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LEGAL REGULATION OF THE PRE-TRIAL SETTLEMENT OF DISPUTES BY THE FINANCIAL PLENIPOTENTIARY

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Abstract

This publication addresses the issue of legal regulation in the Russian Federation of pre-trial settlement of disputes by a financial plenipotentiary, established by the Federal Law of June 4, 2018 №123-FZ "About the Commissioner for the Rights of Consumers of Financial Services" (hereinafter referred to as the Law on the Financial Commissioner). The aim of the research is to study the legal status of the financial commissioner in the Russian Federation in the pre-trial stage of the conflict, regulatory issues for the formation of the Financial Commissioner Service in the Russian Federation, as established in the provisions of the Law on the Financial Commissioner; procedure for the consideration and resolution of a dispute by the financial ombudsman in the pre-trial stage of its development based on the appeal of the consumer of financial services, areas of application of the Law on the Financial Commissioner on various types of legal relations. Attention is drawn to the issue of the presence in the current Law on the Financial Commissioner of “restrictive” regulations as regards the legal regulation of the procedure for the consumer of financial services to appeal to the financial ombudsman. The effectiveness and feasibility of introducing a pre-trial procedure for the settlement of a dispute by a financial commissioner for a consumer of financial services is evaluated, including from the standpoint of the speed of its resolution by the financial ombudsman at the pre-trial stage.

Keywords: Dispute, financial ombudsman, legal regulation, pre-trial procedure

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1. Introduction

The financial commissioner institute is currently operating in many states. Thus, the Credit Ombudsman and Financial Ombudsman Service operates in Australia, the Ombudsman Service operates in Germany with the Union of Private Banks of Germany. In Italy, a similar structure has a different name "The Banking and Financial Ombudsman Service" (Eurasian legal portal, 2020). The scope, order and organization of activities of the financial plenipotentiary in different countries are significantly differentiated, due to the difference in the legal, social, economic foundations of states. In the Russian Federation, the post of financial ombudsman has been introduced by the Law on the Financial Commissioner. It follows from part 1 of Article 2 of the Law that this position has been established to consider consumer requests for satisfying property requirements for financial institutions that have provided them with financial services. The explanatory note to the draft Law contains the grounds on which the federal legislator proceeded, introducing the position of the representative authorized to protect in the specified services. "In world practice, the institution of a financial ombudsman is an independent (public) body for the settlement of disputes arising between financial organizations and their clients — individuals. The experience of several European countries, in particular the UK, Ireland, Germany, shows that insignificant issues on small amounts of disputes may well be resolved within the framework of the institution of a financial ombudsman (commissioner).This allows you to ease the burden of work for financial institutions, saves the costs and time of the consumer, the supervisor, and also helps to avoid appealing to court" (Explanatory note, 2020).

2. Problem Statement

The legislative interest of the legislator listed in the explanatory note to the Law in introducing the post of financial ombudsman, which entailed, as a result, procedural changes in protecting the rights of consumers of financial services at the pre-trial stage, is not implemented in full. This is due not only to the incorrect presentation of the legislative definitions contained in the Law, but also to the presence of legal gaps, legal conflicts between the provisions of the Law and the procedural requirements to be applied in the event that a court case is initiated. Moreover, certain provisions of the Law, in principle, cause objective, justified doubts. So, for example, part 5 of Article 16 of the Law establishes that the appeal to the financial commissioner is sent by the consumer personally, with the exception of cases of legal representation. Based on the above legal norm, it follows that the special regulation established in this part does not provide for the possibility for the consumer of financial services to exercise the right to appeal to the financial ombudsman through representatives by proxy (except in cases of legal representation). At the same time, taking into account the development in the Russian Federation of legal relations on contractual representation, the question arises: is such legal regulation not unreasonably arbitrary on the part of the legislator and does not take into account the consumer's interest in the extrajudicial resolution of the conflict by participating in such a conflict by an authorized person? Is this norm not an unreasonable "narrowing" of possible forms of consumer participation in civil relations arising at the pre-trial stage (while the goal of such legal relations is directly to protect consumer rights)?

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The Law does not contain a specific answer to the question of whether the competence of a financial ombudsman is to consider, in an out-of-court manner, disputes regarding the specific performance of an obligation (for example, a requirement for an insurance company to repair a damaged vehicle). If the financial commissioner is competent to resolve such disputes, does the restriction established for monetary claims apply to these cases? There is no answer to the question whether the absence in the Law of provisions on the consumer's right to appeal the decision of the financial representative provided only to the financial organization and the lack of liability (material, property) of the ombudsman for the decision made if the latter is declared unlawful in court is procedural "justice".

