

# PROTECTION OF RIGHTS OF PLAYERS IN EXCHANGE MARKETS OF GAS, OIL, AND OIL PRODUCTS

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*The article analyzes the sources of Russian law containing provisions aimed at protection of rights of the players in exchange markets of gas, oil, and oil products, including Federal Law dated November 21, 2011, No. 325-Φ3 On Organized Trading, Federal Law dated February 7, 2011, No. 7-Φ3 On Clearing, Clearing Activity, and Central Counterparty, and other federal laws as well as the rules of organized trading of stock exchanges, the peculiarities of contractual regulation, the rules for performance of clearing activity, and the court practice formed in this field.*

*The author of the article notes the increasing influence of the current practice of applying information technology to development of the regulatory framework in the field of trade in energy resources. So far, apparently, this practice cannot be called a valid source of law, but it definitely starts to have a significant impact on the content of legal acts.*

*An example would be the introduction of amendments into the Civil Code of the Russian Federation on digital rights (Article 141.1 of the Civil Code of the Russian Federation enters into force on October 1, 2019); development of the draft Federal Law On Digital Financial Assets, and preparation of a number of other draft regulatory acts.*

*The author studies the legal nature of smart contracts and concludes that they can be used in various closed technological systems, in particular, in the gas and oil industries.*

**Keywords:** *energy law, protection of rights of players in exchange markets of energy resources, clearing activity, clearing members, information technology.*

Protection of rights of exchange market players shall mean not only protection of the subjects of civil legal relations in court, but also creation of legal mechanisms to avoid disputes in connection with the contracts concluded at the stock exchange as well as legal costs.

The sources of law containing provisions aimed at protection of rights of players in exchange markets of gas, oil, and oil products are:

— federal laws, regulatory legal acts of the Bank of Russia, and other regulatory legal acts of the Russian Federation securing the rights of the players at the level of national and international law;

— rules of organized trading and performance of clearing activity;

— court practice.

At the level of the federal laws, the legal framework includes:

— Federal Law dated November 21, 2011, No. 325-Φ3 On Organized Trading (hereinafter referred to as the Law on Organized Trading);

— Federal Law dated February 7, 2011, No. 7-Φ3 On Clearing, Clearing Activity, and Central Counterparty (hereinafter referred to as the Law on Clearing);

— Federal Law dated April 6, 2011, No. 63-Φ3 On Digital Signature;

— Federal Law dated July 27, 2006, No. 149-Φ3 On Information, Information Technology, and On Protection of Information.

Currently, the increased influence of the practice of application of information technology on development of the regulatory framework in the field of trade in energy resources shall be specifically noted. This practice has not yet become a valid source of law, but it already has a significant impact on creation of legal norms.

Thus, Federal Law dated March 18, 2019, No. 34-Φ3 amended the Civil Code of the Russian Federation on digital rights (in particular, Article 141.1 of the Civil Code of the Russian Federation, which comes into force on October 1, 2019, was adopted). Over the past few years, a draft Federal Law *On Digital Financial Assets* has been developed and a number of other draft regulatory acts has been prepared. This is actually the beginning of transformation of the regulatory framework under the influence of new technologies, which, in their turn, cannot develop outside the legal field.

One of the main sources of law in the field under consideration is the Law on Organized Trading, which establishes the basic principles of protection by defining the requirements to the rules of organized trading and granting equal rights and obligations to the bidders of exchange trading of the same groups of bidders (categories of bidders); equal conditions for identification of the bidders, equality in the admission to trading, uniformity of terms for filing bids, concluding contracts and their securing, bringing to liability for infringement of rights, and disclosing information on non-performance of contracts, etc.

The said law defines uniform terms and conditions for conclusion of contracts between the stock exchange and the bidders for provision of services for organized trading. The contracts for

provision of services for organized bidding are concluded by accession to a contract, the terms and conditions of which are provided for by the rules of organized trading, and the bidders undertake to pay for these services. All bidders participate in exchange trading in accordance with the rules of organized trading approved by the authorized body of the trade institutor and registered with the Bank of Russia.

