THE EVOLUTION OF LEGAL REGULATION OF CIVIL PROCEEDINGS AND ARBITRATION IN AUSTRALIA IN 2014-2018

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Abstract

This article is the result of research conducted by teachers and researchers of the RUDN University. (Frolova et al, 2017) It presents a general description of the most significant reforms of civil and arbitration procedural law of Australia in 2014-2018. Emphasis is placed on the study of changes in the Civil Dispute Resolution Act, 2011 and the Evidence Act 1995. It indicates that at the end of 2018 - the beginning of 2019, the Australian Law Reform Commission plans to adopt some regulations related to the legal regulation of third-party financing of legal proceedings by the so-called “judicial sponsors” and lawyers. It is emphasized that in Australia there is a double legislative regime that regulates international and domestic commercial arbitration. The procedure for international arbitration is defined in the International Arbitration Act 1974 (Cth) (IAA). Domestic arbitration is governed by state and territory laws. The laws of the states and territories on domestic arbitration, other than the 1986 Law of the Australian Capital Territory, are relatively new - adopted in 2010-2013. Until 1984, there was no uniformity in the states and territories of Australia in the field of regulations governing the arbitration.

It is concluded that the evolution of Australian civil procedural law is largely based on similar reforms of the former metropolis - the United Kingdom, as Australian scholars explicitly state. However, the federal government of the country makes its adjustments. Reforms of the Australian civil procedure occur under the direct control of the Australian Law Reform Commission, which: 1) formulates proposals for specific areas of improvement of existing legislation; 2) publishes the specified proposals for extensive public discussion; 3) summarises public discussions.

In the area of arbitration law, international arbitration practice and modern international standards of arbitration are of great importance for Australia. Currently, arbitration proceedings in Australia, both in domestic and international arbitration, are governed per the provisions of the UNCITRAL Model Law on International Commercial Arbitration 1985 as amended in 2006. The exception is the Australian Capital Territory, which has an outdated law on domestic arbitration in 1986, created on the model of the English arbitration law of 1979.

This research may be useful for researchers of Australian Civil Law as well as students from continental law countries.

Keywords: Australia, arbitration, administration of justice, equity, Civil Procedure.

1. INTRODUCTION

Australian lawyers Colin Loveday and Nicholas Mavrakis in their review noted that the primary method of handling and resolving major commercial disputes in Australia is litigation. This is partly due to the introduction of streamlined procedures for resolving commercial issues in most of the higher courts, and the strict application of the so-called “just quick and efficient” principles of legal proceedings. Many state courts have special branches designed to manage commercial disputes with streamlined interlocutory procedures. An increasing number of courts also have special judges to handle class actions to handle disputes of multi-claimant cases. Class actions are continually increasing in Australia (Loveday Colin and Mavrakis Nicholas, 2016).

The Australian judicial system as a whole is adversarial, and the relevant standard of proof in civil proceedings is the balance of probabilities.

Arbitration is also widely used in commercial disputes. As a rule, the parties choose their arbitrator(s) and are bound by the decision of this person or group, either by agreement or by law. Most court procedures actively promote alternative dispute resolution (for example, mediation).

2. METHODOLOGY

Firstly, the authors would like to state that this work is a research study explicitly prepared for students in order to lay out the basics of reforming Australian civil procedure law in the most accessible form. The information presented in this article should serve the purposes for graduate law students to prepare master's theses, reports, course papers and master's theses. (Miroshnichenko et al, 2017)

More detailed information on the legal regulation of civil proceedings in Australia until 2013 can be found in the works of Russian scholars: dissertation by E.M. Vakhtinskaya "The main features of the civil process in Australia" (Vakhtinskaya, E.M., 2013), as well as articles by Artemyeva Yu.A. (2018), Reshetnyak V.I. (2016), Solovyov A.A. (2016), and other authors. The works of Australian lawyers were studied: Chung Leon, Macknay Elizabeth and Poulos Elizabeth (2015); Coggins Jeremy (2011); Galatas Jennifer (2005); Loveday Colin and Mavrakis Nicholas (2016); Spigelman (2009); Stephenson Andrew & Andersson Astrid (2016).

The work also used a number of Australian regulations: Civil Dispute Resolution Act of 2011 as in force in 2015; Evidence Act of 2015 as in force in 2018, International Arbitration Act of 1974 as in force in 2016 (Cth) (IAA), state and territory laws.

