

PROBLEMS OF CORRELATION BETWEEN NORMS OF THE CIVIL CODE OF THE RUSSIAN FEDERATION AND SPECIAL REGULATORY LEGAL ACTS, AND EFFICIENCY OF LEGAL SUPPORT FOR PROTECTION OF RIGHTS OF ENERGY MARKET PLAYERS

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Arbitration currently considers a large number of disputes in the field of power supply, special judicial structures are formed in regional arbitration courts. Issues of correlation between the norms of the Civil Code of the Russian Federation, special federal laws, and subordinate regulatory acts in the field of energy supply, which require settlement of conflicts, arise in practice. Legal conflict in the energy industry arises in case of a mutual discrepancy between legal norms and regulation of similar public relations, which the judge shall balance or link so that the legal mechanism would become efficient. Today there is a tendency to ignore the principle of exclusivity of regulatory legal acts, therefore, first of all, a good law is necessary in the context of the priority of general stable provisions of the Civil Code of the Russian Federation. This article analyzes the problems of correlation between the norms of the Civil Code of the Russian Federation and special regulatory legal acts. The author comes to the conclusion that legal conflicts in the energy industry arise when legal norms do not coincide and in regulation of similar public relations, conflicts should be settled so that the legal mechanism could efficiently work. To activate the doctrine in lawmaking as well as in court proceedings complicated by the need to settle conflicts between the rules of law at various levels, including disputes arising out of legal relations in the energy sector, it is proposed to most actively apply the doctrine through scientific expert activities involving specialists in this field.

Keywords: *Civil Code of the Russian Federation, civil law, energy law, energy legislation, contracts in power supply.*

In the period of Russia's integration into the world market economy, the role of well-regulated and actually applicable civil laws, which should comply with the latest world trends in this area, is significantly increasing. Civil law

regulates property and monetary, and personal non-property relations involving citizens, and contractual relations in the field of civil turnover involving organizations. The majority of contractual legal relations involving legal entities

and citizens acting as entrepreneurs are governed by the law of obligations. Legal relations in the economic turnover arise with regard to movement of material goods: things, money, work, and services in the fields of production, circulation, production or personal consumption, that is, act as goods.

The property nature of civil (commercial, entrepreneurial) contracts requires a very clear interpretation of the provisions of the current legislation and their correct application by the counterparties. It is not by chance that in law enforcement practice, it is said that “civil jurisprudence is an exact science” and the mistakes made by the subjects in application of civil law or their poor legislative control may lead to certain negative consequences of a property and monetary nature in an indefinite future.

Federal [Law](#) dated December 28, 2016, No. 497-ΦЗ added clause 2.1 to Article 3 of the Civil Code of the Russian Federation. According to it, the Civil Code of the Russian Federation shall be amended, and the provisions of the Civil Code shall be suspended or invalidated by individual laws. Provisions providing for amendments to the Civil Code of the Russian Federation, suspension or invalidation of the provisions of the Civil Code of the Russian Federation “may not be included in the texts of laws that amend (suspend or invalidate) other legislative acts of the Russian Federation or contain an independent subject of legal regulation”.

However, the legislator left unchanged the wording of clause 2, Article 3 of the Civil Code of the Russian Federation, according to which civil law consists of the Civil Code of the Russian Federation and other federal laws adopted in accordance with it, which regulate the relations specified in clauses 1 and 2, Article 2 of the Civil Code of the Russian Federation.

Petrov A.A. differentiates positive and negative subject hierarchies [1]. In the course of increase in the legal force of a codified legal act (the civil code is a codified federal law) as compared to other similar acts in a certain area of regulation (for example, special federal laws in the energy sector), there is a positive subject hierarchy. Reduction of the legal force of an act as compared to the lower-level acts is a way of

ensuring superiority of lower-level special rules over higher-level acts or literal reversion of a hierarchic connection.

According to the second paragraph of clause 2, Article 3 of the Civil Code of the Russian Federation, civil norms contained in other laws shall comply with the Civil Code of the Russian Federation, that is, according to the above logic, a positive subject hierarchy ensuring the unity of legal regulation of relevant branches of law and legislation is applicable.

