LEGAL ASPECTS OF ENSURING THE STABILITY OF ENERGY PROJECTS

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The accumulated experience in the implementation of energy projects suggests that conflict situations negatively affecting energy projects can be provoked by the participants to these projects, objective economic processes in the global economy and crises as well as inspired by political differences in the international arena. The mentioned circumstances create serious risks for the stability of projects. They indicate the need to take into account a very long list of factors that should be taken into account, both upon formation of energy projects and their implementation, and upon monitoring changing circumstances that require adjustments to the current regulation.

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The practice of Russian companies provides enough examples of the conclusion and implementation of major energy projects, both in Russia and abroad. A distinctive feature of the vast majority of them is the presence of a foreign element. It can be expressed in different ways: the participation of a foreign entity as a co-founder of a legal entity implementing the project in the Russian Federation; a foreign supplier of key technologies or equipment for the project, or key consumers of energy resources; the energy project may be implemented by the Russian company outside the Russian territory; the participation of foreign individuals in the management of a company is common; and other forms of presence of a foreign element in the Russian energy project are also possible.

The legal regulation of an energy project containing a foreign element has three significant features. First, emerging private law relations are regulated, and disputes that arise are considered on the basis of international private law in accordance with the international civil procedure. Second, being related to natural resources, the energy projects inevitably fall under the norms of national, both Russian and foreign, public law: laws on subsoil, environmental and environmental law, and, taking into account the strategic importance of the energy industry, antimonopoly as well as laws on export control and foreign investment. Third, these relations can be regulated by norms of international public law. At the same time, it should be noted that recently, along with national and international legal regulation, the regulation of the European Union, which applies to legal relations, the subjects of which are not only companies of EU member states but also their counterparties from other

countries, in particular, Russian companies, has acquired significant importance. This was most clearly manifested after the adoption of the Third Energy Package of the European Union in relation to the Nord Stream 2 project.

Modern domestic experience of energy projects with foreign participation is already 40 years old. The accumulated experience suggests that conflict situations that negatively affect energy projects can be provoked by the participants to these projects, objective economic processes in the global economy and crises, and also inspired by political disagreements in the international arena. The specified circumstances create serious risks for the stability of projects. They indicate the need to take into account a very long list of factors that should be taken into account, both upon formation of energy projects and their implementation, and upon monitoring changing circumstances that require adjustments to the current regulation. The latter circumstance is very important not only for entities with the right of legislative initiative but also for business associations in the course of their possible participation in the process of rule-making or improving local corporate regulation.

The following may be singled out from the extensive list of possible risk factors that can negatively affect the stability of energy projects.

The universal factors include: an objective opposition of the interests of companies and countries supplying energy resources with the interests of companies and countries importing energy resources; the period of their validity, and the arbitrary choice of the language of the contracts.

Differences in the interests of exporters and importers, customers and contractors, licensors and licensees as the parties to the contract are quite understandable. With regard to international projects, these contradictions, in legal terms, most clearly manifested themselves in cases related to Yukos in the part concerning the problem of the operation of the Energy Charter providing for an arbitration procedure for resolving disputes. The duration of energy projects is a factor that can give rise to destabilizing circumstances in the context of innovative energy development as well as changes in national regulation and the international law and order.

The following should be noted with regard to the Russian practice. Russian energy projects were formed simultaneously with the reform of the domestic legal system. The adopted regulations, even including codes and laws, have been repeatedly amended. However, the contractual framework for energy projects with foreign participation could not be modernized at the same pace. In practice, this has repeatedly led to conflict situations between project partners. However, not only the objective need for the development of new Russian laws stretched over time has become a source of destabilization for a number of projects. Recent trends in the development of EU law testify to the breakaway of the Community law from a number of such fundamental institutions of continental law as the territoriality of the operation of legal norms, Lex retro non agit, and an expanded interpretation of the rules on the admissibility of unilateral refusal of the agreement has also been applied.

In addition to circumstances related to the dynamics in law, it is necessary to take into account the factor of the duration of a number of energy projects due to their industry specifics. Projects in the field of nuclear energy may serve as an example. Nuclear power has a seventy-year history[1].

[1] For more detail see: Problem Issues and Trends of Legal Regulation in the Sphere of Nuclear Energy Use. Monograph edited by V.V. Romanova, LL.D. Moscow: Yurist Publishing House. 2017; Viktoria V. Romanova. Legal Regulation of Nuclear Medicine and Modern Goals of the Development of Energy Law Order. Czech yearbook of Public and Private International Law. 2019. P. 313–320; Viktoria V. Romanova. On the Current

These projects require the interaction of their participants for many years from the moment the design of the object begins until it is put into operation, not to mention its subsequent maintenance.

Another example is related to the legal regulation of relations for the capital construction of energy facilities.[2] However, renewable energy projects are already knocking on the door. In this case, the development of technical parameters inevitably requires new approaches in legal regulation, in particular, in such a sensitive area for energy as technical standards. For example, hydrogen energy. This immediately raises questions of technical security, and the formation of new companies taking into account the current competition law, and the use of existing infrastructure, and differences in the legal policies of states in relation to the global environmental agenda. In this case, not only the problems of stability of energy projects but also the problems of ensuring the energy security of the country are affected.[3]

The transnational factor present in many energy projects objectively raises the question of the language used in the course of their formation and implementation as well as in the event of disputes between project participants or disputes between the project participant and the state. This problem is closely related to the choice of legal forms and the place of resolution of emerging disputes.

