RUSSIAN COMPULSORY FINANCIAL OMBUDSMAN AND CIVIL PROCEDURE

KIRILL MOLODYKO,
National Research University Higher School of Economics
(Moscow, Russia)

https://doi.org/10.17589/2309-8678-2021-9-3-111-136

In international law, there is no directly prescribed duty of states to create the institution of financial ombudsman. However, in practice this institution is in real terms very popular for effectiveness in various forms. This paper analyzes the models of financial ombudsman in some of the leading European jurisdictions as well as the Russian model and its distinction from all these models. The successful introduction of compulsory financial ombudsmen according to a new Russian law is impossible without deep integration of this institution with the general civil procedure legislation. The Russian financial ombudsman is authorized by law to partially create for himself the rules for resolving disputes, which in essence gives him the right to create rules of civil procedural law. Since pre-trial settlement of certain categories of civil disputes in the financial markets through the financial ombudsman system is mandatory, providing him with unlimited discretion to determine the amount of the fee for considering a case, this can create a conflict of interest in his or her activities. The new Russian law is criticized for numerous inconsistencies with civil procedure legislation, without the elimination of which the practical work of the financial ombudsmen will be ineffective. I offer some legal approaches for the development of this institution. The competence of the further alternative dispute resolution (ADR) Russian institutions depends on the success or failure of the financial ombudsman.

Keywords: financial ombudsman; alternative dispute resolution; financial institutions; consumer; civil procedure.

Recommended citation: Kirill Molodyko, *Russian Compulsory Financial Ombudsman and Civil Procedure*, 9(3) Russian Law Journal 111–136 (2021).

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Introduction

In June 2018, the Russian parliament adopted and published a federal law that would substantially reform the institution of financial ombudsman. The law formally uses the term financial attorney, not financial ombudsman.[1] Nevertheless, the chief executives of the Central Bank of Russia, researchers, and experts, with very few exceptions, call the new institution the financial ombudsman. Therefore, I will also call it that.

There are already three ombudsmen with public law-based status in Russia. These are the Ombudsman for Human Rights in the Russian Federation, the Ombudsman for Children's Rights under the President of the Russian Federation, the Ombudsman for the Protection of the Rights of Entrepreneurs under the President of the Russian Federation (Business Ombudsman). However, none of them has the right to make compulsory jurisdictional decisions. And there are no cases when it would be mandatory according to law to appeal to them before the court.

Some lawyers could object with reference to the fact that then financial ombudsmen will in principle be no different from federal judges. The Russian academic

[1] Formally, all these institutions are terminologically called *upolnomochennyi*, that is, the word ombudsman does not apply directly. The new Russian institution is referred to as similarly formally called *upolnomochennyi* not ombudsman. At the same time, all of them in practice are referred to as ombudsmen, so I consider it appropriate to use this term.

and expert community has never agreed to recognize ombudsmen by judicial authorities. According to the Constitution of the Russian Federation, the Central Bank and the courts are independent of each other. So ombudsmen who are "quasi-federal judges" will be appointed by the Central Bank, not the President of Russia, like regular judges and they are not selected in accordance with the procedure established for the selection of federal judges. True, the candidature of the Chief Financial Ombudsman must be agreed by the President before his appointment by the Central Bank Board, but the President's approval does not apply to other sectoral financial ombudsmen.

In this regard, the financial ombudsman will be the first "pilot". Based on the results of whose work a decision will be made, is it advisable in the Russian conditions to transfer to ombudsmen the right to make jurisdictional decisions or is it inappropriate? It would not be an exaggeration to say that the competence of the further alternative dispute resolution (ADR) Russian institutions depends on the success or failure of the financial ombudsman.

1. International Dimension

Fundamentally, in international law there is no directly prescribed duty of states to create an institution of financial ombudsman.

However, The United Nations Guidelines on Consumer Protection recommends that Member States should encourage the development of fair, effective, transparent and impartial mechanisms to address consumer complaints through administrative, judicial and alternative dispute resolution, including for cross-border cases. Member States should establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant organizations to obtain redress through formal or informal procedures that are expeditious, fair, transparent, inexpensive and accessible. Such procedures should take particular account of the needs of vulnerable and disadvantaged consumers. Member States should provide consumers with access to remedies that do not impose a cost, delay or undue burden on the economic value at stake and at the same time do not impose excessive or undue burdens on society and businesses (para. 37). Member States should ensure that collective resolution procedures are expeditious, transparent, fair, inexpensive and accessible to both consumers and businesses, including those pertaining to overindebtedness and bankruptcy cases (para. 40).[2]

[2] The United Nations Guidelines for Consumer Protection (UNGCP) are "a valuable set of principles for setting out the main characteristics of effective consumer protection legislation, enforcement institutions and redress systems and for assisting interested Member States in formulating and enforcing domestic and regional laws, rules and regulations that are suitable to their own economic and social and environmental circumstances, as well as promoting international enforcement cooperation among Member States and encouraging the sharing of experiences in consumer protection." The Guidelines were first adopted by the General Assembly in resolution 39/248 of 16 April 1985, later expanded

The creation of the institution of financial ombudsman in Russia is obviously within the framework of the implementation of these recommendations. At the same time, I agree with A. Guznov that consumer protection, of course, is not limited to just the consideration of complaints and the provision of judicial and extrajudicial opportunities for the consumer to appeal against the actions of financial service providers.[3]

Alternative dispute resolution is widespread in European countries. The explanation is that the consumer most often more quickly, as compared to courts, receives not only a binding decision, but also a chance to settle a dispute with service providers without any risk and fees. Alternative dispute settlement is especially attractive when the value of the dispute is too low to turn to a court.[4]

Regarding the coordination of financial ombudsmen at the international level, in the EU, there was created FIN-NET which is a mechanism of extrajudicial dispute settlement in the financial services segment of the common market aimed at helping entrepreneurs and consumers avoid long and expensive court proceedings. This network especially focuses on those consumer disputes where the seller of the services is incorporated in a state different from the state of a consumer's residence. The network consolidates national schemes that are either designed for specific financial services (e.g. banking and insurance ombudsmen) or are competent over consumer disputes in general. The network is based on the 98/257/EC Commission Recommendation.[5] Norway, Liechtenstein and Iceland are also joined to the FIN-NET. The status of out-of-court dispute settlement bodies varies in different countries. They are created by market members, by the state as a non-state independent body, by consumer associations, etc. Decisions of these bodies can be binding as well as non-binding for the parties of a dispute.[6]

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by the Economic and Social Council in resolution E/1999/INF/2/Add.2 of 26 July 1999 (Jul. 4, 2021), available at http://unctad.org/en/PublicationsLibrary/UN-DESA_GCP1999_en.pdf. Recently revised by the General Assembly in resolution 70/186 of 22 December 2015, United Nations Conference for Trade and Development (Jul. 4, 2021), available at https://unctad.org/en/Pages/DITC/CompetitionLaw/UN-Guidelines-on-Consumer-Protection.aspx.

[3] *Гузнов А.Г.* Банк России как орган по защите прав потребителей финансовых услуг // Банковское право. 2014. № 1 [Alexei G. Guznov, *Bank of Russia as an Authority for the Protection of the Rights of Consumers of Financial Services*, 1 Banking Law (2014)] (Jul. 4, 2021), available at http://lexandbusiness.ru/view-article.php?id=2925.

[4] *Сергеев В.В.* О заседании Комиссии по законодательству в сфере деятельности кредитных организаций и финансовых рынков Ассоциации юристов России // Банковское право. 2010. № 4. С. 40–42 [Valerii V. Sergeev, *Meeting of the Commission on Legislation for Credit Institutions and Financial Markets of the Association of Lawyers of Russia*, 4 Banking Law 36, 40–42 (2010)].