There were also some other case precedents examined: Cameron Australasia Pty Ltd v AED Oil Ltd [2015]; Esso Australia Resources Ltd v Plowman - [1995].

3. RESULTS

3.1 Judicial system

The High Court of Australia is the highest court in the country and exercises both initial and appellate jurisdiction. Most of the issues heard by the High Court are appeals against the rulings of the state and territory appeals divisions of the Supreme Courts and the Federal Court of Australia. Such appeals are possible only after granting special permission to appeal. Issues heard by the High Court of First Instance include the problems of the constitutional validity of laws. High Court decisions are binding on all lower courts.

Each of the six states and territories of Australia has the Supreme Court, which is the highest court of that state and is subject only to the High Court of Australia. The state Supreme Court has unlimited civil jurisdiction. The Supreme Court considers in the first instance monetary claims above a certain threshold based on the amount specified in the statement of claim. In most of the Supreme Courts, there are Lists of commercial cases that are specifically designed to handle major commercial disputes. Such lists provide intensive business management and simplified procedures to ensure that issues are dealt with fairly, quickly, and efficiently.

Monetary requirements below a certain threshold are reviewed by lower courts in the hierarchy of state courts. The appeals division of state courts is the Court of Appeal or Full Court, which considers appeals against individual decisions of judges of the Supreme Court, decisions of some other state courts, and decisions of tribunals. The appellate court has both appellate and supervisory jurisdictions over all other courts in the state or territory.

In most states, there are two more levels of lower courts. District Court (in some states, called County Court)

is a "middle court" and has jurisdiction over most civil cases. Some county courts have lists of commercial cases. There is also the Local Court (in some states it is called Magistrates' Court), which deals with smaller civil disputes.

Along with the hierarchy of courts established under the laws of each state, there is also a hierarchy of courts dealing with disputes related to federal law.

The Australian Federal Court has jurisdiction covering almost all civil matters arising under the Australian Federal law. First of all, the Federal Court has jurisdiction to hear disputes on issues related to competition law and consumer protection, bankruptcy, corporations, industrial relations, intellectual property, federal property and taxation. The Family Court of Australia deals with the most complex disputes arising from Family Law. The Federal District Court deals with less complex disputes related to child support, administrative law, bankruptcy, industrial relations, migration, and consumer law.

3.2 Sources of Legal Regulation of Civil Proceedings

3.2.1 General Provisions

The English colonisation of Australia began in 1788. In 1827 the British government officially announced the establishment of English sovereignty over the entire continent. In 1900 individual colonies were merged into the Australian Union, which received the right of dominion. In 1931, following the Westminster Statute, Australia gained complete independence from Great Britain in foreign and domestic affairs. In Australia, as well as in other former colonies of England, the sources of regulation of legal relations in civil procedure, arbitration and mediation are modelled on the sources of the law of the metropolis governing this area. The following groups of sources of civil procedural law can be distinguished: 1) Statutory law (laws); 2) Delegated legislation (rules of the courts and practical instructions); 3) Common law (precedents).

Vakhtinskaya E.M. found that “at the present stage in Australia lacks the codification of civil procedural law. This is due to the huge share of delegated legislation and the peculiarities of legal technology, which is characterised by numerous reference rules." (Vakhtinskaya, 2013). Nevertheless, two normative acts that form the basis of the modern legal regulation of civil procedure in Australia at the federation level can be identified: the Civil Dispute Resolution Act 2011 and the Evidence Act 1995.

We shall underline that Australia is a federal state. Therefore, among the sources of legal regulation of civil proceedings can be identified federal sources and sources of states. Federal sources have a double meaning: 1) first, federal sources regulate the judicial proceedings in the federal courts of Australia; 2) second, these sources act as Uniform Evidence Law, which are then completely or with some changes perceived by the states and territories of the country.

It should immediately be said that the situation with uniform laws and other uniform regulatory acts is not that simple. If, in the field of evidence, a uniform act for the states and territories of Australia is the Evidence Act 1995, then in the sphere of regulation of the main stages of legal proceedings, the New South Wales Civil Procedure Act 2005 (NSW) is considered a uniform act. In the sphere of delegated legislation (rules of the courts and practical instructions) under the uniform normative act usually the Uniform Civil Procedure Rules are considered, i.e. uniform rules for all courts of the state or territory.

