ALTERNATIVE FINANCIAL DISPUTE RESOLUTION MECHANISM IN AUSTRALIA

Dmitry V. Yakovlev[1]
Dina R. Kripakova[2]
Galina I. Barkalova[3]
Svetlana H. Solovykh[4]
Kseniya V. Didenko[5]

1. Candidate of jurisprudence, associate Professor of the Department of civil law and process of the Belgorod state national research University.
2. Candidate of law, the head of the Department of civil law, Astrakhan State University.
3. Associate Professor, Department of Civil Law and Process, Belgorod University of Cooperation, Economics and Law.
4. Candidate of law, associate Professor associate Professor of the Department of arbitration process of the Federal state budgetary institution of higher education " Saratov state law Academy»; arbitrator of the International commercial arbitration court at the chamber of Commerce and industry of the Russian Federation.
5. The assistant professor of the chair “Criminal law disciplines” the candidate of jurisprudence of the Belgorod Law Institute of the Ministry of Internal Affairs of Russia named after I.D. Putilin.

Corresponding Author email: yakovlev_d@bsu.edu.ru

ABSTRACT: The authors of the article study the legal mechanism in Australia for alternative resolution of civil disputes arising from legal relations after consumers’ having received financial services. They analyze its current state and existing statutory regulation. The paper compares the key aspects of the existing consumer dispute resolution mechanism in Australia with financial service providers and the institution of the settlement of similar disputes by a financial agent introduced in Russia.

Keywords: financial service, financial authorized agent, consumer of financial services, alternative dispute resolution mechanism, financial dispute.

INTRODUCTION

Since June 1, 2019, the Russian Federation has a new procedure for initiation of legal action for consumers of financial services provided by insurance companies. This procedure carries the mandatory pre-trial appeal to the Commissioner for the Protection of the Rights of Consumers of Financial Services with a statement, the receipt of an appropriate decision which is binding under certain conditions, and in case of disagreement with it, further judicial recourse on general terms. The specified procedure

is stipulated by the entry of the Federal Law "On the Commissioner for the Rights of Consumers of Financial Services" into force (Voronov, 2018; Abishov et al, 2018; Gamarra, et al, 2018), the developers of which claimed to take into account foreign experience in resolving similar disputes, as well as changes to the Federal Law "On Compulsory Third Party Liability Insurance of Vehicle Possessors". The introduction of the institution of a financial authorized agent drew the attention of the scientific community long before the aforementioned law came into force, and its role in the human rights mechanism, the effectiveness of the procedure and practical benefits were the matter of considerable debate.

Obligatoriness of its passage as expected shortcomings was indicated, which, according to a number of analysts, would entail an increase in the length of pre-trial procedures, as well as the endowment of non-governmental organizations with dispute resolution functions and the adoption of binding decisions that are subject to enforcement[1]. Some authors pointed to the lack of a system of principles on the basis of which it is proposed to build a new dispute resolution system and the inconsistency of this to the world's practice[2]. The ambiguity of the procedure prescribed by law for appealing by a financial organization of a decision of a financial authorized agent and limiting the competence of an authorized representative to property requirements[3] was also noted. The given positions provide ample evidence of the relevance of the problems and the value of foreign experience in regulating similar legal arrangements. The authors of this paper used various general scientific techniques and special cognition methods. The methods of analysis and synthesis were used to study the essence of the alternative procedure for resolving financial disputes existing in Australia. System-structural and formal-logical methods were used to identify the patterns of the mechanism under study and its regulatory framework. Formal legal and comparative legal methods were used to compare the study object and the institution of the financial representative in Russia, as well as to identify differences between these systems for resolving financial disputes.

RESULTS

The development and implementation of the institution of a financial agent in the human rights mechanism of Russia was caused by the need to create an effective mechanism for alternative resolution of disputes arising between consumers and organizations providing financial services, the share of which has grown significantly in the total mass of civil disputes over the past decade. It should be noted that such mechanisms for the non-governmental resolution of civil disputes have been successfully and for relatively long period of time applied in a number of countries of the Anglo-Saxon legal family, and one of the longest operating systems can be found in Australia. It should be noted that when we firstly familiarize ourselves with such a system, we will inevitably encounter the fact that the Australian system of dispute resolution with financial institutions requires two elements: an internal dispute resolution system (IDR) and an external dispute resolution system (EDR). The obligation of a financial institution to have an IDR and to be a party to EDR is enshrined directly at the legislative level, for example, in section 1017G (1) of the Corporations Act of 2001[4]. In addition, the mandatory participation of financial institutions in such procedures is provided for in Regulation 165 "Licensing: Internal and External Dispute Resolution" (hereinafter referred to as Regulatory Guide)[5], approved by the Australian Securities and Investments Commission (ASIC)[6], the government body entrusted with the functions of corporate regulation of

relations for the provision of financial services. The mentioned guide formulates a clear algorithm of actions and terms of their implementation by financial organizations in the event that a citizen complains about their decisions and actions taken (https://www.legislation.gov.au).