[5] 98/257/EC: Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (Jul. 4, 2021), available at https://publications.europa.eu/en/publication-detail/-/publication/0c096a7b-99f5-4794-93e6-e2bc374308ff/language-en. Also for details *see* European Commission, Alternative Dispute Resolution in the Area of Financial Services, Consultation Document, MARKT/H3/JS D(2008), 11 December 2011 (Jul. 4, 2021), available at http://ec.europa.eu/internal_market/consultations/docs/adr/adr_consultation_en.pdf.

[6] *Фогельсон Ю.Б., Ефремова М.Д., Петрищев В.С., Румянцев С.А.* Защита прав потребителей финансовых услуг [Yuri B. Fogelson et al., *Protection of the Rights of Consumers of Financial Services*] 299 (2010).

One of the leading Russian banking law professors, A. Vishnevskii, compared and promptly described the following key models of financial ombudsmen existing in Europe such as the centralized UK model, the decentralized French model and the model of a professional association in Germany. The latter is in between the centralized and decentralized models. The French model is basically consultative mediation that has no binding force.[7]

1.1. Germany

In Germany ombudsmen serve with the national associations, for example Ombudsman der privaten Banker (Ombudsman Scheme of the Private Commercial Banks). The Ombudsman's decision is binding on the bank, but not on the complainant, where the amount involved in the dispute does not exceed EUR 10,000. The consumer doesn't pay a fee. If the complainant does not accept the Ombudsman's decision, he can – even after the decision has been announced – pursue the matter further before a court of law. The bank can only do likewise if the amount involved in the dispute is more than EUR 10 000. For disputes concerning application of the law on credit transfers or misuse of a payment card, the Ombudsman's services are available not only to private individuals but also to companies and professionals. The Ombudsman can't take action if the matter in dispute is already being dealt with by another extra-judicial conciliation body or by a court of law or if the customer's claim is already barred under the Statute of Limitations. No Ombudsman proceedings are possible either if witnesses would have to be heard in order to establish the facts of the case.[8]

1.2. France

The Ombudsman does not render a decision, i.e. he does not act as a lawyer or a judge for either party. He may suggest solutions but he is not permitted to settle a dispute by enforcing his decisions. Both parties can: refuse mediation terminate an ongoing mediation procedure, accept, change or reject the Ombudsman's proposals.[9]

1.3. The United Kingdom

In the UK, the financial ombudsman, as shown above, is a part of a broad system of ombudsmen who are empowered to adjudicate and make forced decisions on disputes.

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[7] *Вишневский А.А.* Современное банковское право: банковско-клиентские отношения: Сравнительно-правовые очерки [Alexander A. Vishnevskii, *Modern Banking Law: Banking-Client Relations: Comparative Legal Essays*] 84–85, 89–93 (2013).

[8] European Commission, ADR scheme – Germany – Ombudsman Scheme of the Private Commercial Banks (Jul. 4, 2021), available at https://ec.europa.eu/info/file/fin-net-member-germany-private-banks_en.

[9] European Commission, ADR scheme – France – AMF Ombudsman (Jul. 4, 2021), available at https://ec.europa.eu/info/file/fin-net-member-france-financial-markets_en.

The British centralized model can be simplified to be described as follows. Financial organizations were required to enter the financial ombudsman system in the part of their services licensed by the Financial Services Authority, for example, accepting household deposits. For some types of services that were not licensed by the FSA, for example, cash withdrawal from ATMs, payment of cheques, entry into the financial ombudsman system was voluntary. The ombudsman has to review cases on the merits based on what he regards as fair and reasonable with all the circumstances of the case taken into account. He has the right to order payment of money to a consumer including damages (financial and any other) and sums of money that the ombudsman regards as a fair compensation for damages or harm suffered by the consumer. The ombudsman also has the right to order to make certain actions. If a consumer does not appeal the ombudsman's decision to a court, it becomes binding and final for the claimant as well as for the bank. It is extremely important that the Financial Services and Markets Act provides ways of compulsory enforcement of the ombudsman's decision through the court system by way of a court order (sheriff order in Scotland). The ombudsman also designs procedural rules that guide his work (handbooks). It is important that the enforcement of the ombudsman's decisions through the judicial system by issuing a court order (sheriff order in Scotland) was envisaged.[10]

The declared purposes of new UK Regulations on the alternative settlement of consumer disputes passed in 2016[11] were four-fold: (i) to implement those provisions of Directive 2013/11/EU[12] that were not implemented by the ADR Regulations; (ii) to implement those provisions of Regulation (EU) No 524/2013[13] ("the ODR Regulation") which needed specific transposition into domestic law in order to make the obligations they contain enforceable; (iii) to make certain corrections to the ADR Regulations; and (iv) to postpone the coming into force of Parts 4 and 5 of the ADR Regulations to 1 October 2015.

The rules were aimed at regulating the following problems: 1) setting requirements to information that must be published by service providers about themselves and the products they sell; 2) creation of competent bodies for the ADR schemes certification; 3) setting standards such that ADR applicants must comply with the authorization certificate.

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[10] Vishnevskii 2013, at 87–89.

[11] Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 (SI No. 1392 of 2015) (Jul. 4, 2021), available at https://www.legislation.gov.uk/uksi/2015/1392/made.

[12] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Jul. 4, 2021), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0011.

[13] Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Jul. 4, 2021), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R0524.

The UK government authorized for the regulated segments the following bodies to certify the ADR schemes:

a) Ofgem – Office of Gas and Electricity Markets,

b) FCA – Financial Conduct Authority,

c) CAA – Civil Aviation Authority,

d) LSB – Legal Services Board etc.

The competent body for other economy segments is the CTSI – Chartered Trading Standards Institute (CTSI). Further, the FCA authorized the Financial Ombudsman Service (FOS) as the ADR certifying body for financial disputes resolution. A similar certificate was issued by the LSB to the Office for Legal Complaints of the Legal Ombudsman for alternative dispute resolution of disputes concerning remuneration of legal aid.[14]

1.4. Switzerland

The Swiss Banking Ombudsman has been operating since April 1993. Instead of acting as a judge, it acts as an intermediary between the parties and strives to develop a mutually acceptable solution. However, the parties are not bound by the decision and can either accept it or take legal action, for instance, by bringing a claim to a court. Nonetheless, the practice shows that the decisions reached by way of the ombudsman's mediation are most often accepted by the parties.[15]

The Swiss banking ombudsman is an independent mediator and takes no fees from the claimants. The ombudsman reviews individual claims against Swiss banks. Moreover, the banking ombudsman also heads the scheme of the Swiss Banking Association on dormant assets search. So individuals with knowledge of possible assets without contact or dormant assets, to which he or she is entitled, should contact the bank in question. In cases where the name of the bank is unknown, it has been possible since 1996 to conduct a search with the help of the Swiss Banking Ombudsman. A search can be conducted at any time once assets have become without contact – it is not necessary that the 60 years have passed. Because the assets that are contained in this centralized database are subject to bank-client confidentiality, an inquiry may only be made through the Banking Ombudsman and only with proof of entitlement. For such a research to be conducted, the claimant must submit documents that substantiate entitlement to the assets. This ensures that only those individuals who are in fact entitled to the assets do indeed receive the assets in question. If assets are found, the Banking Ombudsman contacts the affected bank, which conducts a final

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[14] *Ермакова Е.П.* Реформа гражданского судопроизводства Англии 2014–2017 гг. // Арбитражный и гражданский процесс. 2018. № 3. С. 53 [Elena P. Ermakova, *Reform of Civil Proceedings in England 2014–2017*, 3 Arbitration and Civil Procedure 48, 53 (2018)].

