

PROBLEM ISSUES OF LEGAL REGULATION OF THE EXCHANGE MARKET OF OIL, PETROLEUM PRODUCTS, AND GAS: ISSUES CONCERNING FULFILLMENT OF THE BIDDERS' OBLIGATIONS

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At the moment, there is practically no special legal regulation of the exchange market of oil, petroleum products, and gas at the legislative level, the rules for general regulation of exchange trade are insufficient, and there are many gaps and contradictions, which adversely affects settlement of disputable situations. The author examines the norms of Russian and foreign laws, and legal research. The author concludes that it is necessary to amend the current laws governing relations in organized biddings in order to eliminate the legal uncertainty relating to application of the rules of substantive law.

The issue of ensuring proper fulfillment by the organized bidders of their obligations is one of the most important and priority tasks of the trade institutor. Encouraging the bidders to properly perform as well as efficient application by the exchange of measures aimed at improvement of discipline among the bidders make it possible to minimize the risks of the exchange, for example, the risk of loss of business reputation. Both Russian and foreign exchanges face the problem of non-fulfillment of the bidders' obligations. Among the measures applied to unfair bidders, suspension of the services for admission to organized bidding, on the one hand, is the most applicable measure, and, on the other hand, it is a measure that is not clearly specified at the level of the federal law, which regulates relations arising in organized biddings.

Keywords: energy law, legal regulation of the exchange market of energy resources, bidding, bidder, contractual regulation of exchange trade in energy resources.

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exchange market of oil, petroleum products, and gas at the legislative level, the rules for general regulation of exchange trade are insufficient, and there are many gaps and contradictions, which adversely affects settlement of disputable

situations. The exchange market of oil, petroleum products, and gas is not an exception. Herewith, it should be noted that there are obvious peculiarities of oil, petroleum products, and gas as the objects of relations in exchange trading, peculiarities of the legal status of the bidders in exchange trading in oil, petroleum products, and gas, and the terms of delivery. The main burden is currently borne by local acts of the exchange. [1]

There are practically no legal studies on the problems of legal support of the exchange market of oil, petroleum products, and gas either. Herewith, relevance of legal research performed by M.M. Vildanova should be noted. [2]

This article considers the most topical issues of legal regulation arising for the bidders.

Encouraging the bidders to properly perform as well as efficient application by the exchange of measures aimed at improvement of discipline among the bidders make it possible to minimize the risks of the exchange, for example, the risk of loss of business reputation. Both Russian and foreign exchanges face the problem of non-fulfillment of the bidders' obligations. Among the measures applied to unfair bidders, suspension of the services for admission to organized bidding, on the one hand, is the most applicable measure, and, on the other hand, it is a measure that is not clearly specified at the level of the federal law, which regulates relations arising in organized biddings. Moreover, the very concept of "admission to organized biddings" is not regulated in the Russian laws either. The fact that it is not set forth in the regulatory acts as well as the ambiguity of interpretation of certain measures of influence on the bidders give rise to differences in understanding and application of the provisions of the law by the courts and trade institutors.

Due to the presence of these gaps in the laws, this article considers the issues of admission of the bidder to organized biddings, examines Russian and foreign experience of applying sanctions to the bidders, and also proposes the wording of amendments to regulatory legal acts governing exchange trading, including trade in oil, petroleum products, and gas in the Russian Federation.

The duty of the trade institutor to establish measures applicable to the bidders that violated the rules of organized biddings (for example,

suspension or termination of admission to organized biddings) in the rules of organized biddings is determined by clause 1.17 of Regulations of the Bank of Russia on Organized Trading Activity No. 437-П (hereinafter referred to as the Regulations). According to the text of the Regulations, the above types of measures are referred to as "sanctions on the bidder that committed a violation", "measures applied to the bidders that committed violation of the rules of organized biddings", and "measures of disciplinary influence". Does a measure of influence, such as suspension, relate to the category of sanctions, or is it a different measure that has a different legal nature as compared to the sanctions?