3.2.2. The 2011 Dispute Resolution Act was passed by the Australian Parliament on March 24, 2011, taking into account the reform of civil proceedings in the UK, also called the Lord Woolf reform. The law had the following common goals and objectives: 1) to change the adversarial culture of dispute resolution; 2) to ensure that citizens initially turn to alternative dispute resolution methods, and only then to the court; 3) if the dispute is nevertheless submitted to the court, then the range of contentious issues must be strictly defined in order to shorten the time of the trial.

The 2011 Dispute Resolution Act was amended in 2013 and 2015 concerning the Federal District Court of Australia (2013) and the merger of the tribunals (2015). The 2015 Merger Tribunal Act consolidated the Administrative Appeals Tribunal (AAT), the Social Security Appeals Tribunal (SSAT) and the Migration and Refugees Tribunal (MPT PPT). It was expected that the merger of the Commonwealth Tribunals would lead to annual budget savings of US $ 7.2 million. The 2013 Amendment Act to the Australian Federal District Court Act concerned the renaming of the Federal Magistrates Court to the “Australian Federal District Court”. The federal magistrates were renamed “Judges,” which more fully reflected their role and jurisdiction.

Currently, the outcome of the 2011 Dispute Resolution Act is being discussed by the Access to Justice Taskforce created by the Australian Government within the framework of a Strategic Framework for Access to Justice in the Federal Civil Justice System (Strategic Framework); and the National Dispute Resolution

Council (NADRAC). The issue of the legal regulation of “pre-action protocols” and other alternative methods of evidence disclosure is more thoroughly discussed.

3.2.3. In the Evidence Act of 1995 for the years 2015-2018 seven amendments were made that were related to the amendment of the Marriage law, the Trade law, the Law on amending Civil and Civil Procedural law, the Common law, and others. Australian lawyers noted that the Evidence Act 1995 applies to all litigation in all federal courts. Rules of evidence in state or territory courts are established in regulatory enactments adopted by the relevant state or territory. Evidence acts are based mainly on Common law, but also extend it and constitute the complete codification of the rules on evidence to date. (Loveday Colin and Mavrakis Nicholas, 2016).

The materials of the Australian Law Reform Commission contain information on the impact of the 1995 Federal Evidence Act to state law. Thus, on the basis of this federal law, the following state regulations were adopted: 1) New South Wales - the Evidence Act 1995 (NSW); 2) Queensland - the Evidence Act 1995 (QLD); 3) South Australia- the Evidence Act 1995 (SA); 4) Tasmania - the Evidence Act 2001 (Tas); 5) Victoria - the Evidence Act 2008 (VIC); 6) Western Australia - the Evidence Act 1995 (WA); 7) Australian Capital Territory – the Evidence Act 2011(ACT). In the Northern Territory, there is the Evidence Act of 1939 (NT) 1939), and there is no corresponding regulatory act in the Jervis Bay Territory. In conclusion, it should be emphasized that at the end of 2018 - the beginning of 2019, the Australian Law Reform Commission plans to adopt a number of regulations related to the third-party financing of legal proceedings by the so-called "judicial sponsors" and lawyers.

3.3 Australian Arbitration Law Reforms

Until 2010, domestic commercial arbitration was governed by state legislation based on the English Arbitration Act 1979. For reasons that domestic commercial arbitration in Australia does not provide benefits that were initially provided for by Unified Laws, Australian state and territory governments introduced a new internal arbitration regime modeled on the UNCITRAL Model Law on International Commercial Arbitration of 1985 to minimize judicial intervention and ensure the finality of arbitral awards while strengthening the arbitration process. In particular, the right to file an appeal to a court against an arbitration award has been significantly reduced (Loveday Colin and Mavrakis Nicholas, 2016).

According to Australian lawyers Andrew Stevenson and Astrid Andersson, the recent amendments to Australian arbitration law have increased the demand for arbitration. These amendments were designed to increase certainty in the finality of arbitral awards limiting the right of appeal and to strengthen the principle of confidentiality of the arbitration procedure. The amendments were met with great enthusiasm by the business community in Australia, in particular by those firms that are involved in the implementation of large construction projects. For the past five years, over 200 billion Australian dollars were spent on a number of energy and natural resource projects. In the course of completion of these projects, a significant number of disputes arose, many of which were subject to arbitration. The scale and complexity of these disputes are unprecedented in the history of Australian arbitration. Many claims exceed 1 billion AUD. According to Australian lawyers, lawsuits are poorly suited to solve these problems (Stephenson Andrew & Andersson Astrid, 2016).