[15] *Певницкий С.Г.* Регулирование банковской деятельности в Швейцарии: институциональный аспект // Международное публичное и частное право. 2013. № 2. С. 38 [Sergei G. Pevnitskii, *Banking Regulation in Switzerland: Institutional Aspect*, 2 International Public and Private Law 36, 38 (2013)].

verification of the legitimacy of the claimant, and the contact between the bank and the client is re-established in this manner.[16]

2. Integration of the Financial Institution and Civil Procedural Legislation

I have no doubt that the powers of the financial ombudsman, if he is mandatory for the consumer, are essentially judicial in nature, even if formally named in the new Russian law as "pre-trial settlement."

P. Mikulskaia notes that the institution of financial ombudsman is traditionally a pre-trial instance. Therefore, the Ombudsman does not accept disputes over which court decisions have already been issued.[17] I cannot accept this argument. The reason for the ban for the Ombudsman to consider such disputes is not that the ombudsman is a non-judicial body. The reason is that it is prohibited in principle to consider the same dispute between the same subjects twice in two different trials. In this aspect, the ombudsman, who has received a dispute which had been resolved by the court earlier, is no different from a court that has received a civil case that has already been considered by another court.

Mikulskaia also states that, in order to exclude the very possibility of manipulating a bank with a limitation period, in Germany the limitation period is suspended while the complaint is being considered by the Ombudsman.[18] In my opinion, this is evidence of the fact that the German ombudsman is integrated into the civil procedure for resolving disputes by the courts, equating him to a certain extent with the judicial authority. Otherwise, it would be impossible to logically justify why the statute of limitation would be suspended. Unfortunately, the new Russian law says nothing about the suspension of the limitation period for the period of consideration of the dispute by the financial ombudsman. The law only blocks the consumer to circumvent a statute of limitations for appeal to court through an appeal to the financial ombudsman. So if the limitation period for claiming to court has expired, then the financial ombudsman also cannot examine the case.

I agree with the opinion of O. Ivanov, that the functioning of a financial ombudsman is characterized with the absence of procedural formalism, however, this does not mean complete absence of procedural elements, according to Code of Civil Procedure (CCP). Ivanov reasonably states, that it seems that the activity of

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[16] Contactless and Dormant Assets: What Happens When Contact with the Customer Is Lost, Swiss Banking Association (Jul. 4, 2021), available at https://www.swissbanking.org/en/topics/information-for-private-clients/dormant-assets/dormant-assets.

[17] *Микульская М.П.* Создание института омбудсмена в Российской Федерации // Банковский ритейл. 2011. № 4 [Maria P. Mikulskaia, *Creation of the Institution of the Ombudsman in the Russian Federation*, 4 Banking Retail (2011)] (Jul. 4, 2021), available at http://futurebanking.ru/reglamentbank/article/751.

[18] *Id.*

the financial ombudsman should be enriched not only with mediative elements, but also with the majority of constructions used in regular civil procedure. Failing that, dispute resolution by the financial ombudsman would be correlated with voluntarism, arbitrariness and lack of any legal forms.[19]

The need for the integration of the dispute resolution process by the financial ombudsman and the court was de facto indicated by V. Tartashev. He noted that if the financial ombudsman will deal with complaints by bank consumers in issues already settled by the court in favor of the bank, then the procedural actions of the creditor may be slowed down. For example, the court decided to collect the debt from the defaulter. In addition to the principal debt, at the request of the bank, the court awarded a penalty, which is calculated up to the date of repayment of the debt, not up the day of the court decision issue only. Such acts are appealed by the defaulter or by his attorney to the higher level court, however, even in this case a final decision may be made against the debtor. Then, by an application of the bank, the financial ombudsman steps into the procedure of debt collection and then the process of a defaulted debt can be delayed for a long time.[20]

Historically, in the first Russian draft law No. 517203-6 on the financial ombudsman (2012), the amendment to the CCP was offered that the credit institution would be refused acceptance of the claim for the court examination, if there exists a valid decision of the financial ombudsman by the same dispute. Obviously, the aim of this order was to integrate the ombudsman into the regular civil procedure. Unfortunately, there is no such norm in the newly (2017) adopted Russian law.

The Presidential Council for Codification and Improvement of the Civil Legislation, which consists of leading Russian civil law scholars, issues legal opinions on draft laws for the government and the parliament. The Council paid attention to the insufficient integration of both the first and second Russian draft laws with the Russian CCP. The first draft was criticized for 1) individuals not being able to receive the enforcement order directly from the ombudsman without subsequent claiming to court, 2) the statute of limitations not being suspended for the period of the ombudsman settlement and his ruling enforcement, 3) no appeal of the ombudsman decision to court by the parties.[21]

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[19] *Иванов О.М.* Заключение на проект федерального закона «О финансовом уполномоченном по правам потребителей финансовых услуг» // Банковское право. 2013. № 1. С. 24 [Oleg M. Ivanov, *Conclusion on the Draft Federal Law of the Financial Ombudsman*, 1 Banking Law 18, 24 (2013)].

[20] *Тарташев В.А.* Роль института финансовых омбудсменов при урегулировании задолженности // Банковский ритейл. 2010. № 1 [Victor A. Tartashev, *The Role of the Institution of Financial Ombudsmen in Debt Settlement*, 1 Banking Retail (2010)] (Jul. 4, 2021), available at https://www.lawmix.ru/bux/14345.

[21] Экспертное заключение по проектам федеральных законов «О финансовом уполномоченном по правам потребителей услуг финансовых организаций», «О внесении изменений в отдельные законодательные акты Российской Федерации в связи с принятием Федерального закона «О финансовом уполномоченном по правам потребителей услуг финансовых организаций»» (принято на заседании Совета при Президенте Российской Федерации по кодификации

Later in 2017, assessing the new draft law, which subsequently were passed after the revision in 2018, the Council, among other things, criticized it for the following.

1. The legal status of a financial ombudsman is unclear. In accordance with the CCP, the protection of civil rights in an administrative procedure is carried out in cases provided for by law. The draft law brings the status of a financial institution authorized to a quasi-judicial one, the attribution of its activities to the administrative procedure for the protection of rights may be questionable. The establishment of quasi-judicial systems deprives incentives to improve a genuine judicial system, the functioning flaws in which, apparently, give rise to the need for such legislative initiatives. Such a structure will meet its tasks only if the resolution of disputes will be more accessible, simple and effective for the consumer as compared to the regular judicial procedure.

2. The draft law does not contain rules that would embed the ombudsman office (de facto secretariat) into the existing dispute resolution system in Russia. Since his office can hardly be attributed to state bodies, is raises the question of violation of the principle *par in parem non habet imperium*.

3. The Council, which makes some administrative decisions relating to ombudsman activity, is formed from representatives of the state and financial organizations without the participation of representatives of consumer associations. So being, exclusively from representatives of one of the parties to the dispute and the state.

4. After the ombudsman ruling, citizens will have to turn their applications to a court where their case will be reviewed on merit, otherwise they will not receive the enforcement order. Perhaps, procedural codes should have a procedure of compulsory enforcement of the financial ombudsman's decision by analogy with the issuance of an enforcement order for the enforcement of an arbitral decision. During this procedure a court will examine the compliance of the ombudsman's decision with exclusively formal criteria.

5. The draft law provides for a financial organization the rights to appeal the financial ombudsman decision and for reimbursement of expenses effected by the enforcement of the ombudsman's decision, if the latter is annulled by the court. A disputable question arises about 1) the type of the judiciary procedure for this new category of cases in courts, 2) the content of the above-mentioned costs and 3) legal qualification of the right for their compensation. Apart from this, there is also an issue about the influence of the court's decision declaring the ombudsman's

и совершенствованию гражданского законодательства 28 января 2013 г. № 114-5/2013) // Экспертные заключения Совета при Президенте Российской Федерации по кодификации и совершенствованию гражданского законодательства 2013 г. [*Expert Opinion on the Draft Federal Laws on the Financial Ombudsman and on Amendments to Laws of the Russian Federation in Connection with the Adoption of the Financial Ombudsman Federal Law, adopted by the Presidential Council for Codification and Improvement of the Civil Legislation on 28 January 2013, No. 114-5/2013* in *Expert Opinions of the Presidential Council for Codification and Improvement of the Civil Legislation for 2013*] 262–263 (2014).

decision unlawful for sums already received by the consumer from the financial organization in accordance with such an unlawful decision.[22]

In part, this criticism from the academic community was taken into account by the legislator. Thus, the new law provides for the possibility of appealing against the decision of both parties and its implementation by a citizen without filing a lawsuit. However, the legal consequences of the court's annulment of the financial ombudsman's decision are not yet fully settled.