This issue is raised in the works of various lawyers, such as A.E. Kirpichev, A.S. Panova, and others. [3] The authors distinguish between the concepts of "sanction" and "measure of operational influence". According to A.S. Panova, the following grounds can be distinguished:

- in terms of the function: the measures of operational influence have a motivation function (encourage the debtor to fulfill the obligations in good faith), while the sanctions, in their turn, have particularly punitive nature;

- in terms of the form of protection of the right: the measures of operational influence are generally performed in an extrajudicial form in contrast to the sanctions, which are secured by the state enforcement and aimed at forcing the person to act in accordance with the will of the ruling subject;

- as a rule, the sanctions entail an additional obligation that did not previously exist, for example, compensation for damages or recovery of a penalty. We should agree with O.S. Ioffe, that if the consequences of the offense were limited to forcing the defaulting party to actually fulfill the obligations only, from the point of view of liability, this would be equivalent to the full irresponsibility of the offender, who would incur the same obligation both before and after the violation — to fulfill the assumed obligation. [4] The measures of operational influence are aimed at actual fulfillment of the obligation;

- application of the measures of operational influence does not cause replacement of the obligation that existed prior to the violation with a monetary equivalent.

Taking into account the above grounds, A.S. Panova believes that the measures of operational influence and the sanctions are not similar concepts. None of these measures can be recognized as a sanction, but it rather refers to remedies, which pertain to a broader category involving application of constraints of various kinds. Depending on the specific situation, it will be determined whether the remedy is applied as a sanction or as an instrument of operational constraint. A.E. Kirpichev considers the sanction in civil law as a condition of the contract, which is applied for violation of an individual rule of conduct. In his opinion, the sanction for a breach of contract is a broader concept as compared to the measure of legal liability for a breach of contract because it includes such legal consequences as measures of operational influence on the debtor as well as non-legal consequences.

In our opinion, taking into account different approaches of lawyers to the problem of the relations between the sanctions and the measures of operational influence, it seems that such a measure as suspension of admission to organized biddings shall be classified as a measure of operational influence for the following reasons. For example, according to the Rules for Admission to Organized Biddings of Joint-Stock Company Saint-Petersburg International Mercantile Exchange, one of the reasons for adoption of the decision to suspend admission is a failure to pay the market charges and other payments within the terms established for payment by the Agreement on Provision of Services for Organized Biddings and/or the Agreement on Provision of Services for Delivery to the Bidders of SPIMEX, JSC, of Software and (or) Technical Means for Remote Access to the Exchange Services concluded with the bidders. [5] In the event of suspension of admission to organized biddings on the specified grounds, the likely aim of the exchange is to induce the bidder to pay for the exchange services rather than to punish since it is assumed that the bidder, in its turn, is interested in conclusion of contracts for supply of the goods in organized biddings subject to transparent pricing, formation of a fair market price and on the pre-determined terms and conditions. Therefore, we believe that the exchange aims at encouraging the bidders

rather than punishing for the committed violation of the rules of organized biddings. Consequently, despite the lack of uniformity in the wording of the Regulations as related to the suspension mechanism, suspension of admission to organized biddings should be considered as a measure of operational influence; however, it appears that the legal methods used in the Regulations upon description of these measures is subject to revision and bringing into line throughout the Regulations.

Suspension of the mechanism of admission to biddings shall be acceptable not only on the basis of special rules: provisions of the Regulations, but also on the basis of the rules of civil laws, Article 328 of the Civil Code of the Russian Federation. According to Article 328 of the Civil Code of the Russian Federation, should the obliged party fail to fulfill the obligation provided for by the contract, or if there are circumstances that clearly indicate that this obligation would not be fulfilled within the set period, the counterparty shall be entitled to suspend fulfillment of its obligation or refuse to fulfill this obligation and claim compensation for damages. Therefore, the counter obligations of the trade institutor under the Agreement on Provision of Services for Organized Biddings may be suspended in accordance with Article 328 of the Civil Code of the Russian Federation.

Herewith, it should be noted that, according to, for example, the Rules for Admission to Organized Biddings on the Commodity Market of Joint-Stock Company National Mercantile Exchange, admission of the bidder to biddings may be suspended under one or several types of contracts. [6] Since the bidder is admitted to the biddings by conclusion of the Agreement for Provision of the Services for Organized Biddings and the Agreement on Provision of the Integrated Technology Service (names of the agreements differ depending on the trade institutor), it seems that if there are grounds provided for by the Rules for Admission to Organized Biddings on the Commodity Market of National Mercantile Exchange Joint-Stock Company, the exchange will suspend its obligations specified in the mentioned agreements. As a rule, the exchange suspends fulfillment of its obligations under all agreements with the bidder. At the same time, current court practice interprets clause 2, Article 328 of