It appears that inclusion of clause 2.1. in Article 3 of the Civil Code of the Russian Federation does not fully correlate with clause 2, Article 3 of the Civil Code of the Russian Federation, which can complicate the legislative process as well as law enforcement and court practice. Problems of legal procedures are reflected in scientific works of many scientists and special publications of practicing lawyers [2].

Attention should be paid to the opposite approach of Kurbatov A.Ya., Professor of the Department of Civil and Entrepreneurial Law of the National Research University Higher School of Economics, Doctor of Law, about invalidity of priority of the rules of the Civil Code of the Russian Federation as a codified act over other federal laws. He considers the priority of the Civil Code of the Russian Federation to be unconstitutional, defining it only as a method of legislative procedure [3]. Kurbatov A.Ya. proposed to exclude the priority of the Civil Code of the Russian Federation, to change general and special rules at the same time since the effect of the amended general rules will block special ones. At the same time, the Constitutional Court of the Russian Federation did not recognize the legal norms establishing the priority of the Civil Code of the Russian Federation as invalid or unconstitutional.

The Constitution of the Russian Federation does not provide for a hierarchy of legal norms within acts of the same type. According to V.D. Zorkin, the President of the Constitutional Court of the Russian Federation [4], the general part of the Civil Code of the Russian Federation should have the status of a constitutional law.

Filippova S.Yu., Assistant Professor of the Department of Commercial Law and

Fundamentals of Law of the Lomonosov Moscow State University, Candidate of Legal Sciences, believes that the Civil Code of the Russian Federation, in its essence of a codified act, should consolidate and give integrity to the entire system of civil law, especially in general provisions [5].

V.A. Musin, Head of the Department of Civil Procedure of the Saint-Petersburg State University, Corresponding Member of the Russian Academy of Sciences, Doctor of Law, Professor, commented on the priority of the Civil Code of the Russian Federation over other laws as on a codified act with the highest legal force when comparing the provisions of the Civil Code of the Russian Federation and Federal Law dated December 26, 1995, No. 208-ФЗ *On Joint-Stock Companies* [6].

It seems that clause 2.1., Article 3 of the Civil Code of the Russian Federation did not appear accidentally, for the projected amendments to the Civil Code of the Russian Federation, taking into account its provisions, it will not be necessary to consider both the opinions of experts in the field of lawmaking and public opinion. In such a situation, there are no doubts about possibility of promotion of laws as well as ignoring the postulates of the Civil Code of the Russian Federation with the aim of giving legitimacy to the actually new legal order.

The “war of the laws of the USSR and the Russian Federation”, including that caused by borrowing by the Russian laws of the rules of common law, has already unbalanced the manageability of the energy sector, while the efficiency of protection of rights of the players in the wholesale and retail energy markets has decreased. The strategic interests of the state in energy supply are realized through the use of facilities such as land plots, roads, and transport communications. Defects of the legal system increase mismatch of legal norms in the energy sector, and therefore, arbitration courts rarely apply the rules of the Civil Code of the Russian Federation when qualifying legal relations in the energy sector using the rules of special legislation and subordinate regulatory acts.

The preamble to the current Constitution of the Russian Federation reads: “We, the multinational people of the Russian Federation...,

while proceeding from the generally accepted principles of equal rights and self-determination of peoples, honoring the memory of the ancestors who gave us love and respect for the Fatherland, faith in goodness and justice, reviving the sovereign statehood of Russia and asserting inviolability of its democratic basis, striving to ensure well-being and prosperity of Russia, proceeding from responsibility for our Home State to present and future generations, and perceiving ourselves as a part of the global community, adopt the Constitution of the Russian Federation”.

Growth of the package of legal norms and regulatory legal acts in the energy sector outside the scope of application of the stable norms of the Civil Code of the Russian Federation contributed to emergence of legislative and enforcement errors, excessive legal rules currently make it possible for the courts to apply a wide discretion under the guise of justice. The principle of justice provides for morality, and in the interpretation of an entrepreneurial contract, the court shall respect the will of the parties and impose the risks on the party that best controls the wording of its disputable conditions. In the event of the electric power industry, these are monopolists, energy companies, and the consumers are the weak party to the contract. Judicial discretion has limits. It is not allowed to go beyond the rule of law, even in the protection of the weak party. In the subjective interpretation of the rules of law by the court, no normative novelty arises. Law enforcement practice shall comply with the law, and not vice versa. Otherwise, power and rights will be abused. There is a current tendency to ignore the principle of exclusivity of regulatory legal acts. Therefore, first of all, a good law is required in the context of the priority of general stable provisions of the Civil Code of the Russian Federation.