3. Creation of New Civil Process Rules by the Financial Ombudsman for the Stage of Mandatory Pre-Trial Consideration

There is no doubt that the activities of the financial ombudsman are civil procedural, since it resolves essentially the most ordinary civil disputes. The unchanged actions of the financial ombudsman unless annulled by the court, are enforced by the federal bailiff service in the same manner as the decisions of the civil courts.

Some procedural procedures are established by the new Financial ombudsman law, for example, requirements for filing a claim (Art. 17), admissibility of applications (Arts. 18, 19), suspension of the dispute (Art. 20). In fact, these are quasi-norms of the civil process, very similar to the CCP requirements for judiciary claims, actions of the court at the stage of accepting a statement of claim, jurisdiction of civil cases to the court, suspension of disputes, etc.

However, the law does not provide for the possibility of applying, by analogy with the law, the norms of the CPC. In these conditions, the financial ombudsman himself, or rather the Council of the Financial Ombudsman Service (hereinafter referred to as the Council), started the creation of a parallel civil process, that is, procedural rules for the consideration of civil disputes at the mandatory pre-trial stage of the financial ombudsman. In a certain sense, the acts of the Council became a new source of acts of civil procedural legislation.

In accordance with Article 7 of the Financial Ombudsman Law, the Council includes 15 members including representatives (generally, five) of the Central Bank of Russia, three representatives of the Government of the Russian Federation, one representative

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[22] Экспертное заключение по проектам поправок Правительства Российской Федерации к проектам федеральных законов № 517191-6 «О финансовом уполномоченном по правам потребителей услуг финансовых организаций» и № 517203-6 «О внесении изменений в отдельные законодательные акты Российской Федерации в связи с принятием Федерального закона «О финансовом уполномоченном по правам потребителей услуг финансовых организаций»» (принято на заседании Совета при Президенте Российской Федерации по кодификации и совершенствованию гражданского законодательства 16 октября 2017 г. № 169-1/2017) // Экспертные заключения Совета при Президенте Российской Федерации по кодификации и совершенствованию гражданского законодательства 2017 г. [*Expert Opinion on the Government of Russia Bills Drafts No. 517191-6 on the Financial Ombudsman and No. 517203-6 on Amendments to Laws of the Russian Federation in Connection with the Adoption of the Financial Ombudsman Federal Law, adopted by the Presidential Council for Codification and Improvement of the Civil Legislation on 16 October 2017, No. 169-1/2017* in *Expert Opinions of the Presidential Council for Codification and Improvement of the Civil Legislation for 2017*] 332–335 (2018).

of self-regulatory organizations of insurance companies, two representatives of associations (unions) of credit organizations (banks), two representatives of other self-regulatory organizations in financial markets, for whom participation in the financial ombudsman scheme is mandatory, one member of the financial ombudsman academic expert council, and the Chief financial ombudsman himself.

Since the law authorized submitting complaints to the financial ombudsman alternatively by the traditional paper-based file or electronically through a personal account on the ombudsman's website, the Council approved the relevant online filing procedures, detailing the relevant rules of the law.[23]

From the civil procedural law point of view, these are simply requirements for mandatory pre-trial claims. After all, the Supreme Court indicated in an aspect of the financial ombudsman that from 28 November 2019

> the legislator established a mandatory pre-trial procedure for the settlement of dispute, including in cases arising from voluntary personal insurance relations related to the provision of consumer credits.[24]

The Russian Supreme Court also declared illegal the establishment of a mandatory pre-trial procedure for the settlement of disputes in financial services agreements, as this would infringe upon the restriction on access to justice.[25] In other words, the financial ombudsman got a legal monopoly on mandatory pre-trial consideration of disputes under his jurisdiction.

The Council, for example, introduced a mandatory requirement for a consumer to inform a financial institution when applying for a bank account in case a consumer has

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[23] Положение о порядке ведения службой обеспечения деятельности финансового уполномоченного личного кабинета финансовой организации и личного кабинета потребителя финансовых услуг (утверждено решением Совета службы финансового уполномоченного от 7 декабря 2018 г. (Протокол № 1)) [Regulations for the Personal Accounts of Financial Organizations and Consumers of Financial Services in the System of Financial Ombudsman, approved by the Council of the Financial Ombudsman Service on 7 December 2018, Protocol No. 1]. *See also* Положение о стандартной форме заявления, направляемого потребителем в финансовую организацию в электронной форме (утверждено решением Совета службы финансового уполномоченного от 12 апреля 2019 г. (Протокол № 4)) [Regulation on the On-Line Standartised Claim Forms for Submission by Consumers to Financial Institutions, approved by the Council of the Financial Ombudsman Service on 12 April 2019, Protocol No. 4] (Jul. 4, 2021), available at https://finombudsman.ru/regulirovanie.

[24] Обзор практики рассмотрения судами споров, возникающих из отношений по добровольному личному страхованию, связанному с предоставлением потребительского кредита (утвержден Президиумом Верховного Суда Российской Федерации 5 июня 2019 г.) [Review of the Case-Law of Disputes on Voluntary Personal Insurance Related to Consumer Credits, approved by the Resolution of the Supreme Court of Russia on 5 June 2019], para. 4 (Jul. 4, 2021), available at http://www.supcourt.ru/documents/thematics/?year=2019.

[25] Определение Верховного Суда Российской Федерации от 5 февраля 2019 г. № 49-КГ18-61 [Decision of the Supreme Court of Russia of 5 February 2019 No. 49-KG18-61] (Jul. 4, 2021), available at http://vsrf.ru/stor_pdf.php?id=1738004.

submitted monetary claims. I do not claim that such a requirement is unreasonable in essence. Obviously, its goal is to ensure a quick payment to the consumer by the financial institution of the disputed amount of money or that part of which the latter does not dispute. I just want to emphasize that it is the Ombudsman that is legally the source of such a legal norm.

In addition, this wording indicates that, in the opinion of the Council, a consumer can also claim non-monetary claims on a financial institution, which can then potentially be the subject of consideration by a financial ombudsman. After all, the Council does not have the authority to establish the details of the requirements for appeals on issues that are not under the Ombudsman's power. However, unfortunately, it remains unclear what non-monetary claims that the financial ombudsman is entitled to consider.

Similarly, the Council obliged individual entrepreneurs when applying to the financial ombudsman to indicate the date of their state registration as an individual entrepreneur. I do not dispute the practicality of this norm in essence.[26] I pay attention only to the fact that the financial ombudsman is the source of this rule, which is, in its legal essence, a quasi-requirement for a lawsuit in a civil dispute introduced by the financial ombudsman, even on the basis of the powers granted to him by the parliamentary law.

The same can be said about the rules for calling the parties.[27] The Ombudsman has the discretion to consider the dispute in absentia, or in person with a call by the parties. The Council is entitled by law to establish rules for in-person considerations (Art. 20.6.) There is no doubt that most disputes will be resolved in absentia. However, if the Ombudsman considers it necessary, then he has the right to call the parties. In fact, the Council approved the rules for serving quasi-judicial subpoenas, which in Russia were traditionally always approved by the parliamentary law as a part of the procedural codes.