An unforeseen side effect of the increase in the number of disputes submitted to arbitration was a relevant reduction in court proceedings and, as a result, the emergence of new judicial precedents. The Australian legal circles are now increasingly concerned that this reduction in the number of litigation delays the development of common law. This problem is particularly seen in the Construction law, where the final and binding arbitration is the default dispute resolution mechanism (Chung Leon, Macknay Elizabeth and Poulos Elizabeth, 2015).

3.3.1. The Evolution of Australian Legislation on International Arbitration

Australia has a dual legislative regime that regulates international and domestic commercial arbitration. The procedure for international arbitration is defined in the International Arbitration Act 1974 (Cth) (IAA). Domestic arbitration is regulated by state and territory laws (Commercial Arbitration Act 1984 (NSW); Commercial Arbitration Act 1984 (Vic); Commercial Arbitration Act 1985 (NT); Commercial Arbitration Act 1985 (WA); Commercial Arbitration Act 1986 (ACT); Commercial Arbitration and Industrial Referral Agreements Act 1986 (SA); Commercial Arbitration Act 1986 (Tas); Commercial Arbitration Act 1990 (Qld) (together the Uniform Commercial Arbitration Acts), s 55).

The 1974 International Arbitration Act (IAA) gave the force of law to the 2006 Model Law on International Commercial Arbitration in Australia. The 1986 Model Law was included in the Australian Law on May 15,

1989, and the amendments to the Law on International Arbitration 2010 replaced it with a version of the 2006 Model Law. Five amendments were made to the Law on International Arbitration in 2015-2016. However, no radical changes were made to the law. The International Arbitration Act also recognises the Australian Convention on the Recognition and Enforcement of Foreign Arbitration Decisions (New York Convention) and the Convention on the Settlement of Investment Disputes between States and Citizens of Other States (ICSID Convention) in Australia.

3.3.2. The Laws of the States and Territories on Domestic Arbitration,

Other than the 1986 Law of the Australian Capital Territory, are relatively new: they were adopted in 2010-2013. Until 1984, there was no uniformity in the states and territories of Australia in the regulations governing the arbitration. The role of state courts was limited to the execution of arbitration decisions. However, in all states, arbitration decisions could have been reconsidered if obvious errors of fact or law were made. Since 1984, uniform legislation was gradually introduced, based on borrowing the 1979 reform of the English Arbitration Act. The right to reverse an arbitral award challenged on the basis of an error of fact or law (as was done in the 1979 Act of England and Wales). This right was replaced with the right of appeal. However, this right was limited. The purpose of the reform was the to limit the number of arbitral awards that were subject to review by the courts.

In 1984-1990 Australian states and territories passed the first uniform laws regulating domestic arbitration (Commercial Arbitration Act 1986 (ACT); Commercial Arbitration Act 2010 (NSW); Commercial Arbitration Act 2011 (Vic); Commercial Arbitration Act 2011 (Tas); Commercial Arbitration Act 2011 (SA), Commercial Arbitration Act 2013 (Qld); Commercial Arbitration (National Uniform Legislation) Act 2011 (NT); Commercial Arbitration Act 2012 (WA). By the end of 2010, Australia's domestic arbitration regime was criticized for being outdated and not corresponding to the best world arbitration practice. In February 2009, Mr James Spiegelman, then-Chief Justice of the New South Court argued that the uniform arbitration legislation of the 1980s "was now hopelessly outdated" and became embarrassing. He called for a complete change to the legislation governing domestic arbitration and adoption of the UNCITRAL Model Law as an internal arbitration law (Spigelman, 2009).

3.3.3. Key Features of State Domestic Arbitration Law Reform

Since 2010, all states and territories (with the exception of the Australian Capital Territory) have cancelled their old legislation and adopted new arbitration acts on the basis of the UNCITRAL Model Law on Commercial Arbitration as amended in 2006. It was these reforms that revived interest in arbitration in Australia (Chung Leon, Macknay Elizabeth and Poulos Elizabeth, 2015).

There are three most significant amendments to the regime of domestic commercial arbitration: a) the circumstances that allow the suspension of proceedings and the transfer of the dispute to arbitration; b) the right of appeal; and c) confidentiality.

Reform to determine the circumstances under which the termination of proceedings in a state court and the transfer of a dispute to arbitration (Stay of proceedings) is allowed. Modern state and territory arbitration acts of Australia are based on the UNCITRAL Model Law on International Commercial Arbitration. Art. 8 of this law states: "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed". Australian scholars believe that the consolidation in arbitration acts of norms based on Article 8 of the UNCITRAL Model Law should lead to a significant increase in the number of cases considered in the country arbitrations (Stephenson Andrew & Andersson Astrid, 2016).