Let us consider the problem using correlation of the norms of the Civil Code of the Russian Federation and special regulatory legal acts regulating legal relations of the energy market players as an example.

Arbitration currently considers a large number of disputes in the field of power supply, special judicial structures are formed in regional arbitration courts. Issues of correlation between the norms of the Civil Code of the Russian

Federation, special federal laws, and subordinate regulatory acts in the field of energy supply, which require settlement of conflicts, arise in practice. Legal conflict in the energy industry arises in case of a mutual discrepancy between legal norms and regulation of similar public relations, which the judge shall balance or link so that the legal mechanism would become efficient.

Legal regulation of types of contracts in the field of energy supply in force in practice and the priority of the Civil Code of the Russian Federation, special laws applicable to them can be conditionally classified as follows.

Energy supply contracts, under which the norms of general rules of § 6, Chapter 30 of the Civil Code of the Russian Federation Energy Supply have priority over special laws on individual energy supply contracts:

1) *heat supply contract* (Article 15 of Federal Law dated July 27, 2010, No. 190-Ф3 *On Heat Supply*, hereinafter referred to as the Law on Heat Supply). The consumer under this contract acquires heat energy (capacity) and/or heat carrier from the heat supplying organization for its own consumption or for provision of public services.

2) *heat and hot water supply contract* (Article 15.1 of the Law on Heat Supply). The consumer connects to an open heat supply system (HWS) to purchase heat energy (capacity) and heat carrier from the heat supplying organization.

3) *contract for supply of heat energy (capacity) and/or heat carrier* (clause 45 of Decree of the Government of the Russian Federation dated August 8, 2012, No. 808 *On Arranging Heat Supply in the Russian Federation and On Amendments to Certain Acts of the Government of the Russian Federation*). The unified heat supplying organization, the heat supplying organizations (suppliers) legally own sources of heat energy and are obliged to conclude a contract for supply of heat energy and heat carrier for a distributed heat load according to the heat supply scheme.

4) *gas supply contract* (clause 5 of Decree of the Government of the Russian Federation dated February 5, 1998, No. 162 *On Approval of the Rules of Gas Supply in the Russian Federation hereinafter referred to as the Rules*). In accordance with the

requirements of the Civil Code of the Russian Federation, federal laws, the Rules, and other regulatory legal acts, gas is supplied under the contract between the supplier and the buyer.

Contracts, in which special laws on individual contracts have priority over the provisions of § 6, Chapter 30 of the Civil Code of the Russian Federation Energy Supply. The rules of the Civil Code of the Russian Federation apply, unless other rules are provided for by a special law:

1. Energy supply contracts

1) *electricity supply contract*, according to which electricity is supplied by the energy supplying organization to the consumer through the connected grid and is paid for by the latter, given integrity of the grids and the operability of devices and equipment are ensured. “The rules of this paragraph shall apply to relations under the electricity supply contract unless otherwise provided for by law or other legal acts” (clause 4, Article 539 of the Civil Code of the Russian Federation);

2) *energy supply contract with the guaranteeing supplier*, under which the guaranteeing supplier shall sell electricity (capacity) to the consumers, and render electricity transmission services through third parties (clause 4, Article 539 of the Civil Code of the Russian Federation, clause 28 of Decree of the Government of the Russian Federation dated May 4, 2012, No. 442 *On the Operation of Retail Electric Power Markets, Full and/or Partial Restrictions of Electric Power Consumption*). Fulfillment of the obligations by the guaranteeing supplier is controlled by the state. Commercial suppliers promote competition in the course of sale of electricity, implement the principle of freedom of contract through unregulated electricity prices;

3) *water supply (HWS or CWS) and disposal contract*, “the provisions of the energy supply contract provided for by the Civil Code of the Russian Federation apply to the water supply (disposal) contract unless otherwise provided by the federal law and the regulatory legal acts of the Russian Federation adopted in accordance with it, and it contradicts the essence of the water supply contract” (clause 2, Article 13, clause 2, Article 14 of Federal Law dated December 7, 2011, No. 416-Ф3 *On Water Supply and Disposal*);

4) *unified cold water supply and disposal contract* is concluded “in accordance with the standard unified cold water supply and disposal contract approved by the Government of the Russian Federation” (Article 15 of Federal Law dated December 7, 2011 No. 416-Φ3 *On Water Supply and Disposal*).