Articles 20, 21 of the Law consider the following situations:

– the submission by the financial ombudsman to the parties to the dispute of proposals for resolving the dispute of a recommendatory nature, which is an attempt to reconcile them;

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[26] Положение о стандартной форме обращения, направляемого финансовому уполномоченному в электронной форме (утверждено решением Совета службы финансового уполномоченного от 12 апреля 2019 г. (Протокол № 4)) [Regulation on the On-Line Standartised Claim Forms for Submission by Consumers to Financial Ombudsman, approved by the Council of the Financial Ombudsman Service on 12 April 2019, Protocol No. 4] (Jul. 4, 2021), available at https://finombudsman.ru/regulirovanie.

[27] Положение о порядке уведомления сторон спора о дате, времени и месте рассмотрения обращения финансовым уполномоченным в случае принятия решения о его очном рассмотрении (утверждено решением Совета службы финансового уполномоченного от 12 апреля 2019 г. (Протокол № 4)) [Regulation on Calling the Parties for Appearance by the Financial Ombudsman in the case of his Decision of Offline Consideration of their Dispute, approved by the Council of the Financial Ombudsman Service on 12 April 2019, Protocol No. 4] (Jul. 4, 2021), available at https://finombudsman.ru/regulirovanie.

– actions of the financial ombudsman in case the parties have concluded a settlement agreement,

– actions of the financial ombudsman in case the consumer has refused a requirement, as well as if it is voluntarily executed by a financial organization. In the civil law sense, we are talking about the termination of proceedings.

The Council specified these prescriptions of the law.[28] Although this concretization was mainly of a technical nature, the Council introduced some purely legal procedural rules that were absent in the parliamentary law. For example, an agreement between the parties to the dispute, that is, a quasi-settlement agreement (cl. 3.4 of the Council Regulation) can't contain conditions that violate the rights and interests of third parties protected by law. Of course, this procedural requirement is logical and substantiated in essence, but it is important to emphasize here that the Council legally established it is not the Parliament.

Also, I am in doubt about the authority of the ombudsmen to revive the procedural limit for filing a complaint, which is not limited by time or a clear set of grounds. Especially in conditions, when in the Russian model, if the dispute is under the jurisdiction of the ombudsman, the citizen cannot appeal to the court until the ombudsman first considers his conflict.

4. Controversial Conceptual Issues of the New Russian Law

At their core, ombudsmen will consider de facto ordinary civil lawsuits. The courts will automatically re-direct consumers to the ombudsman first, if their question was within the competence of the latter. Therefore, it is extremely important to establish its competence very precisely. Acquaintance with the new Russian law on financial ombudsman raises a number of controversial following issues.

4.1. Fees

Very controversial and provocative of a lot of expert discussions is the Council's statutory right to set a fee for the consideration of disputes. In this regard, the rights of the financial ombudsman are actually even greater than the rights of the court, since the state fee for applying to the civil court is established and fixed by parliamentary law, and the court does not have the right to amend it. The maximum

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[28] Положение о порядке осуществления финансовым уполномоченным процедур, направленных на урегулирование спора между его сторонами, а также о порядке оформления соглашения сторон об урегулировании спора (утверждено решением Совета службы финансового уполномоченного от 12 апреля 2019 г. (Протокол № 4); с изменениями, внесенными решением Совета службы финансового уполномоченного от 6 августа 2019 г. (протокол № 6)) [Regulations on the Procedure for the Financial Ombudsman for Settling Disputes, Including Formalising Dispute Settlement Agreements Between the Parties, approved by the Council of the Financial Ombudsman Service on 12 April 2019, Protocol No. 4, amended by the Council of the Financial Ombudsman Service on 6 August 2019, Protocol No. 6] (Jul. 4, 2021), available at https://finombudsman.ru/regulirovanie.

that the court can do is to reduce the fee for a particularly low-income person or defer its payment to within 1 year.

Now in 2021 the financial ombudsman is mandatory for all compulsory insurance disputes, except compulsory health insurance, regardless of the price of the dispute. Also the financial ombudsman is compulsory, but with a limit on the amount of consumer claims up to 500,000 Russian rubles, for both credit organizations (banks), microfinance organizations, credit consumer cooperatives, pawnshops and private pension funds.[29] In order to motivate all other types of companies operating on the financial market to voluntarily participate in the system, the Council imposed a reduced fee for them.

The Russian parliament entrusted financial organizations with payment for the activities of the financial ombudsman, making it free for citizens. Theoretically, the financial ombudsman takes upon himself all the costs if the consumer's file is completely tenuous. However, de facto this is a cross-subsidization system, because these bills are paid by financial institutions which lost other cases. How much should be paid by the latter is decided by the Council, which can indeed create some internal conflict of interests in the activities of the financial ombudsman.

So now the maximum fee for insurers by decision of the Council is 45,000 Russian rubles for the resolution of one dispute, i.e. about 500 EUR. However, a system of reducing coefficients applies, that is, benefits for the parties that have settled a dispute even if it is in the stage of consideration of the dispute by the financial ombudsman, but before his decision is made.[30] It is important to emphasize that the amount of 45,000 rubles for the ombudsman decision is also collected from the insurer, if the consumer claim is granted partially only. This is completely different from the rules for distributing the amount of the state fee in civil courts under the Russian Civil Procedure Code, where it is assigned to the parties in proportion to the percentage of the dispute resolved in their favor.

In other words, if, for example, in a Russian court, a civil suit is granted only by 5%, then the defendant finally compensates the plaintiff, as a general rule, only 5% of the state fee paid by the latter in all court instances cumulatively. However, if the financial ombudsman grants 5% of the consumer's complaint only, the latter does not pay anything, and the financial institution will pay the financial ombudsman 45,000 rubles. If the financial ombudsman grants, for example, 80% of the consumer's requirements, nothing will change in the aspect of the dispute resolution fee. Similarly, the consumer does not pay anything, and the financial institution will pay the financial ombudsman 45,000 rubles.

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[29] Current exchange rates are 1 USD = around 74 Russian Rubles, 1 EUR = around 88 Russian Rubles.

[30] О размере дифференцированной ставки взносов финансовых организаций (утверждено решением Совета службы финансового уполномоченного от 18 декабря 2020 г. (Протокол № 15)) [Regulation of the Differentiated Fee Rates for Financial Organisations, approved by the Council of the Financial Ombudsman Service on 18 December 2020, Protocol No. 15] (Jul. 4, 2021), available at https://finombudsman.ru/regulirovanie.

Thus, in the system of financial ombudsman, there are different rules for fees compared to the ordinary civil process. The law forbade the financial ombudsman from taking payments for the consideration of disputes from consumers, but provided his unlimited discretion is upon the question of how much to take from financial organizations. This system has obvious signs of "cross-subsidization." That is, the ombudsman took over all expenses in cases where the consumer turned out to be completely wrong, but de facto these expenses are subsidized by high fees in cases where the consumer is right at least in a small part of his claims. At the same time, the degree of incorrectness of the insurers does not matter. Moreover the fee could be several times more compared to the sum of the dispute. Such regulation can be useful from the point of view of creating motivation for financial organizations to resolve minor disputes with consumers peacefully.