When submitting bids, the bidders ensure safety and integrity of the bids by signing them using digital signatures created on the basis of Federal Law dated April 6, 2011, No. 63-Φ3 *On Digital Signature and Federal Law* dated July 27, 2006 No. 149-Φ3 *On Information, Information Technology, and On Protection of Information*.

A clearing organization is an essential element in building a system to secure the rights of clearing members acting as the bidders and their clients. In accordance with the Law on Clearing, the rules for performance of clearing activity should provide for a procedure for monitoring availability of security for contracts concluded in trading and levers that make it possible to increase the level of performance of exchange contracts. In the course of organized trading, the clearing organization checks the security under each contract. Upon receipt of the register of concluded contracts, the obligations arising out of the contracts concluded at the stock exchange are calculated; and fulfillment of the obligations under the contracts for supply of gas, oil, and oil products is tracked, which creates additional guarantees for observance and protection of rights of the bidders.

Special attention should be paid to recently enacted Federal Law dated December 27, 2018 No. 514-Φ3 *On Amendments to the Federal Law On the Securities Market and Certain Legislative Acts of the Russian Federation as Related to Improvement of Legal Regulation of Securities Issue* (hereinafter referred to as Federal Law No. 514), which amended Article 19 of the Law on Clearing and Article 22 of the Law on Organized Trading making it possible for the Government of the Russian Federation to determine cases, in which information provided for by the Law on Clearing and the Law on Organized Trading shall be

disclosed to the limited extent and/or volume, a list of this information that may not be disclosed as well as entities, about which information may not be disclosed. In this case, it refers to cases when it is impractical to disclose information related to the imposition of sanctions on Russian legal entities and their counterparties.

Up to the present moment, the trade institutor and the clearing organization disclosed a rather wide scope of information about the bidders, the volume of settled transactions and fulfillment of obligations, and the Government of the Russian Federation was not able to impose any restrictions on disclosure. Upon adoption of Federal Law No. 514, the Government of the Russian Federation obtained the right to resolve this situation and allow the clearing organization, the central counterparty, and the trade institutor to disclose information to the limited extent. Thus, protection of rights of the bidders and the clearing members will be ensured not only at the national level, but also internationally.

The rules of organized trading and the rules for performance of clearing activity are special sources of law containing provisions on protection of rights of the bidders and the clearing members in the markets of gas, oil and oil products. In accordance with the Law on Organized Trading, in the rules of organized trading, the stock exchange establishes detailed requirements to the bidders in each group (category) for admission to trading (in particular, to submission of constituent documents, to the period of activity, to financial statements and equity capital, to availability of the website specifying the terms and conditions for conclusion of contracts with the clients, etc.).

The rules of organized trading can be contained in several documents of the trade institutor, for example, the rules of organized trading in gas, the rules of organized trading in oil, the rules of organized trading in oil products, etc. The rules of organized trading may include provisions not stipulated by the Law on Organized Trading that do not conflict with this law and regulatory legal acts of the Bank of Russia. The rules are binding on all parties and their implementation ensures protection of the rights of the bidders.

There are not many legal studies devoted to contractual regulation of exchange trade in energy resources, despite the fact that many issues deserve attention. The subject of legal research is the problems of legal regulation of the rights of the suppliers and the buyers of gas in the exchange market [1], problem aspects of legal regulation of exchange trading in gas, oil, and oil products [2], problems and tasks of legal support of exchange trade in energy resources in the Russian Federation and within the Eurasian Economic Union [3]. Issues of legal support of exchange trade in energy resources are also considered within the framework of studies on legal regulation of energy markets [4].