2. Sales contracts (not referred to the energy supply contracts)

1) *contract for sale and purchase of electricity and/or capacity* is concluded by the subjects according to the rules of the wholesale market (the second paragraph, clause 1, Article 32 of Federal Law dated March 26, 2003 No. 35-Φ3 *On the Electric Power Industry*);

2) *contract for sale and purchase, supply or transfer of energy resources containing the terms and conditions of the energy service agreement (contract)* (Article 20 of Federal Law dated November 23, 2009, No. 261-Φ3 *On Energy Saving and Enhancement of Energy Efficiency and On Amending Certain Legislative Acts of the Russian Federation*).

3. Network agreements (not referred to the energy supply contracts)

1) *agreement on wastewater transportation* (Article 17 of Federal Law dated December 7, 2011, No. 416-Φ3 *On Water Supply and Disposal*);

2) *agreement on connection (technological connection) to centralized systems of cold water supply and/or cold water disposal* (Article 18 of Federal Law dated December 7, 2011, No. 416-Φ3 *On Water Supply and Disposal*);

3) *agreement on connection (technological connection) to the centralized hot water supply system* (Article 19 of Federal Law dated December 7, 2011, No. 416-Φ3 *On Water Supply and Disposal*);

4) *agreement on hot and cold water transportation* (Article 16 of Federal Law dated December 7, 2011, No. 416-Φ3 *On Water Supply and Disposal*);

5) *agreement for provision of services for transfer of heat energy, heat carrier* (Article 17 of Federal Law dated July 27, 2010, No. 190-Φ3 *On Heat Supply*);

6) *gas transportation agreement* (clause 8 of Decree of the Government of the Russian Federation dated February 5, 1998, No. 162

On Approval of the Rules of Gas Supply in the Russian Federation), in which the procedure, and the terms and conditions for gas transportation are established by the gas transportation or gas distribution organization;

7) *paid service agreement for electricity transfer* (clause 2, Article 26 of Federal Law dated March 26, 2003, No. 35-Φ3 *On the Electric Power Industry*), the following conditions are mandatory: the buyer trades in the wholesale market, or an agreement between the buyer and the producer (other electricity supplier) is concluded and duly performed.

4. Contracts aimed at obtaining energy (not referred to the energy supply contracts):

— **priority of rules of § 1, Chapter 30 of the Civil Code of the Russian Federation General Provisions on Lease**

1) *contract of lease of power plant* (only general provisions on the lease contract apply), under this contract the lessor shall transfer to the lessee for temporary possession and use subject to the terms and conditions of lease the power grid property belonging to it under the right of ownership, which is required to ensure the electricity supply, and the lessee undertakes to pay a lease payment for the leased property in the manner and within the time limits set forth in the contract.

— priority of § 1 General Provisions on Contracting of Chapter 37 of the Civil Code of the Russian Federation and § 3 Supply of Goods of Chapter 30 of the Civil Code of the Russian Federation

1) *tolling agreement or processing of raw materials (for example, in the form of gas or electricity) subject to tolling: mixed agreement* (both general rules of the contract (work: processing of raw materials) and the rules of the supply contract (goods: finished product after processing of raw materials) are applicable. The project of the tolling agreement is missing in the laws of the Russian Federation. According to the tolling agreement, the customer shall transfer toll materials to the contractor, and the contractor, after processing of the raw materials, shall manufacture finished products according to the statement of work and deliver them to the customer.