If a consumer has a dispute with an organization that has obtained rights to the consumer through an assignment agreement, then such an organization is in some cases authorized to apply to the financial ombudsman to resolve the dispute with the consumer. Such an appeal of the financial organizations, regardless of the result of the review, will cost 15,000 Russian rubles, i.e. about 200 EUR.[31]

Unfortunately, a public conflict has arisen between the financial ombudsman and microfinance organizations, for which the Council has established rules for the payment of fees, which differ from the rules for insurers. So, microfinance organizations, unlike insurers, must pay a fee of 9,300 Russian rubles, i.e. about 105 EUR to the financial ombudsman, if the consumer's complaint is completely rejected. If the consumer's complaint against the microfinance organization is fully or partially granted by the financial ombudsman, the fee is 27,900 Russian rubles, i.e. about 315 EUR. In the opinion of microfinance organizations, the rule on payment of a fee when they totally win the case is unfair, and they demand from the financial ombudsman an equal non-discriminatory treatment towards insurers in this aspect. The counter-argument of the financial ombudsman is that there are many times more insurance disputes than disputes arising from the activities of microfinance organizations. Accordingly, the economics of considering insurance disputes is completely different, it allows not to take anything from insurers in the case of fully unreasonable consumer claims. Consideration of complaints against the actions of microfinance organizations in the same principle would be economically lossmaking for the financial ombudsman. Alternatively, the amount of the fee would have to be increased very significantly in cases where consumer complaints against microfinance organizations are granted at least partially.[32]

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[31] О размере платы за рассмотрение финансовым уполномоченным обращений третьих лиц, которым уступлено право требования потребителя финансовых услуг к финансовой организации (утверждено решением Совета службы финансового уполномоченного от 12 апреля 2019 г. (Протокол № 4)) [Regulation of the Fee Rates if Consumers Debts Were Assigned, approved by the Council of the Financial Ombudsman Service on 12 April 2019, Protocol No. 4] (Jul. 4, 2021), available at https://finombudsman.ru/regulirovanie.

[32] *Усов И., Шерункова О., Трифонова П.* Без вины поплатившие // Коммерсант. 2021. 18 янв. С. 7–8 [Ilia Usov et al., *Paying Without Guilt*, Kommersant, 18 January 2021, at 7–8].

The data demonstrates the first visual results of the work of the financial ombudsman. For the first year of his activity, 2019, until 28 November, he had the right to consider only disputes arising from compulsory motor vehicle insurance (OSAGO). Since 28 November 2019, he also began to consider other insurance disputes, except compulsory health insurance based ones. Only starting in 2021, he began to consider complaints against both credit organizations (banks), microfinance organizations, credit consumer cooperatives, pawnshops and private pension funds. So in 2019, the financial ombudsman made 30,909 decisions on the merits of disputes, of which 16,188 consumer petitions (around 52.3 %) were granted fully or partially. Insurers have appealed about 30% of decisions that are in favour of the consumers. As of 1 April 2020, only in 15 cases the court overturned the decision of the financial ombudsman.[33] Of course, these data will be supplemented and updated over time. Unfortunately, there is no statistic about how many complaints of the consumer were granted by the financial ombudsman in full, and how many in part. There is also no statistic on the monetary amounts of granted claims and their distribution by complaints. It is not known how many dissatisfied consumers having received a negative decision of the financial ombudsman, then filed civil claims against the insurers in court, as well as how the courts decided on these claims.

4.2. Power of the Financial Ombudsman over Third Parties

In practice, with the provision of financial services, complex constructions with the participation of third parties other than the financial organization and its client constantly arise; as an example, a loan secured by a third party property. Or, for example, the pledge keeper other than the bank or its consumer. The legislator found it possible to grant the financial ombudsmen the power to solve multilateral disputes from mandatory auto-insurance (OSAGO) with participation of auto repair companies as well as disputes involving the assignee of consumer credit. But if the financial ombudsmen solves such disputes, why can't they deal with other multilateral disputes? We are talking about mortgagors, loan guarantors, victims of traffic accidents, etc.

It is also unclear whether or not there is a procedural status of a third party when considering disputes by financial ombudsmen If yes, are third parties bound by the decision of the ombudsman; can they appeal to the court? Could the person who did not participate in the consideration of the dispute by the financial ombudsman, but believe that he decided to dispute about their rights and obligations, appeal to the court? Should the enforcement of the ombudsman's decision be suspended in case of such an appeal or not?

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[33] Совет службы рассмотрел годовой отчет о деятельности финансовых уполномоченных в 2019 году // Финансовый уполномоченный. 18 мая 2020 г. [The Council Reviewed the Annual Report on the Activity of Financial Ombudsmen in 2019, Financial Ombudsmen, 18 May 2020] (Jul. 4, 2021), available at https://finombudsman.ru/finnews/sovet-sluzhby-rassmotrel-godovoj-otchyot-o-deyatelnosti-finansovyh-upolnomochennyh-v-2019-godu/.

The next controversial group of issues is succession. So, should the heirs of a deceased consumer of a financial service have to apply to a financial ombudsman? How does the duty of applying to the financial ombudsman transform in the event of the opening of a personal insolvency (bankruptcy) procedure in relation to the borrower of the loan?

Unfortunately, the new Russian law is silent on all these issues. On these issues, it is obviously necessary, at least as a temporary option, for clarification from the Plenum (General Meeting) of the Supreme Court. But they will have to be settled by parliamentary law as soon as possible.

4.3. De Facto Appearance of a New Fourth Type of the Civil Procedure in Russia

It is well known that civil claims in the legal doctrine of post-Soviet countries are traditionally divided into three types: a) award, b) recognition, c) conversion.[34] In financial services, these groups look like this. An award lawsuit is for example, if a citizen demands to recover a sum of money from a financial institution or oblige it to make a client payment. A claim for recognition is, for example, a claim demanding recognition of an obligation to be fulfilled, including recognizing as absent the debt of a borrower under a loan agreement. A conversion lawsuit is, for example, a lawsuit to amend a contract, supposing that an individual condition that violates the consumer's rights is excluded from it. After all, it is often possible to keep the agreement on the provision of financial services as a whole, by excluding from it a single unfair condition, for example, on charging an illegal fee from the borrower. Also, the transformation of the contract lawsuits include the part of the claims for recognition of transactions invalid and installments, deferments of loans claims, even if procedurally, the latter are requested by borrowers from the courts not by filing lawsuits, but by a special after-trial procedure.

The absence in the law of the power, at least restricted by law, of financial ombudsmen to provide citizens, who are in difficult life circumstances, loan installments and deferments is an obvious shortcoming of the new law. Is it possible to recognize such a right by the Resolution of the Plenum (General Meeting) of the Supreme Court members? The question is very controversial. Most likely not, and appropriate amendments to the parliamentary law are necessary. After all, the existing right of courts to provide installments and deferments on loans is fully preserved. Under these conditions, citizens who simply need a deferment (installment) will first have to clutter the ombudsmen with thousands of unnecessary purely technical complaints just to "go through" the stage of the ombudsman and get the right to go to court for deferment (installment). If the right to grant deferrals (installments) is retained by trial courts and magistrates[35] under the supervision of

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[34] In Russian a) "*o prisuzhdenii*", b) "*o priznanii*", c) "*o preobrazovanii*".

[35] Magistrates which examine minor cases in Russia ("*mirovye sudy*").

appellate regional courts, the scope of the rights of the judicial branch and financial organizations will not diminish, if the same will be granted by financial ombudsmen under the control of the same appeals regional courts. It doesn't matter who will be the first to consider the consumer's request for a deferment (installment), if then the appeal of the side who disagrees will be considered by the same judges of the civil panel of the respective regional appeal court.

This issue is connected with the general question of which courts should examine appeals against ombudsmen decisions on merit, regional (appeal), district (trial) courts or magistrates for minor cases. In my opinion, the recent (February 2018) Ukrainian financial ombudsman draft law[36] reasonably proposes that complaints be filed to regional (appeal) courts. The Russian law grants this power to district (trial) courts. I support the Ukrainian approach. Indeed, one of the goals of the reform is to relieve the overloaded basic level courts as much as possible. In addition, one of the functions of the latter is objectively "sifting" relatively simple mass situations, and this function actually passes to financial ombudsmen. Complicated controversial disputes must be solved by regional appeal courts where the judges are more experienced. The state fee for such appeals must be much higher for financial institutions than for consumers of financial services.