One of the features of a statutory IDR is the consolidation of nine principles that must be met by the financial dispute resolution system mentioned above, and the disclosure of the content thereof. Thus, the principle of awareness, from the point of view of Australian law, involves bringing to the attention of consumers the features of the IDR system used in a financial organization, namely, communication of the procedure and methods for filing a complaint, the obligation of employees of the organization to know this procedure and communicate the information necessary to the consumer verbally or by handing memos, as well as the placement of the algorithm for filing and considering complaints on the organization's website. The principle of accessibility of the IDR procedure envisaged by the Regulatory Guide means the creation by the financial organization of a simple complaint mechanism, the mandatory availability and accessibility of uniform forms for consumers to fill in, and assistance to persons with disabilities in their preparation. By establishing the principle of feedback, the legislator actually fixed the time frame for the organization to handle the consumer's complaint and inform one of the accepted results, and if it is not possible to resolve the dispute, the obligation is to inform the applicant about this and clarify the right to use the EDR system. In Australia, there are three types of deadlines for the IDR system: 90 days for the complaints about traditional financial services, 45 days for resolving other complaints, and 21 days for the claims of affirmative performance.

The principle of objectivity envisaged by the Regulatory Guide involves mandatory consideration of all the arguments of the consumer's complaint, if possible, by an employee who is not involved in the dispute, with the preparation of an answer with reference to the regulatory documentation and the standards and rules used in the organization. Due to the principle of free-of-charge basis, the above actions of the organization should be carried out for the consumer without charge (Pondel, 2019; Nazoktabar, & Tohidi, 2014). In addition to the above, the principles that an internal system for resolving disputes of the financial organization must meet are the following: the principle of confidentiality, the principle of customer mindset, the principle of answerability, as well as the principle of improving IDR procedures.

In addition to the above system of principles, the Australian Securities and Investments Commission has four responsibilities for financial institutions: an obligation to comply with regulatory rules, an obligation to allocate resources for internal dispute resolution procedures, an obligation to ensure information gathering, and an obligation to analyze and evaluate the complaints received. The above indicates that Australia has established and will apply uniform standards for the internal dispute resolution system for all business entities operating in the financial market. Such a concise regulation of the activities of financial organizations makes the system of internal dispute resolution understandable and predictable for consumers, and, consequently, in demand and convenient. If the requirements of the consumer of the financial institution's services were not satisfied within the framework of the IDR system, they are entitled to use the external dispute resolution system by filing a complaint with the Australian Financial Complaints Authority (AFCA).

Despite the fact that the mentioned organization was established only in 2018, in fact it has combined three previously existing independent from each other alternative

dispute resolution mechanisms: the Financial Ombudsman Service (FOS), Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT), which largely predetermined the nature of the borrowed EDR scheme applied by the AFCA[7]. The Australian Financial Complaints Authority, like the financial commissioner in Russia, is not a public authority, but it performs a public function, the purpose of which is to resolve disputes within its competence, and under certain conditions makes decisions binding on the parties to the dispute and affects the development of legal relations in financial services. Currently, the activities of the AFCA are regulated by the relevant rules[7] developed by the department itself, consisting of six sections regulating the process of resolving complaints, claims for a dispute and a complaint, exceptions to general rules, legal remedies, interest treatment, terminology and transitional provisions. The operational guidelines[8] that are nothing more than explanations of the current procedure for resolving complaints in a language that is accessible to consumers have been adopted in addition to the rules[9].

An analysis of these normative documents as a whole indicates the similarity of the algorithm for handling complaints against actions of financial organizations used in Australia to the procedure enshrined in the Federal Law "On the Commissioner for Consumer Rights of Financial Services". Meanwhile, there are a number of significant differences, some of which, in our opinion, may be of scientific and practical interest.

So, for example, unlike Russia, the submission of a dispute for resolution to the AFCA is the right of the consumer, and the law does not prevent from taking legal actions. Meanwhile, this form of dispute resolution is the most attractive due to its mobility, the lack of a formalized procedure and the need to bear legal costs in the form of fee payment. Moreover, as reflected by the report published on the AFCA website for the first year of operation (since November 1, 2018 till October 31, 2019), the investigated procedure is popular. The AFCA received 73,272 complaints during the above period, 77 percent of which were examined on the merits, and the total amount of compensation collected in favor of consumers amounted to Australian $ 185 million (https://www.afca.org.au/news/statistics).