— special rules have priority over the provisions of § 1 General Provisions on Contracting of

Chapter 37 of the Civil Code of the Russian Federation and the provisions of Chapter 39 of the Civil Code of the Russian Federation Provision of Paid Services

1) *energy service agreement (contract)* (Article 19 of Federal Law dated November 23, 2009, No. 261-Φ3 *On Energy Saving and Enhancement of Energy Efficiency and On Amending Certain Legislative Acts of the Russian Federation* (as amended, effective since January 16, 2019); Article 108 of Federal Law dated April 5, 2013, No. 44-Φ3 *On Contractual System in the Field of Procurement of Goods and Services for State and Municipal Needs*), the subject of the agreement is implementation of actions aimed at energy saving and enhancement of energy efficiency of energy use by the customer;

2) *service contract for formation of prospective technological reserve* (clause 6 of Decree of the Government of the Russian Federation dated December 7, 2005, No. 738 *On the Procedure for Formation of Prospective Source of Funds to Pay for Services Related to Formation of a Technological Reserve of Electricity Production Capacities and Financing of Electricity Production Facilities in Order to Prevent Occurrence of Electric Power Shortage*).

In the consideration by the arbitration courts of cases on disputes in the energy sector, the following issues that need to be understood in terms of settlement of legal conflicts arose:

1) Are there any contradictions between the rules of Article 426 of the Civil Code of the Russian Federation and the second paragraph of clause 3 of the Rules for Technological Connection of Power Receivers of the Electricity Consumers, Electricity Production Facilities as well as Power Grid Facilities Belonging to Grid Organizations and Other Entities to Grids approved by Decree of the Government of the Russian Federation dated December 27, 2004, No. 861 (hereinafter referred to as Decree No. 861)? If so, how can they be eliminated by court practice?

— *Option 1.* No conflict of the norms.

— *Option 2 (preferred).* There are the following contradictions between the rules of Article 426 of the Civil Code of the Russian Federation and the second paragraph of clause 3 of Decree No. 861: the second paragraph of clause 3 of

Decree No. 861 obliges the network organization to implement measures for technological connection in respect of any person applying to it. Decree No. 861 obliges the network organization to effect technological connection in any case, and Article 426 of the Civil Code of the Russian Federation provides for the mandatory conclusion of the contract only if there is such an opportunity (including technical).

Since the norms of the Civil Code of the Russian Federation have priority over the norms of the subordinate act, the second paragraph of clause 3 of the Rules cannot be applied; to prove presence or absence of technical capability, a legal technical examination should be recommended.

2) Is the contract for technological connection to grids concluded with the consumer acting as a business entity public?

— *Option 1.* The contract for technological connection to grids concluded with the consumer acting as a business entity may be both real and consensual, not for personal consumption. Therefore, it is not possible to apply the provisions of the Law on Protection of the Consumers' Rights on "citizens purchasing goods (work, services) for personal domestic needs" to this contract, which means the contract with the consumer acting as the business entity is not a public contract.

According to the general principle, if the contract is concluded for personal consumption and not for business purposes (deriving of profit), then it is public; if it is concluded for business purposes, it is non-public. For example, the contract for technological connection with a budget-funded institution is public, and with a business entity (the goal is to make profit) is non-public.

— *Option 2.* The public nature of this contract is manifested in the fact that the network organization acting as the monopolist is obliged to conclude the contract with any individual or legal entity acting as the consumer of the goods, work, or services that addresses it with an application for technological connection of power receivers. The public nature of the contract for technological connection to grids is derived from the provisions of Article 16 of Law of the Russian Federation dated February 7, 1992, No. 2300-I *On Protection*

of the Consumers' Rights, hereinafter referred to as the Law on Protection of the Consumers' Rights, clause 1, Article 26 of the Law on the Electric Power Industry, and Article 426 of the Civil Code of the Russian Federation.

In the broad interpretation of clause 1, Article 426 of the Civil Code "in respect of any person applying to it", the concept of the "consumers" is defined to refer to all individuals and legal entities, despite the absence of compliance with the same concept in the Law on Protection of the Consumers' Rights – "citizens purchasing goods (work, services) for personal domestic needs".