Some of the legal problems cited earlier were brought to the attention of Voronov (2018), however, their reflection and permission at the legislative level has not been implemented to date.

3. Research Questions

The issue of pre-trial settlement of disputes in recent years is becoming increasingly important in the Russian Federation against the backdrop of an ever-increasing number of civil cases pending and resolved by the courts. In this regard, the legislator is attempting to reform existing conflict resolution procedures aimed at updating the application of extrajudicial procedures. One of the significant legislative shortcomings is the adoption of the Law on the Financial Commissioner. In a fair remark, "the text of this law raises many questions and doubts" (Kniazev, 2019).

The Law on the Financial Commissioner, introduced into the legal field of the Russian Federation, modified the institution of pre-trial settlement of a dispute between a financial organization and a consumer of financial services. This is clearly seen in the example of car insurance. After the occurrence of the insurance event, the consumer of the financial service must contact the insurance company with a request for insurance compensation. If the financial institution refuses to satisfy these requirements, or the financial service consumer does not receive a response to his appeal within the time period established by law, the consumer must send a claim to the financial institution, which the insurance company must consider and send a reasoned response to. Only after that the consumer is obliged to apply to the financial plenipotentiary with a statement containing a request to satisfy the property requirements presented to the financial organization that provided the consumer with financial services. According to the previously existing legal requirements, it was enough for the consumer to apply to the court to receive a "rejected" response from the insurance company or to wait for the expiration of the legal deadline for receiving an answer to his appeal. Thus, by the adoption of the Law, the essence of the freedom of the consumer of financial services, which consists in the right to choose his own concept of action, is minimized, since it is mandatory to go through an out-of-court procedure for resolving a dispute by contacting a financial plenipotentiary. Non-observance of this procedure entails for the consumer, when implementing judicial protection, the right to "adverse" procedural consequences: returning or leaving the claim without consideration (Clause 1, Part 1, Article 135, second paragraph of Article 222 of the Code of Civil Procedure of the Russian Federation). "Determining for the court is an appeal to the court in a certain procedural form" (Nikolajchenko, 2019).

The federal legislator provides for the phased entry into force of the Law on the Financial Commissioner. So, from June 1, 2019, this legal act applies to the car insurance market, from November 28, 2019 to insurance companies in general: the exception is insurance companies that provide compulsory

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health insurance; microfinance organizations are subject to the Law from January 1, 2020, and from January 1, 2021 - legal relations with credit organizations, credit consumer cooperatives, private pension funds, and pawnshops.

The doctrine expresses rather different opinions about the effectiveness and positive (negative) impact of introducing the institution of a financial ombudsman. Thus, a positive aspect of the ombudsman's activity was noted, expressed in the ability of the consumer insurer to turn to the authorized person at the pre-trial stage to resolve the dispute, indicating its nature and the size of the "desired" to recover and satisfy property claims (Ovchinnikova, 2019). Another positive aspect is seen in the fact that the procedure for resolving a dispute by the ombudsman at the pre-trial stage allows the consumer to receive, as compared to a court proceeding, the fastest decision to be enforced by a financial institution (Vishnevsky, 2018). At the same time, it is noted that "from the new dispute settlement procedure with the participation of a financial plenipotentiary, it follows that the legislator has increased the number of written appeals and pre-trial claims that the insured should write before his dispute can be examined in essence in court, and the time increases during which the insurance organization and the financial plenipotentiary will consider the dispute of the insured regarding the size of the insurance payment made" (Kondratovich, 2019). Voronov (2018) rightly noted, that

> if the authorized representative for the rights of consumers of financial services is vested with quasi-judicial functions, then what prevents them from endowing with similar functions (by creating relevant laws), say, an authorized representative for the rights of consumers of public services, the rights of consumers of public services, to protect the rights of certain categories of citizens, a variety of commissioners, obliging everyone who needs judicial protection to contact them to resolve the dispute on the merits? Then it will be possible to hope for an even more significant reduction in the burden on judges. But will one of the basic guarantees then be really real for citizens: "Everyone has the right to effective restoration of rights by competent national courts in case of violation of his fundamental rights granted to him by the constitution or law" (Article 8 of the Universal Declaration of Human Rights)? (p. 142)

The doctrine notes the most detailed regulation of out-of-court dispute resolution involving consumers in local acts of special institutions supporting consumers (Reznik, 2017), the impossibility of legal instruments to be archaic in the context of digitalization of society (Valeev & Nuriev, 2019), the need to specify the content of state regulations in the context of its digitalization (Chernysheva, 2019).