the Civil Code of the Russian Federation as applicable only when it comes to the obligations arising out of one agreement, or when the parties expressly specified that it should be possible to suspend performance of one agreement until the obligation under another agreement is fulfilled. [7] For example, fulfillment of the obligation to deliver the goods is not counter to fulfillment of the obligation to pay for the goods arising out of another supply agreement. [8] This interpretation by the courts of clause 2, Article 328 of the Civil Code of the Russian Federation makes suspension of the counter obligations of the exchange under different agreements with the same bidder impossible if the bidder fails to fulfill the obligations only on the basis arising out of one agreement. One should agree with A.G. Karapetov that if the counter obligations of the counterparties arise out of two different agreements, but are so interconnected that suspension seems acceptable from the point of view of the principles of proportionality and good faith, the law should not remove this possibility. [9]

This idea is also specified in clause 4, Article III.-1:102 of the Model Rules of European Private Law: the obligation shall be deemed counter to another obligation not only in the case when one obligation is fulfilled in exchange for fulfillment of the other one, but also when one obligation “is so clearly connected with another obligation or its subject matter that fulfillment of one obligation is reasonably understood as depending on fulfillment of the other obligation”. Thus, it seems that if a number of agreements is concluded between the parties, and these agreements are closely interconnected and aimed at achievement of a common economic goal, it is also possible to suspend fulfillment of the obligation. This conclusion is also specified in the Dutch Civil Code: the party is entitled to suspend fulfillment of its obligation if the counterparty fails to fulfill its obligation, provided that there is a sufficient interrelation between two obligations to justify such a remedy (clause 1, Article 6:52 of the DCC). Herewith, according to clause 2, Article 6:52 of the DCC, this sufficient interrelation is also assumed if the counter obligations arise out of general legal relations or the established practice of relations between the parties.

In the US contract law, suspension of performance is associated with the principle of

condition. To justify the creditor’s right to suspend performance in response to the counterparty’s failure to fulfill its obligation, the debtor’s outstanding obligation shall be conditional on the obligation, fulfillment of which the creditor intends to suspend. If counter performance of the agreement is deemed to be dependent (under the condition) on the counterparty’s fulfillment of its obligation, violation by the latter of its obligation will result in non-occurrence of the agreed condition, which entitles the creditor not to perform (to suspend the counter performance) and, if needed, to irrevocably and unilaterally terminate the agreement. [10] Herewith, if the agreement does not contain the condition (fulfillment of one obligation is not conditional on fulfillment of the other one), the issue of conditioning and interconnectedness depends on the discretion of the court and the circumstances of the case.

From to the analysis of the presented rules of the contractual law of the United States and the Netherlands, it follows that a clear “counter” connection between the obligations of the parties to the agreement may not be established. However, the mechanism for suspension of performance in relation to different agreements may be implemented.

Since conclusion of the Agreement on Provision of Services for Organized Biddings and the Agreement for Delivery of Software and Technical Complex is one of the grounds for admission to biddings, each of these agreements usually contains the obligation of the bidder to observe the rules of organized biddings as well as other internal documents of the exchange that determine the applicable measures to be applied to the bidder.

It is worth noting that the concepts of “suspension” as well as “admission of persons to organized biddings” are used in the internal documents of the trade institutors, but they are not specified in the Russian laws.

Thus, for the purpose of the Rules for Admission to Organized Biddings on the Commodity Market of Joint-Stock Company National Mercantile Exchange, for example, suspension of admission of the bidder to biddings means suspension of acceptance by the exchange of bids of this bidder and possible withdrawal or change of previously submitted bids by this bidder. Therefore, suspension of

the obligation to perform the agreement by the exchange on the grounds provided for by the rules of organized biddings will be a limitation on the ability to submit bids for purchase/sale for a certain period. Herewith, it appears that the remaining obligations for provision of other services are fulfilled by the exchange in full, for example, provision of the bidder with certain information (if provided for by the rules of organized biddings).

Accordingly, the issue of possible counter suspension in part arises since the bidder is able to use other services of the exchange (except for the trading system). It seems that partial counter suspension may occur in this case since other services of the exchange continue to be available to the bidder with simultaneous “removal” of the opportunity to perform any actions with the bids.