Clause 16 of Decree of the Plenum of the Supreme Court of the Russian Federation dated December 5, 2012 No. 49 On Some Issues of Application of Provisions of the Civil Code of the Russian Federation on Conclusion and Interpretation of Contract specified the purpose of application of Article 426 of the Civil Code of the Russian Federation as entrepreneurial, having indicated the consumers – citizens, and individual entrepreneurs and legal entities of various forms of incorporation.

The theoretical and practical problem is that upon settlement of a dispute, the court is not able to apply the Law on Protection of the Consumers' Rights. Therefore, there is a conflict of rules in legislation or a dualism of legal relations. In the absence of a precedent, the court practice cannot eliminate the conflict of the rules of law.

3) What is the legal qualification of the contract for technological connection to grids?

— *Option 1.* The contract for technological connection to grids is a *listed service contract* with reference to the provisions of Chapter 39 of the Civil Code of the Russian Federation as well as special provisions of clause 1, Article 26 of the Law on the Electric Power Industry and Decree No. 861, General Rules on Obligations and Contracts (Section III of the Civil Code of the Russian Federation). An additional argument of the courts is that, *as a rule*, constructed and reconstructed facilities of the power grid facilities are not transferred to the customer, and the conditions for technological connection are created by the network organization itself.

— *Option 2.* The contract for technological connection to grids is an independent

organizational civil law contract entered into economic circulation by the Law on the Electric Power Industry that requires detailed regulation at the level of law (it shall be listed in the Civil Code of the Russian Federation as a contractual structure that is stable in the economic turnover) and is a complex contract (includes work and services). The complex contract for technological connection does not contain elements of various contracts, but includes a set of obligations of the same type. The type of contract is determined taking into account the nature of the activities performed for actual connection to the grid aimed at material results (development of design documentation, construction and installation work; execution of the act on delimitation of balance participation and operational responsibility of the parties, etc.).

While indicating the contradictions of the rules of the subordinate act, Decree No. 861, unsatisfactory legal regulation of the above contract is analyzed in detail in the article *On Legal Nature of Contract for Technological Connection in the Field of Power Supply* [7]. Decree of the Plenum of the Supreme Court of the Russian Federation dated December 25, 2018, No. 49 *On Some Issues of Application of General Provisions of the Civil Code of the Russian Federation* (clauses 47 to 49) [8], while regulating the legal qualification of the contract, does not contain a definition of the complex contract acceptable by virtue of the principle of freedom of agreement, in contrast to the unlisted and mixed ones. The issue of controversy is a key one; today contradictions of the law in the energy sector negatively affect the legal realities. The causes of contradictions (conflicts) of legal norms result from problems of legal awareness and understanding of law, conflict of interests, violations of legal methods.

According to A.G. Bykov [9] and P.G. Lakhno [10], the legal doctrine of regulation of the electric power industry remains strategically uncertain, the balance of public and private interests is not sufficiently provided for by the legislator, and an extensive regulatory framework is not functioning due to variation of legal norms on acts of different legal force. It is necessary to modernize the legislation in order to optimize the regulation of the electricity market.

At the same time, the extensive legal framework is embraced by Article 3 of the Civil Code of the Russian Federation (hereinafter referred to as the CC of the RF) Civil law and Other Acts Containing Rules of Civil Law, and in the context of hierarchical conflicts in energy law, the priority of the CC of the RF as a codified federal law with the highest legal force over other federal laws shall apply. According to the general principles of law, the priority of a special norm may be in cases when it comes to acts of the same level, while the CC of the RF and special laws, including laws in the energy sector, are not the federal laws of the same level.

From the point of view of legal doctrine, the hierarchical conflict rule has priority over conceptual and temporal rules:

1) a previously adopted general law is stronger than a law of lower level adopted later;

2) a general higher-level law is stronger than the special lower-level one.

Upon analysis of the current norms of civil law in the field of energy, it should be concluded that a special rule of law as compared to the general rule of law often has priority upon clarification of the rules of conduct. Imperfect logic of the legislator in the wording of legal norms upon adoption of a new law makes it possible to doubt that the subsequent law has priority over the previous one.

To activate the doctrine in lawmaking as well as in court proceedings complicated by the need to settle conflicts between the rules of law at various levels, including disputes arising out of legal relations in the energy sector, it is proposed to most actively apply the doctrine through scientific expert activities involving specialists in this field. ■

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