Another controversial question is which courts should consider consumer complaints against decisions of the financial ombudsman, general courts or commercial courts? In Russia, with the introduction of the 2015 law on bankruptcy of individuals, it was first decided that these cases are to be conducted by general courts. But just before the law came into force, the parliament decided to refer these cases to specialized state courts to commercial disputes, which are called arbitration courts in Russia and traditionally considered bankruptcy cases of legal entities and private entrepreneurs on business debts.[37]

The law provided for the right of a consumer who disagrees with the decision of the financial ombudsman to file a civil lawsuit within 30 days. But if the financial institution disagrees, it should file a "complaint"[38] to the court in accordance with the procedure established by the CCP, but within 10 days. Such procedural differences between challenging a ombudsman's decision by a financial institution and a consumer, in my opinion, are incorrect. Whoever goes to court, it is essentially the same civil legal relationship between a financial institution and a consumer. In

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[36] Проект Закону України про установу фінансового омбудсмена [Draft Law of Ukraine on the Financial Ombudsman] (Jul. 4, 2021), available at http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=63512.

[37] In Russia, commercial (arbitration) courts are a separate vertical of state courts, which are connected to general courts, that consider civil and criminal cases, only at the level of the Supreme Court of the Russian Federation. Consideration of administrative disputes is also divided between general and commercial (arbitration) courts.

[38] In Russian "*zhaloby*."

addition, it is unclear under what norms the CCP should consider the "complaints" of financial organizations, because the CCP does not have a procedure for the consideration of any "complaints." In the Russian CCP, the term "complaint" is used only in the context of an appeal, cassation and supervisory review of trial court decisions. According to the CCP, the latter doesn't examine any complains, they examine only civil lawsuits[39] and "statements"[40] against notarial actions and decisions of bailiffs, but not "complaints." Even if it is understood that a financial office is an administrative body, then the consideration of "complaints" of their decisions is made in the administrative process according to the rules of the Russian Code of Administrative Procedure (CAP). And in those cases, the disputed legal relations are administrative, not civil. "Complaints" are examined according to the CAP only if a person challenges the decisions of administrative bodies. Considering the financial ombudsman as an administrative body, he solves the civil disputes, and the law directly prescribes the challenging of its decisions under the CCP, not the CAP.

It is possible that the wording "complain" in this context was borrowed from Russian labor law. According to the Labor Code of the Russian Federation, organizations may create labor dispute commissions from representatives of the employer and employees. Contacting such a commission is a right, not an obligation of an employee. The decisions of these commissions can be equally complained by both parties to a labor dispute under the same procedure to the court, but they are obliged to execute it. In my opinion, even in labor legislation, the use of the term "complain" is not the best option, because an employee and an employer need to resolve a labor dispute among themselves, not a dispute with the commission. To some extent, it is a relic of the old Soviet civil procedural legislation, under which the courts considered under the Code of Civil Procedure some types of "complaints". As already noted, the current CCP does not provide for the possibility to consider at the first instance any "complaints." In real life, even employees of Russian organizations, dissatisfied with the decisions of labor dispute commissions, file civil lawsuits against the employer as the respondent, not as complaints against labour commission decisions.

In March 2020, the Supreme Court of Russia issued an instruction to the courts, that when appealing against the decision of the financial ombudsman, neither he nor his employees should be summoned to a hearing, and simultaneously provided the following interpretations of the civil procedural legislation:

> Since in the civil procedural legislation there is no special procedure for appeal by financial organizations against decisions of the financial ombudsman, such claims are considered by civil courts in accordance with the general rules of first instance judiciary actions (subsection II of section II of the Code of Civil Procedure of the Russian Federation) <...>

[39] In Russian "*grazhdanskie iski*."

[40] In Russian "*zaiavleniia*."

> Since relevant issues are not directly regulated by procedural law, based on the general principles of administering justice in the Russian Federation (part 4 of Article 1 of the Code of Civil Procedure of the Russian Federation), the financial organization participates in the case as an applicant, the financial ombudsman and the consumer of financial services are involved in the case as interested parties.[41]

However, such list of parties in the Russian Civil Procedure Code is provided only for the so-called "special proceedings cases." These are, for example, the adoption of children, restriction of legal capacity, statements against the notarial actions performed or the refusal to perform them etc. But the list of types of cases for special proceedings is exhaustively defined by this code and does not include appeals against decisions of the financial ombudsman. Realizing this, the Supreme Court did not directly recognize such an appeal as cases of special proceedings. Accordingly, the Supreme Court has created by its clarification a new fourth type of civil proceedings. So, in Russia there are now four proceedings in the civil process: three directly prescribed by the Code such as lawsuit-based, simplified court order-based for some minor disputes, special proceeding, and de facto the fourth one for appealing the decisions of the financial ombudsman. In practice, the latter is a mixture of norms applied by analogy from the three types of the indicated civil processes, as well as from the administrative process under the CAP.

4.4. Some Directions of Development of Legislation on the Financial Ombudsman

It is also a very controversial question, one which is not answered in the new Russian law, whether or not financial ombudsmen or their staff should be participants in all these judiciary proceedings. That is, what of dropping the consideration of complaints from other consumers, to appear in such court hearings, or at least to prepare written memos on them? The argument "in favour": the financial ombudsman is a public authority, and when appealing their decisions they, as a general rule, except for judicial bodies, are summoning, so they are obliged to ensure their representation in court to give explanations. Similarly, a notary summoning must come to the court and give explanations if the applicant does not agree with the notarial act.[42] The argument "against": according to procedural legislation, bodies

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[41] Разъяснения по вопросам, связанным с применением Федерального закона от 4 июня 2018 г. № 123-ФЗ «Об уполномоченном по правам потребителей финансовых услуг» (утверждены Президиумом Верховного Суда Российской Федерации 18 марта 2020 г.) [Clarifications to the Application of the Federal Law of 4 June 2018 No. 123-FZ "On the Financial Ombudsman," approved by the Resolution of the Presidium of the Supreme Court of Russia on 18 March 2020] (Jul. 4, 2021), available at https://finombudsman.ru/wp-content/uploads/2020/03/Razyasneniya-po-voprosam-svyazannym-s-primeneniem-Federalnogo-zakona-ot-04.06.2018-g.-123-FZ.pdf.

[42] I believe that summoning notaries to the court in case of claims against their orders is not always justified, since often the notary has no legal interest in relation to the subject of the dispute, and the court decision will not affect the rights and obligations of the notary.

whose main function is to resolve civil disputes, that is, the courts, when appealing their decisions to higher courts, neither summon, nor submit written memos.

From the text of the law on financial ombudsman it is impossible precisely and unequivocally to understand what, nevertheless, the court should decide procedurally if it disagrees with the ombudsman: a) to annul the ombudsman's decision, b) to solve the civil law dispute between a financial institution and a consumer; c) a and b at the same time. Accordingly, it is unclear how exactly claimants should ask the court to act.

Since the law has a provision of the financial ombudsman personal property responsibility for making a knowingly unlawful decision, it is not clear whether it is possible to consider such a demand in a single procedure while challenging his decision.

Besides, the new legislation on financial ombudsman is not consistent with the legislation on notarial activity. In 2016, amendments were made to the Russia Notary Law, which expanded the lenders' ability to recover debts in a simplified manner, thus without trial, based on the notarial order. The latter may be put by a notary, for example, on the notarized loan agreement or pawnshop certificate.[43] It is not clear from the law of the financial ombudsman whether he is competent to consider disputes from consumer debts, in respect of which the notarial order is put. If so, should the relevant enforcement proceedings be suspended while the financial ombudsman considers the case or not?

In the context of appealing the decisions of the financial ombudsman, there are two more unclear legal issues. First, is it possible to appeal the non-final decisions of the sectoral financial ombudsmen on procedural matters to the court or to the chief financial ombudsman? The law does not provide for the right to such an appeal, otherwise it would be possible to block the consideration of the case on merit by filing a separate complaint against each of its procedural actions. At the same time, the general time period for resolving a dispute by the ombudsman, with some exceptions, is 15 days.[44] In my opinion, this is clearly not enough, and this limit will be massively violated.