The normative regulation of the activities of the financial ombudsman has raised a number of issues that actually impede the due process of protecting consumer rights.

3.1. Arbitrariness of an unequal approach to the formation of the Financial Commissioner Service

The Financial Commissioner Service in the Russian Federation has its own structure, which is defined in Article 6 of the Law. According to this legal norm, the chief financial officer, financial plenipotentiaries in the financial services, the Council of the Service, the service for ensuring the activities

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of the financial agent, the expert council of the Service are part of the structure of the Financial Commissioner Service. Organizations whose representatives are members of the Service Council are named in part 1 of Article 7 of the Law. These include: the Bank of Russia, the Government of the Russian Federation, self-regulatory organizations in the financial market, combining insurance organizations, associations (unions) of credit organizations, other self-regulatory organizations in the financial market, whose members are financial organizations. For example, from the Bank of Russia, the Council of the Service consists of five representatives, from the Government of the Russian Federation - of three representatives; two representatives each are included in the specified composition from associations (unions) of credit organizations and from other self-regulatory organizations. The Service Council also includes the chief financial officer. A fund for financing the activities of a commissioner in the financial market is formed by property contributions made by its founder, the Bank of Russia, and financial organizations. The amount of property contributions of the Bank of Russia is determined by the Board of Directors of the Bank of Russia (Part 2 of Article 10 of the Law). For financial organizations, the payment of such financial contributions as a duty is enshrined in subsection 11 (1) of the Act.

It is noteworthy that in the system of the financial commissioner, in principle, there are no representatives of organizations protecting consumer rights. “The personality has always acted as a limiter of power” (Yurtayeva, 2019, p. 8), “the nature of private and public rights is different” (Bocharova, 2016). Based on this, the question arises: whose interests will the indicated participants of the financial market, in fact being its professional subjects, in the case of assessing the validity of the requirements of the consumer of financial services, first of all, protect and defend: their “lobbyists”, due to whom they exist, or the consumers who expect to receive money at the expense of these organizations?

3.2. Efficiency in protecting the law: a myth for the consumer?

The text of the Law stipulates that the entry into force of the decision of the ombudsman occurs after ten working days from the date of its signing (part 1 of Article 23). The deadline for the execution of the decision is set by the financial ombudsman, while it is legislatively defined so that it cannot be less than ten business days after the day the decision comes into force and cannot exceed thirty days from the same day. In case of disagreement with the decision of the financial ombudsman, the decision of the financial organization gives the right to judicial protection, carried out in the manner prescribed by the civil procedural legislation of the Russian Federation. A financial institution may exercise such a right within ten business days after the day on which the decision of the Ombudsman enters into force (Part 1 of Article 26 of the Law).Thus, it turns out that from the date the financial ombudsman makes a decision on the results of studying the consumer’s appeal, at least twenty business days must pass before the execution date, which is one calendar month, before his decision is executed by the financial institution in favor of the consumer. In the event that the time period for the execution of the decision by the financial ombudsman is determined at a later time period, respectively, the time period for the consumer to receive money is increasing. It does not clearly follow from a literal interpretation of part 1 of Article 23 of the Law which days (work or calendar) are referred to in the part of the norm on the impossibility of exceeding the thirty-day period provided by a financial institution for the execution of the decision of the ombudsman.

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3.3. Restriction in the order of consumer appeal to the financial representative: discriminatory legal regulations

The Law on the Financial Commissioner provides that the appeal of the consumer of financial services is sent personally to the financial commissioner, except in cases of legal representation. The appeal sent by the legal representative of the consumer must contain the attached documents on the powers of such a representative (part 5 of Article 16 of the Law). From a literal reading of the above definition it follows that the Law does not imply an appeal of a consumer of financial services to a financial ombudsman through a representative: only a personal submission of an application (except in cases of legal representation). At the same time, this restriction in the light of the contractual representation developed in the Russian Federation is nothing more than a more than necessary burden for the consumer. In the doctrine, the position was expressed on the inappropriateness of the absence of a legislative requirement on the consumer's appeal to the ombudsman through a representative by proxy (Kondratovich, 2019). From a purely administrative point of view, this norm allows achieving “positive” consequences, that is, a consumer’s actual personal appeal to the financial ombudsman for resolving the conflict that has arisen, and not an outside party in the absence of the consumer’s consent.