Guarantees of fair pricing and equal rights to purchase of goods are primarily provided upon anonymous trading, that is, upon conclusion of contracts based on unaddressed bids. The prices formed in this way upon organized trading are market prices. Submission of unaddressed bids upon trading is not prohibited, but since contracts on the basis of these bids are made by agreement of the parties, the price level may not always be market-based, and therefore, prices may be challenged by tax authorities during relevant inspections.

While continuously improving software and hardware, the trade institutors create equal conditions for all bidders to submit bids, processing of these bids and registration of contracts. Herewith, the issues of information security, ensuring continuity of activities as well as the action plan in the event of emergencies should be settled by adoption of relevant internal documents.

In cases provided for by the rules of organized trading and/or clearing rules, a contract upon organized trading, including a contract with the central counterparty, can be concluded without bidding. In accordance with clause 17, Article 2 of the Law on Clearing, the central counterparty is one of the parties to the contracts concluded at the stock exchange, the obligations of which are to be included in the clearing pool, and also has a license granted by a non-bank credit institution to perform banking operations and a license to perform clearing activity.

Since exchange contracts are concluded with the central counterparty with a sufficiently high

level of capitalization, special funds were created to pay the debt in case of default by any bidders, and relevant legal mechanisms were developed to ensure fulfillment of obligations of the bidders/clearing members, these conditions additionally secure rights of the bidders.

The peculiarities of the contract to be concluded depends on the delivery terms chosen by the bidders in the submission of the bids. At the level of the rules of organized trading, the terms for supply of gas, oil, and oil products are standardized, and each bidder has the right to choose the required basis for delivery. The goods may be delivered subject to the following terms and conditions: self-delivery by car, balance point, ex-factory, FOC - station of departure, FOC - intermediate station, ex-pipe, FOB, ex-tank, ex-tank - OCD (that is, operator of commodity deliveries, in accordance with the terms of services rendering for commodity deliveries, carrying out, monitoring and accounting commodity deliveries under the obligations admitted to clearing. The operators of commodity deliveries shall be accredited to perform specified functions unless it is established by the federal law).

The parties may not change the terms and conditions of the exchange contract or terminate the contract if such contract is concluded on the basis of at least one of the bids addressed to an unlimited number of bidders, except for the cases provided for by the rules of organized trading and/or clearing rules under these obligations.

Clearing shall be performed for the obligations arising out of exchange contracts concluded on the basis of at least one of the bids addressed to an unlimited number of bidders. Upon receipt of the bids of the bidders by the stock exchange, their technical verification is performed. After verification, the bids are sent to a clearing organization that checks availability of security under each contract, of which the stock exchange is informed. Unsecured bids are not allowed. Upon conclusion of the contract, the register of contracts is transferred by the stock exchange to the clearing organization that monitors fulfillment of the obligations and in cases provided for by the rules for performance of clearing activity, registers events of default and ensures collection of penalties.

In the rules of organized trading, a special chapter is usually devoted to measures of liability under the contracts and a dispute settlement procedure. There are cases when, according to the delivery terms stipulated in the rules of organized trading, the counterparties are entitled to terminate the contract by mutual agreement, of which they shall inform the clearing organization. The clearing organization decides to exclude the parties to the contract from the clearing pool, and the parties shall independently determine the procedure for fulfillment and termination of the obligations.

The provisions of the rules of organized trading and the rules for performance of clearing activity are formulated in such a way as to avoid occurrence of disputable situations and, accordingly, lawsuits. The lawsuits mainly concern execution of the transactions (in particular, return of empty tanks, impossibility to fulfill the obligations under the concluded contracts due to closing of specific stations or roads for passage, etc.) rather than their settlement. The stock exchange is guided by adopted judicial decisions upon preparation of the rules of organized trading (for example, upon establishment of penalties for non-fulfillment of the contractual obligations).

Implementation of decisions on disputes with non-residents require special attention. Therefore, it is advisable to provide for consideration of disputes in accordance with the arbitration proceedings in the rules of organized trading and the clearing rules, so that such decisions could be implemented in accordance with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded in New York in 1958 [5].