With the exception of insurance disputes, where the competence of the Russian financial ombudsman is not limited to any maximum amount of the dispute, the law provides that he considers the appeals of consumers in their disputes with financial organizations, if the amount of the requirement of the consumer of financial services for the recovery does not exceed 500,000 Russian rubles. From this wording, the following controversial issues arise, to which there is no clear answer in the law:

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[43] *Куликов В.* Припечатают. Нотариусы разъяснили, как через них взыскивать долги // Российская газета. 2016. 19 дек. [Vladislav Kulikov, *Notaries Explained How to Collect Debts Through Them*, Rossiyskaya Gazeta, 19 December 2016] (Jul. 4, 2021), available at https://rg.ru/2016/12/19/notariusy-raziasnili-kak-s-ih-pomoshchiu-vzyskivat-dolgi.html.

[44] One of the few exceptions is if the consumer has ceded assigning his claim to a financial institution to a third party. In this case, the period for consideration of the appeal of the latter is 30 days.

1. Whether or not the competence of financial ombudsmen covers cases where the consumer does not request to recover money from a financial organization, for example, to exclude from the contract, an unfair condition;[45] to oblige the financial institution to disclose more information about its services, to recognize in whole or in part the contract as invalid, to make the financial institution unblock and provide the payment which was blocked on the grounds of financial monitoring, to recognize the borrower's obligation as fulfilled or not arisen at all etc.

2. Are financial ombudsmen authorized to consider complaints not only from the execution of the concluded agreement, but also to the refusal of the financial organization to conclude an agreement on the provision of financial services?

3. Should the ombudsman consider the above requirements in cases where they are connected by the consumer with the requirement to recover from the financial organization the amount of up to 500,000 rubles?

If it will be recognized that it is impossible to claim to the financial ombudsmen with requirements other than the recovery of money, the benefits of this institution will decrease significantly. Indeed, in practice there are a lot of such disputes. If the financial ombudsmen can consider such complaints only under the condition of a simultaneous application by the consumer of a claim for recovery of money from a financial organization, this may lead to an unnecessary mass application of artificial monetary claims by consumers, just to get to the ombudsman. There would be absolutely paradoxical situations. For example, a financial institution requires a consumer to pay 100,000 rubles more for a loan, and the borrower objects, arguing that he has already repaid everything. It would hardly be the right approach, that, in order to apply to a financial ombudsman to resolve a dispute, the borrower must first pay the disputed 100,000 rubles, and only then claim to the ombudsman with the requirement to recover the sum back from the financial institution.

Besides, in the civil court it is possible in one process to consider together the main issue plus moral injury and loss of profit. Failure to give ombudsmen the right to recover lost profits and moral damage, let's say with a reasonable ceiling to 100 or 200 thousand rubles, would lead to the "duplication" of many disputes.

A significant proportion of consumers who have received a positive decision of the ombudsman on the main issue, then go to the civil courts with claims for the recovery of moral injury and loss of profits. It is possible that the courts will not see it as very difficult to consider such claims of consumers, because the main issue of the dispute will already have been resolved by the ombudsman. But what was the reason for clogging up the courts with these derivatives by purely formal claims of consumers, if one of the goals of the reform is to relieve the courts?

Also in real life, counterclaims of consumers and financial organizations from a single contract often happen, which the civil court considers in one process. The system of ombudsmen, if they are obligatory for consumers, in my opinion, should

[45] Of course all contracts drafted by financial organizations.

not work as a "one-way road" when they consider only appeals from consumers. However, counter-appeals of financial organizations from the same legal relations are not entitled to be considered by ombudsmen under the new law. This is completely wrong. I cannot support the concept when, of the counter-claims of the parties on the same civil contract, the claims of one party are considered by the courts, and the claims of the other by the ombudsman.

Moreover, the law imposed the prohibition of simultaneous consideration of the case by the court and the ombudsman only "in one direction." So the ombudsman does not have the right to consider a dispute that was previously considered or is being considered by the court. But this rule does not work in the opposite direction. That is, the courts are not provided with procedural powers not to accept for consideration or to suspend consideration of claims of financial organizations, if there are consumer complaints on consideration by ombudsmen on the same issue. This may lead to situations where the courts and ombudsmen will at the same time actually consider the same dispute on the counter appeals of the parties. After all, there are no formal restrictions for financial organizations to file any claims to the court on issues that are under consideration by the financial ombudsman or that have already been considered by him. If the law is not amended, the financial servant will protect the consumer only if he managed to "reach" the ombudsman before the financial organization managed to "reach" the court. It is wrong to encourage such "races." On the other hand, unscrupulous citizens should not get a procedural opportunity just before losing the dispute in the court, to block it for a long time by sending a complaint to the ombudsman and then a judicial appeal against his decision.

Formally the decision of a financial businessman is even non-prejudicial for the court. The logic of the law suggests that the decision of the ombudsman, of course, must have a prejudicial force in all future disputes between the same persons. However, formally the cases when the parties are not obliged to prove circumstances in a civil court are fully prescribed by the CCP, yet there is nothing in it about the decisions of the Ombudsman.

The following questions are also unclear and, in my opinion, should be clarified as soon as possible:

– can financial ombudsmen reopen cases and review their former decisions in the context of newly revealed circumstances?

– what happens to the statute of limitations on the main obligation during the consideration of the case by the ombudsman, the appeal, and the execution of his decisions?

– is it possible to recuse the financial ombudsman in a particular case?

– are the interpretations of law made by financial ombudsmen and not annulled by the courts mandatory for further financial disputes with other sides? Especially considering the fact that several parallel sectoral financial ombudsmen will likely be appointed to examine some types of dispute?

Conclusion

It will be necessary to introduce into the Russian Code of Civil Procedure (CCP) a set of norms for a "quasi-civil process under financial ombudsmen." An alternative may be the general rule that the ombudsman has the right to be guided by analogy of the law with the provisions of the CCP, unless otherwise provided by the law on financial ombudsman. Relevant exemptions should be carefully considered by the research and expert community. At the same time, it would be quite sensible to provide an allotment of the places of financial ombudsmen to retired judges by making appropriate amendments to the law on the status of judges, limiting the list of activities in which retired judges may engage.

Among the promising ideas in the development of the institution of the financial ombudsman I include:

– granting him the power to consider disputes for the amount of more than 500,000 rubles, if all parties to the dispute agree to this. For example, financial institutions that wish to increase market confidence in them could commit themselves to raising this limit for their future disputes;

– granting the right to financial institutions that wish to increase market confidence in them to declare their refusal to appeal against future decisions of the financial ombudsman, which would exclude that the court will consider their complaints in the future;

– establishment of different rates of fee for financial organizations and consumers when appealing to the court against the decisions of the financial ombudsman;

– the introduction for financial organizations of the obligation to issue to each client a leaflet on general rights related to applying to financial ombudsmen;

– introduction of financial ombudsmen for all types of financial services. So far, the law provides the obligatory participation in the financial ombudsman system for only the following types of financial organizations: insurance companies (except for those providing exclusively compulsory medical insurance), microfinance organizations, consumer credit cooperatives, pawnshops, credit institutions (i.e. banks), and private pension funds. However, for other participants of the financial services market, for example, for some professional participants of the securities market, participation is voluntary. In addition, acute socially significant conflicts arise in the field of "near-financial services," in particular, debt collectors and services of the credit reporting bureaus. It also seems promising to give the financial ombudsman the right to consider complaints from small businesses, as well as to create a financial ombudsman to protect the rights of customers of banks which are in bankruptcy.

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Information about the author

Kirill Molodyko (Moscow, Russia) – Associate Professor, Senior Researcher, HSE-Skolkovo Institute for Law and Development, School of Law, National Research University Higher School of Economics (11 Pokrovskii Blvd., Moscow, 109028, Russia; e-mail: kmolodyko@hse.ru).