The arbitrary choice of the language of contracts, and this is the English language that is often used today, as a kind of "neutral" or "compromise", is due to the desire to put all parties to the project on an equal footing, both in terms of interaction upon implementation of the project and upon settlement of possible disputes. The continuation of this logic was the practice of transferring all disputes arising under the project or in connection with it to one of the centers of international commercial arbitration most often located outside the territory of the Russian Federation.

The used arbitration clause of the relevant contracts is as follows: "All disputes under or in connection with this contract shall be subject to consideration by [for example, the London Court of Arbitration], except for the submission of such disputes to the courts of state jurisdiction".

Despite the persistence of this practice, it should be noted that the objective effect of public law norms adopted in the project implementation country on energy projects makes an attempt to remove possible disputes, for example, from Russian jurisdiction, thus opening up the possibility of avoiding the imperative norms of Russian law in the future, is rather a destabilizing factor than an effective tool for achieving a certain "neutrality" that acts in the interests of all project participants. Moreover, the intention to completely exclude state courts as a form of protection of rights in disputes arising from contracts that form an energy project is incorrect due to the above-mentioned connection of these projects with the sphere of public law relations and relevant regulation. Public law relations are "not arbitrable" by their nature[4].

The listed features of energy projects, in order to achieve their stability, raise questions

Trends of International Treaties in the Field of Nuclear Law with the Participation of Russian Federation. Czech yearbook of Public and Private International Law. 2020. P. 370–378; Viktoria V. Romanova. The Decarbonization Process, Nuclear Energetics Potential and the Challenges of Legal Regulation. Czech yearbook of Public and Private International Law. 2021. P. 337–344.

[2] For more detail see: V.V. Romanova. The Legal Regulation of the Construction and Modernization of Power Facilities. Moscow: Yurist Publishing House. 2012; V.V. Romanova. International Projects on the Construction of Energy Infrastructure and Energy Law and Order Tasks. Energy Law Forum. 2021. No. 2. P. 22–27.

[3] A.G. Lisitsyn-Svetlanov. Ensuring Energy Security: Some Tasks of Domestic and Foreign Legal Policy of the Russian Federation. Energy Law Forum. No. 4. 2021. P. 8–12.

[4] For more detail see: A.G. Svetlanov. Trends in Development of the International Civil Process Moscow. 2002, P. 126–176.

about the application of special conditions and methods of contractual regulation as well as the correction of current Russian laws and practice in the formation of international legal regulation.

Russian energy projects with foreign participation should be built taking into account the fact that Russia is essentially the only country that is both the user and the exporter of the entire range of energy resources. This circumstance is objectively capable of generating disputes between project participants, as well as disagreements or contradictions in the international context.

An energy project cannot be viewed as a private law transaction. It necessarily affects both the public interest and the public law regulation. In this regard, Russian private law laws should be built taking into account the peculiarities of both the object and the subject of regulation in the energy sector. Thus, the normative regulation of commercial contracts concluded within the framework of the energy project related, for example, to subsoil use, should be built taking into account subsoil laws.

Factors of interaction between private and public law regulation as well as the period of project implementation should be taken into account when agreeing on the terms and conditions of the relevant contracts. Attempts by the project participants, most often by the foreign partner, to create "independent" ad hoc regulation can give rise to serious uncertainties even if some, at first glance, insignificant disagreements arise between the project participants.

The principle of applying the law of the country that has the closest connection with the fulfillment of basic obligations is among the fundamental principles of regulation of international commercial private law relations. Taking into account this principle of private law regulation, the impact of public law regulation on private law contracts as well as factors that can have a destabilizing effect within the framework of long-term energy contracts, it should be noted that there is a non-exhaustive number of contract terms and conditions that, when agreed upon, should not be considered as typical, but as requiring an individual approach. These include, in particular:

Force majeure contract terms and conditions; amendment and termination of the contract; the pricing procedure and its changing as a special condition of the contract; financial risks associated with external factors, including changes in public law regulation; state and/or bank guarantees; and provisions directly or indirectly related to the nationality of the parties to the contract.

In the field of procedural regulation, danger posed by the non-alternative approach expressed in the arbitration clause, which provides for the transfer of all disputes to the commercial arbitration of a third country, should be mentioned. Without belittling the importance of international commercial arbitration for foreign economic projects, one should take a balanced approach to the issue of its competence and not extend the effect of the arbitration clause to possible relations and disputes that affect the public interest and the operation of imperative norms of Russian public law.

The international crisis of 2022, which embraced the political, economic, and military spheres, indicated the need to form new approaches in the development of international law. The sanctions and restrictions imposed by the "collective West" not only have destroyed the foundations of the WTO. They have also trampled on such a universal UN principle as the "Obligation of the states to cooperate with each other in accordance with the Charter" set forth in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation of States in accordance with the UN Charter adopted by the UN General Assembly on October 24, 1970.

Being a fundamental basis for the transformation of such institutions as the most favored nation treatment and national treatment into international treaties and national laws, even in the context of East-West confrontation, this principle gave these institutions a fairly liberal character contributing, among other things, to the development of cooperation in the energy industry.

Following the principle of the obligation of states to cooperate with each other, the Russian practice was built in the direction of creating the most favorable conditions for attracting foreign investment in the Russian energy sector, while remaining open to companies from all countries.

The current confrontation has led to the need to declare many states and their companies as "unfriendly". This involuntarily leads to the need to introduce clarifications into Russian laws that determine the terms and conditions for admitting investors to Russian energy projects and the conditions for their implementation. ■

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