Comparing the system of alternative resolution of financial disputes with the traditional judicial procedure, it is precisely the cost and duration of the latter that is often recognized as the reason for the demand for the analyzed legal mechanism. The rationality of the use of judicial procedure, as noted in Australian legal literature, can occur if it is necessary to make the dispute public and set a judicial precedent[11]. A distinctive feature of the Australian financial dispute resolution process is the ability to contact the AFCA both by paper form and by telephone. Moreover, in the latter case, an AFCA employee can help the consumer file a complaint, and a phone call will be regarded as a consumer's desire to contact the AFCA and consent to the applicable complaint procedure. Another distinguishing feature of the Australian mechanism for handling complaints by AFCA is the rule of opportunity to join a dispute. With regard to Russia, the indicated legal pattern, joining a dispute, was first mentioned in the Civil Code of the Russian Federation when it introduced Chapter 9.1 (Decisions of assemblies) in 2013, and the special procedural order for this action was first enshrined in Chapter 22.3 of the Civil Procedure Code of the Russian Federation, entered into force on October 01, 2019. Meanwhile, in Australia, such an opportunity is allowed in relation to financial disputes resolution using non-judicial procedures, which translates the AFCA resolution process of individual disputes into the sphere of socially significant ones.

In accordance with the Rules, in the case of acceptance of a complaint by the AFCA against the financial institution, a number of restrictions are imposed, that is, a prohibition on initiating or continuing a dispute with a consumer to recover a debt in court, a prohibition on the alienation of immovable property in dispute, an obligation to take measures to create conditions to protect disputed property, etc.. At the same time, it follows from the contents of the relevant section of the Rules that these restrictions are assumed, and no AFCA procedural decision is required for this. From the above provisions, the priority of an alternative form of dispute resolution also appears, in which there is more opportunity to reconcile the disputing parties over a traditional trial. Regarding the very complaint resolution procedure, the Rules state that the main methods for resolving the dispute are informal mechanisms that encourage the parties to reach an agreement (facilitating negotiations, conciliation procedures, a conference). Moreover, such a procedure as a preliminary assessment is provided. It suggests the AFCA sets out the variants for resolving the dispute, through recommendations to the parties on what they should do to resolve the conflict peacefully. If these measures come to naught, the AFCA renders a determination that, under certain conditions, becomes binding on the parties. The rules stipulate that, if necessary, the AFCA may decide to attract an expert to resolve the complaint, the payment for which is made most often at the expense of the financial institution, but can also be made at the expense of the budget of the very AFCA, if the examination is necessary taking into account the nature of the dispute. The mechanism for the entry into force of the AFCA decision adopted on the complaint is also noteworthy. It is stipulated that such a decision is final and binding for the parties, but only if the applicant agrees with it within 30 days from the receipt of such.

An analysis of the content of the Rules allows us to conclude that the AFCA is involved not only in the resolution of specific disputes but can also influence the development of legal relations in the field within its competence. This is done through the implementation of control powers and the publication of summary reports on their work. Apparently, therefore, the results of the EDR system by some Australian authors are recognized as a factor influencing the development of legal relations along with industry codes and other legislative acts [12]. So, in the event that serious financial and systemic violations of the law are identified by individual financial organizations, the AFCA is entitled to report ones to the competent authorities vested with state powers to bring to responsibility. The AFCA annual reports are published on the website and contain information about the number of appeals to the AFCA by the financial institution; the number of complaints examined in relation to various financial organizations; the result of the consideration of these complaints and other information. Quite unusual for Russian reality is the presence in the Rules of an exhaustive list of remedies that the AFCA can use when judging on an application. Among these, there are the funds aimed at restitution of property rights, providing for the possibility of imposing obligations on the financial organization to perform property actions (to pay monetary compensation; to forgive or change the debt; to foreclose on the mortgaged property). Along with this, the AFCA is authorized to make the decisions changing or terminating the legal relations of the parties (amending and terminating the contract), as well as the decisions aimed at restoring non-property rights (deleting information that is confidential, apologizing). A significant difference from Russia is the possibility of recovering court costs in the total amount of up to Australian $ 5,000, as well as the application of sanctions in the form of recovery of interest stipulated by special legislation.

CONCLUSION

Legislative regulation of the financial institution's internal dispute resolution system existing in Australia is aimed at harmonizing relevant procedures throughout the country and appears to be extremely positive since it creates transparency in such a system. Concerning Australian alternative mechanism for the external resolution of financial disputes by the AFCA, Australia, despite the absence of the obligation to use it before recourse to legal proceeding, it is quite popular due to the convenience and mobility of the procedure. The main activity of the AFCA as a participant in the system of internal corporate regulation is not the adoption of a binding decision for the parties, but the search for the ways to resolve the conflict, which ultimately helps to build confidence in this sector or branch of economic activity. Meanwhile, the process of investigation by AFCA of complaints of consumers of financial services, despite all its informality, is quite clearly regulated, and the competence and powers of the organization are much wider than the similar criteria of a financial representative in Russia.

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