level of competence when considering (by way of supervision) commercial disputes, no offense to them. After all, this is normal, it goes without saying. And the resolutions there are adopted by a majority vote of the members of the Presidium of the Supreme Court of the Russian Federation participating in the court session.

Whereas earlier, before the abolishment of the Supreme Commercial Court of the Russian Federation, the supervisory instance for commercial disputes, the Presidium of the Supreme Commercial Court of the Russian Federation, consisted entirely, one hundred percent, of judges with a high level of competence in respect of economic justice.

Thus, we can say that the abolishment of the Supreme Commercial Court of the Russian Federation entailed the loss of the overall high competence of the judges of the supervisory instance, the Presidium of the Supreme Court of the Russian Federation, in economic justice (including the cases related to the FEC sphere that are highly specific in nature) when considering commercial disputes in the exercise of supervisory powers.

Why did this happen? It is believed, and this has been expressed on various platforms by different people, that there have been cases when one party to a dispute, dissatisfied with the resolution of a court of one jurisdiction, appealed to a court of another jurisdiction, and it resolved in its favor.

How could this happen? It is unclear. Firstly, in the beginning, the powers of commercial courts were separated from the powers of courts of general jurisdiction both on the subject of the dispute (the sphere of economic activity) and the subject composition of the parties to the dispute. And it is possible to "shift" from one jurisdiction to another only by violating this principle.

Secondly, from 1992 to 2014, that is, for 22 years there were no problems with the "overlap" of the jurisdictional powers of the two judicial systems, and why would they become so intolerant in 2014 that they demanded the abolishment of the Supreme Court of the Russian Federation by seriously amending the Constitution of the Russian Federation?

Thirdly, the separate intersections of the jurisdictional powers of the two judicial systems that took place, inevitable due to the development of our country's economy, could be overcome without any problems; and were initially overcome by joint Resolutions of the Plenums of the Supreme Court and Supreme Commercial Court of the Russian Federation. [5] The main, fundamental aspect in this matter was Resolution of the Plenum of the Supreme Court of the Russian Federation and Resolution of the Plenum of the SCC of the Russian Federation No. 12/12 dated August 18, 1992, on Certain Issues of Courts and Commercial Courts Jurisdiction over Cases. This joint Resolution regulated this jurisdiction in detail, including Clause 5, which established: "If several related claims are combined, some of which are under jurisdiction of the court, and other of the commercial court; all claims are subject to consideration in court."

Fourthly, according to the author of these words, it is possible that the abolishment of the Supreme Commercial Court of the Russian Federation was based on some other, not officially announced grounds. In any case, if we ask the arbitrators the question: "Would the Supreme Commercial Court of the Russian Federation be abolished if it were still headed by V. F. Yakovlev", the answer would obviously be no.

Also, other arguments can be brought against the abolishment of the Supreme Commercial Court of the Russian Federation in 2014. According to the author's opinion, the Supreme Commercial Court of the Russian Federation, as well as the arbitration judicial system as a whole, should be restored as an independent one.

Strictly speaking, the arbitration judicial system, as a specialized and completely independent one, not only can, but even should not become the only one. For such, each such, completely independent system, there should be three components, since it will be an independent specialized organizational and legal mechanism of justice. And such components are judicial (the courts of the relevant system, headed by their Highest (Supreme) Court); procedural (their procedural codified laws and regulations) and judiciary (their specialized professional judiciary) ones.

It is worth recalling that two types of justice, criminal and civil, in one, that is, in one judicial body, appeared in our country a very long time ago. It was proclaimed in paragraph 4 of Article 2 of Decree of the Council of People's Commissars of the RSFSR No. 1 dated November 24, 1917. [6] And since then, it has continued like this; in the judicial bodies of the system of courts of general jurisdiction of the USSR and the Russian Federation there were two judicial chambers on civil and criminal cases (and recently also a judicial chamber on administrative cases emerged). And the transfer of judges, good professionals of one jurisdiction, from "their" judicial chamber (panel of judges) to another, which did not require any organizational costs, meant the loss of a professional judge in one judicial chamber and the appearance of a non-professional judge in another judicial chamber. With the loss, of course, for a certain time, of due justice in the judicial acts awarded, until that transferred judge gains sufficient experience and

becomes a professional in this new form of legal proceedings for him.

And what is important here is the need to pay attention to the fact that in some foreign judicial systems, approach to the specialization in justice is seriously different from our approach. In the Federal Republic of Germany, for example, there are five main jurisdictions, five completely independent judicial systems, namely, for general, administrative, financial, labor and social issues. And there are no problems with the "intersection" of jurisdictions there, since there is a Joint Senate of the Federal Supreme Courts of Justice. It was established by the Law of 1968 in order to ensure the unity of judicial practices. Sessions of the Joint Senate are convened when the Federal Supreme Court intends to resolve a legal issue differently than it is resolved by another Federal Supreme Court or the Joint Senate. The Joint Senate consists of the Chairmen of the Federal Supreme Courts, the chairmen of the senates of the respective federal supreme courts and one judge from each of those senates [7, p. 63–76].

Of course, in similar situations in court cases, the conduct of judges should be similar. But, at the same time, in justice there is no uniform motivation in awarding even specific resolutions, the mosaic of motivation (and argumentation) of each resolution consists of small, sometimes the smallest personal pieces of motives, often contradictory ones.

This problem, if not completely eliminated, becomes less acute with specialized justice.

Thus, according to the author, the strategic way of development of domestic justice is the formation of several specialized completely independent judicial systems. It cannot be ruled out that the first step in this direction has been taken by the constitutional legislator. We are talking about the inclusion in the list of types of legal proceedings (Part 2 of Article 118 of the Constitution of the Russian Federation amended by Federal Constitutional Law of the Russian Federation No. 1-ФКЗ dated March 14, 2020), arbitration proceedings, which was not originally in the Constitution of the Russian Federation and with all its amendments and additions, as mentioned above.

Accordingly, taking into account all three necessary components for such a system, there may be at least four of them: for civil cases, commercial disputes, administrative cases and criminal cases. And separately, the system of courts of general jurisdiction should be preserved, which, in particular, will include, as an autonomous system, the system of courts for military servicemen, which does not have its own procedural component. Also, apparently, it is necessary to create separate federal specialized mono-courts, for example, a Patent Court, a Court for cases arising from digital technologies, and some others due to scientific and technological progress. Needless to say, that the Constitutional Court of the Russian Federation will remain a separate federal specialized mono-court.

The above-mentioned radical modernization of the national organizational and legal mechanism of justice (the concerns of non-federal justice modernization are not discussed herein; this is a separate case), requires enormous preparatory work. And since there is a scientific component in any issue, it is not worth approaching the solution of the framework issue indicated here without large-scale preliminary scientific support. Indeed, in terms of its scale and consequences, it will be comparable to the Judicial Reform of 1864 in the Russian Empire.

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Authors' information:
Mikhail I. Kleandrov,
Corresponding Member of the Russian Academy of Sciences
Chief Research Scientist of the Institute of State and Law of the Russian Academy of Sciences
Chief Research Scientist of the V.A. Musin Research Center for the Development of Energy Law and Modern Legal Science Autonomous Non-Commercial Organization (Moscow, Russian Federation)

Сведения об авторе:
Клеандров Михаил Иванович,
член-корреспондент РАН,
главный научный сотрудник
Института государства и права РАН.
Главный научный сотрудник АНО «Научно-исследовательский «Центр развития энергетического права и современной правовой науки им. В.А.Мусина» (Москва, Российская Федерация)

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