At the same time, the Rules for Admission to Organized Biddings of Joint-Stock Company Saint-Petersburg International Mercantile Exchange define suspension of admission as suspension by the exchange of the services for organized biddings as related to ensuring admission to biddings in the manner provided for by the Admission Rules of SPIMEX, JSC. These rules give a fairly broad wording of admission of the bidder to biddings, from which it follows that the trade institutor is entitled to prohibit or restrict *not only* submission/withdrawal/amendment of the bids.

Therefore, lack of the concepts of “suspension of admission to organized biddings” and “admission to organized biddings” creates ambiguity in interpretation of these concepts by various trade institutors. Accordingly, it seems that in order to establish a uniform approach to the definition of these terms, it is advisable to introduce amendments by adding relevant concepts to clause 1.17 of the Regulations and sub-clause 4, Part 3, Article 4 of Federal Law No. 325-Ф3 “On Organized Biddings”.

It is worth noting that due to the global trend towards maximum harmonization of laws of various countries, upon introduction of amendments to the Russian laws, and taking into account the legislative possibility of admitting foreign entities to biddings, it is necessary to study foreign experience in implementation of measures of influence on the bidders. For example, the Rules of Trading of the Chicago Mercantile Exchange on the spot

market (Article 1200. C.) [11] apply to the bidders, by the decision of the exchange’s internal body — the Market Regulation Department, certain types of sanctions, including limitation, suspension or termination of admission of the defaulting bidder to biddings on the spot market and other clearing and trading platforms or other infrastructure controlled or owned by CME Group, shall be applied. Suspension consists in depriving the bidders of a relevant status during the suspension period, including but not limited to the right of access to the trading system or the electronic platform owned by CME Group. The following sanctions may also be applied to the bidder: an order on termination of the wrongful act by the violating party, imposition on the violating party of a fine not exceeding \$100,000, the violating party is obliged to pay any monetary benefit received by it in connection with the violation of the Rules of Trading on the spot market, imposition of restrictions on transactions settled by the violating party, the obligation of the violating party to compensate for the damage caused by its behavior. If the seller does not fulfill the delivery obligation, it will be charged a penalty to the benefit of the counterparty in the amount of 10 cents per unit of measurement of the goods as well as the amount of the price increase (“forfeit”, difference), if any, from the selling price to the full market price on the day of bidding. The official of the exchange shall determine this price, at its own discretion, taking into account fair sales and quotations as of this date, including the transaction settled by the buyer to “replace” the default deal. The seller may claim cashless payment in full prior to the delivery. This claim shall be set by the seller at the date of sale. Confirmation of receipt of this claim by the buyer shall be sent to the Clearing Organization either in the form of an electronic document or in the form of a copy of cashless payment sent to the seller on the date of sale.

Therefore, in the event of subsequent increase in the market price of the goods, the seller receives lost profits since the transaction for purchase and sale of the goods was settled by the parties at a price lower than the market price established later (the price established after a certain time in the future after the parties entered into the agreement). Accordingly, the seller may take the opportunity to default on delivery and subsequent sale of

the goods at the above price. In this case, the seller shall pay a “penalty” in the amount of the price spread in addition to the fine. The term for application of these sanctions is determined *by the decision* of the Market Regulation Department. Any of the specified sanctions, expressed in monetary terms, is subject to payment within the time limits specified in the decision of the Market Regulation Department. In case of non-fulfillment of the payment obligation, the bidder shall be deprived of the right to access all markets of the CME Group as well as electronic trading and clearing platforms owned or controlled by the CME Group. Application of the suspension mechanism is based on the Code of Federal Regulations — CFR. Section 17 of the CFR refers any suspension, exclusion, or another punishment imposed on the bidder in the event of violation by it of the rules of the exchange to disciplinary measures applied by the exchange.