On the right to appeal: finality of the arbitration award. New laws on domestic arbitration have fixed rules for appealing arbitration awards based on Article 34 of the UNCITRAL Model Law. At the same time, the parties must agree on the possibility of appealing the arbitration award. However, the appeal will still be limited to the norms defined in paragraph 2 of article 34 of the Model Law. The requirements of Article 34 have not yet received a broad judicial interpretation in Australia. Australian lawyers cite as an example the 2015 Supreme Court ruling in the case of Cameron Australasia Pty Ltd v AED Oil Ltd. By refusing to grant permission of appeal, the Supreme Court noted that paragraph 34A "allows appeals on legal issues arising from an arbitration decision, but only in limited circumstances." However, the Court did not law specify what it meant by the "legal issues".

The Australian scholars indicate that for many large Australian commercial companies, a higher degree of arbitration certainty, providing a final resolution of the dispute, is likely to encourage them to choose

arbitration as their preferred forum for resolving disputes (Loveday Colin and Mavrakis Nicholas, 2016).

Presumption of confidentiality. As a rule, in common law countries, confidentiality was a sign of arbitration based on the principles of self-determination and the free choice of the parties so that both their dispute and its resolution are confidential. Confidentiality related to private arbitration in these countries meant that commercial information or arbitration awards would not be in the public domain. The reputational risk associated with the public submission of a dispute in an open court was also excluded. Before the adoption of the new laws on commercial arbitration in Australia, there was no presumption of confidentiality. In the 1995 case of "Esso Australia Resources Ltd v Plowman", the High Court of Australia stated that “there is no obligation to maintain confidentiality in arbitration agreements. Confidentiality was an obligation only if it was expressly stated in the arbitration agreement”. The position of the High Court of Australia contradicted the world arbitration practice. Based on this, many Australian lawyers have argued that this was an important reason why foreign companies used to refuse to arbitrate in Australia (Galatas Jennifer, 2005). New commercial arbitration laws secured confidentiality provisions in accordance with international best practice.

However, a number of judges in Australian state courts expressed deep concern that the increase in the number of cases referred to arbitration has an adverse effect on the development of common law in Australia. According to these judges, the parties to the dispute should return to legal proceedings to ensure the further development of law. Australian lawyers believed that such a call was unlikely to be entirely successful, even if lawsuits become more effective. To understand why this call for litigation is unlikely to solve the problem, one needs to understand why arbitration is becoming increasingly popular in Australia (Stephenson Andrew & Andersson Astrid, 2016). In addition to the usual motivational drivers, such as confidentiality, flexibility and finality of the award, other factors outweigh the balance in favour of arbitration (Galatas Jennifer, 2005).

An often discussed benefit of arbitration is that the arbitration procedure is less costly, both temporarily and in monetary terms than a trial. Perhaps this is not true. Back in 2007, Australian judge David Byrne stated that "lawyers seized the arbitration process". Since lawyers are trained to work in a more formal environment, they have transformed the traditionally less formal procedure of arbitration and made it more rigid and similar to the proceedings before a state court (Byrne David, 2007). Not all Australian scholars agree with the statement of D. Byrne. They believed that recent amendments to the Australian arbitration law had changed the legal culture of both arbitrators and practitioners: there was a growing awareness that refusal of proceedings in a state court and transferring the case to arbitration could improve the quality of the final product — getting a quick and fair resolution of the dispute.

4. FINDINGS

The evolution of australian civil procedure legislation is mostly based on similar reforms of the former metropolis - the united kingdom, as australian scholars expressly state. However, the federal government of the country makes its adjustments. The reforms of australian civil procedure legislation occur under the direct control of the australian law reform commission, which: 1) formulates proposals for specific areas of improvement of existing legislation; 2) publishes the proposals for extensive public comment; 3) summarises and generalises public discussions.

In the area of arbitration law, international arbitration practice and modern international standards of arbitration are of great importance for australia. Currently, arbitration proceedings in australia, both in the case of domestic and international arbitration, are governed in accordance with the provisions of the uncitral model law 1985. As amended in 2006. The exception is the australian capital territory, which has an outdated law on domestic arbitration of 1986, created on the model of the english law on arbitration 1979.

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