As already mentioned, development of technologies has a significant impact on regulation of ensuring and protection of the rights of the bidders. Herewith, it is necessary not only to create a regulatory framework of information technology, but also to introduce new technologies into business processes.

Digitalization is an applied method, by which the energy industry, the entire industry, and the state as a whole can evolve.

First and foremost, it is certainly necessary to become aware of what digital rights are and how

these rights should be protected. Next, the agenda includes the following items: creation of technologies, accounting devices that can not only ensure registration of information on consumption, volumes of supplied goods, capacities, but also performance of smart contracts based on blockchain in general (digital distributed registries) in various branches of economy; as well as storage of both current data and the entire history of occurrence of these data, and making settlements in various closed systems, etc.

Blockchain is software that allows, among other things, performance of smart contracts. Some authors currently propose division of blockchains into public and private [6]. Public blockchains do not imply any limitation of access to the system, settlement of transactions and operations, and in private blockchains, access is regulated. A private blockchain, which is a closed information system, is more suitable for use in business projects. At the same time, from our point of view, the proposed name “private blockchain” is not very good and it would be practical to call it a non-public blockchain, which could have a different number of participants having both equal and unequal, but specifically determined rights and level of access.

A system of payment for supply of goods (gas, oil, and oil products) using cryptocurrency in the form of work measurement units can be implemented inside non-public blockchains, which will speed up the process of making settlements between the market players.

Russian and foreign scientists argue about what a smart contract with a relevant code is [7]. However, until a common solution is found, various approaches to this problem are investigated. In the French literature, the following rather clear position was expressed, and it is reasonable to adhere to it: “Since smart contracts were so named, there is a tendency to assimilate them with legal contracts, but they have no legal force. When a legal contract exists, a smart contract is only a technical application of this contract” [8].

If we try to conditionally present conclusion and performance of a contract for supply of gas purchased at exchange trading, which is “independently managed at the technological level”, the data of the smart contract should be

consistently reflected in each block of the blockchain, for example:

- 1) conclusion of a supply contract at a stock exchange and checking data on security in a clearing organization;
- 2) conclusion/presence of an agency agreement with the gas transportation organization;
- 3) commencement of gas supply by a supplier at the point of entry into the gas transmission system in accordance with the exchange contract;
- 4) commencement of gas supply at the point of entry into the gas transmission system according to the agency agreement;
- 5) delivery process (including recording of information on force majeure circumstances in the event of their occurrence);
- 6) recording of gas transfer at the balance point under the agency agreement;
- 7) recording of gas transfer on the basis of the certificate of delivery and acceptance;
- 8) receipt of gas by the buyer at the exit point of the gas transmission system;
- 9) gas supply to consumers.

In the example under consideration, information is being uploaded on several smart contracts, each of which performs its function as a part of the overall process. At each stage, information reflected in the blockchain enters the software of the trade institutor, the clearing organization, the bidders (suppliers, buyers and their customers), and eventually the consumers. After actual receipt of gas by the consumers, relevant information is transferred to all parties to the electronic circulation.

Herewith, it is important that the transferred information is protected against possible interference by third parties, and the subjects of legal relations received comprehensive protection both in the area of their rights and obligations, and personal data of individuals performing the relevant functions within the framework of general production processes. In order to ensure control over operation of the entire information technology platform, including in terms of prevention of technical failures, operational errors, of course, participation of the operator, which could be the operator of commodity delivery as provided for in the Law on Clearing, is necessary. It is also reasonable to ensure functioning of reserve offices, which can copy all settled transactions.

Application of the technologies under consideration will certainly contribute to increase in the level of protection of the rights of players in the markets of gas, oil, and oil products.

It is definitely too early to talk about introduction of blockchain projects in the energy

sector and, in particular, in the organized trading in gas, oil, and oil products. A number of regulatory legal acts should come into force. But further development of legal tools and information technology is possible only subject to their mutual influence. ■

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