In the Clearing Rules, [12] the London Metal Exchange, like the Chicago Mercantile Exchange, defines suspension as immediate suspension of admission to biddings, to any of the elements of the clearing system, with regard to both one particular operation, contract or service, and a set of operations, contracts or services, or all such operations, contracts or services, if an event of default occurred in respect of such a bidder or an event or circumstance occurred that includes an event of default. The access is suspended for the period specified in the decision of the exchange. The rules of the exchange itself establish a system of points, upon reaching which admission of a person is suspended. Participation in the biddings of any person that received 60 or more penalty points over a period of three calendar months, or 140 or more points over a period of six calendar months will be automatically suspended for 3 business days. As follows from the analysis of the Rules of Trading of the London Metal Exchange, despite lack of the term suspension, it also means that it is impossible for the bidders to perform any actions with the bids. Herewith, suspension of participation in biddings, as established by the Rules of Trading of the Chicago Commodity Exchange, is considered as one of the types of punishment (penalty). In addition to suspension, the exchange may apply the following sanctions: fine, reprimand, restitution

for any person in the event the bidder has benefited from unlawful conduct at the expense of this person, depriving the bidder of the benefits derived from a violation of the rules, order (requirement) on compliance with the terms and conditions, and the rules, and removal from the list of bidders.

Therefore, on foreign exchanges, the institution of suspension of counter performance for violation by the bidder is implemented by analogy with Russian exchanges — the bidder is disconnected from the trading systems. The list of applicable sanctions is provided for by separate foreign acts and is made by each exchange at its own discretion. However, the types of possible sanctions are primarily almost the same.

Based on the performed analysis of foreign and Russian practice of application of the measures of influence to the bidder, it can be assumed that the measures of influence on the bidders to encourage proper fulfillment of their obligations are similar among different trade institutors. However, as distinct from the United States, where the right of the exchanges to establish the possibility of suspension of the bidder’s admission to organized biddings is specified at the legislative level, in the Russian laws, namely in Federal Law No. 325- Φ 3 *On Organized Biddings*, this possibility is missing. It seems that in this case, fulfillment of the obligations may be counter suspended on the basis of Article 328 of the Civil Code of the Russian Federation. However, despite this, it is necessary to bring into line the acts of special legislation — the federal law and the Regulations.

So, clause 3, Article 3 of Federal Law No. 325- Φ 3 *On Organized Biddings* authorizes the trade institutor to refuse to perform the Agreement on Provision of Services for Organized Biddings with the bidder if this bidder violates the requirements imposed by the rules of organized biddings on the bidders. The right to suspend the counter performance is not established. It seems that by *lex specialis derogat generali* principle (a special law cancels (supersedes) the general law), in this case, the trade institutor is deprived of the opportunity to counter suspend fulfillment of its obligations to provide the services to the bidder. Herewith, the subordinate regulatory act of the Bank of Russia — Regulations on Organized Trading Activity No. 437- Π allows possible suspension of admission of relevant

person to biddings. Therefore, in order to bring into line Federal Law No. 325-Φ3 On Organized Biddings, the Civil Code of the Russian Federation as well as the Regulations, we consider it practical to amend Article 3 of Federal Law No. 325-Φ3 On Organized Biddings and to word it as follows: “The trade institutor shall be entitled to suspend provision of the services for organized biddings as related to ensuring admission to organized biddings or to refuse to perform the agreement for provision of services for organized biddings with the bidder if this bidder violates the requirements imposed by the rules of organized biddings on the bidders. Herewith, no compensation for losses associated with this refusal shall be provided by the trade institutor to the bidder.” Moreover, for the purpose of uniform interpretation by the trade institutors of the concept of “admission to organized biddings” and determination of the content of this notion, it is proposed to introduce the term “admission to organized biddings” and to define it as follows in clause 1.1 of the Regulations of the Bank of Russia on Organized Trading Activities: “admission to biddings means a set of organizational and legal procedures aimed at ensuring compliance of the

persons specified in Parts 1 to 5, Article 16 of the Federal Law On Organized Biddings with the requirements to the bidders established by the rules of organized biddings to conclude the agreement on provision of services for organized biddings.”

Therefore, having analyzed the right of the trade institutor to counter non-fulfillment of the obligations on the basis of a violation by the bidder of the rules of organized biddings under the agreements concluded with it, it can be noted that the considered mechanism is a tool required to encourage proper behavior of the bidders. Introduction of the proposed amendments to Article 3 of Federal Law No. 325-Φ3 On Organized Biddings, Regulations of the Bank of Russia No. 437-Π on Organized Trading Activities as related to granting the right to the trade institutor to suspend its obligation, introduction of the definition of the concept of “admission to organized biddings” as well as bringing the terminology to conformity throughout the text of the Regulations will eliminate the existing legislative gaps and more clearly define the possibility of the trade institutors to suspend fulfillment of their obligations for provision of services in organized biddings. ■

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