3.4. The financial commissioner's lack of responsibility for the decisions made: is this the way it should be?

The autonomy of the financial ombudsman in the exercise of his powers is regulated in part 4 of Article 2 of the Law and assumes its independence from state authorities of the Russian Federation, federal subjects, local governments, the Bank of Russia, officials and organizations. For a decision made by the financial ombudsman, with the exception of the case of a deliberately unlawful decision, he cannot be held liable.

4. Purpose of the Study

The aim of the research was to study the legal regulation of the procedure for the activities of the financial ombudsman in Russia. The objectives of the study were to determine the legal status of a financial ombudsman in the Russian Federation, to identify legislative gaps and contradictions in the normative regulation of its activities.

5. Research Methods

The research methods are as follows: comparative legal analysis, system-structural analysis, synthesis.

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6. Findings

6.1. Arbitrariness of an unequal approach to the formation of the Financial Commissioner Service

It seems that the legislative issue of a balanced representation of the interests of both parties ofa conflict is not sufficiently settled. The text of the original version of the Law contained provisions that the Service will include representatives of various organizations and associations representing and protecting the interests of consumers. However, after repeated legislative amendments to the draft, such provisions are not included in the final version of the text of the Law. At the same time, the lack of equal relations between the law and citizens, and the provision of equal legal protection conditions for citizens does not allow us to assert that all relevant aspects of a democratic state exist in such legal realities.

6.2. Efficiency in protecting the law: a myth for the consumer?

It seems that since initially in this norm, when calculating the permissible period for the execution of the decision of the financial representative, it was a matter of working days, the 30-day period, as the maximum possible period for the execution of this decision, should be calculated in working days. With this in mind, the maximum permissible time for the execution of a decision of a financial representative, unless otherwise specified in the decision, is, in the meaning of the Law, about 50 calendar days, that is, one and a half calendar months.

Civil cases considered in courts of general jurisdiction are subject to resolution at various procedural times. So, the district courts set a time limit for the consideration of the case before the expiration of two months, calculated from the date of receipt of the lawsuit. This rule applies if a shorter time for consideration of cases is not established in the Code of Civil Procedure of the Russian Federation. The term for consideration of a case by a justice of the peace is determined by the legislator before the expiration of one month, calculated from the date the claim was accepted for trial (part 1 of Article 154 of the Code of Civil Procedure of the Russian Federation). The tribal jurisdiction of civil cases initiated by judicial proceedings after the out-of-court settlement of the conflict by the financial ombudsman can be determined both in relation to a justice of the peace and in relation to district courts. Based on the established timelines for the consideration of civil cases, taking into account the timing of the entry into force of the decision of the financial representative, the legal provision on the "acceleration" of consumer protection is not confirmed with obviousness.

Moreover, in case of disagreement, the financial institution is given the right to appeal against the decision of the financial ombudsman in a judicial proceeding, however, the consumer of financial services is not assigned the right to initiate a judicial review of the legality of the decision. In such a situation, it turns out that the consumer, during the period provided by the financial organization for judicial appeal of the decision of the ombudsman, is in fact in a state of legal uncertainty, awaiting the execution of this decision, while the other party has the intention of challenging it (and can realize it on the last day of term). The abuse of procedural law can be expressed precisely in “deliberate delaying the entry of a court decision into legal force” (Maltsev, 2016, p. 55). Thus, the implementation of the extrajudicial execution of the

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decision of the financial representative entirely depends on the arbitrary discretion of the financial organization, which, in fact, is an unreasonable preferred approach in its favor.

In addition, the initiation in a court of law of a dispute on the legality of a decision of a financial ombudsman not only delays its execution for the period of the trial, but also actually indicates the ineffectiveness of the quasi-judicial procedure introduced, since a civil dispute over consumer property claims will be resolved in court. The idea of the predominant role of judicial protection in the state-legal mechanism for ensuring human rights and freedoms in this context does not lose its relevance (Tarusina, 2015).

6.3. Restriction in the order of consumer appeal to the financial representative: discriminatory legal regulations

Contractual representation in comparison with legal representation, which concerns a certain range of represented and representatives, can take place in almost all cases of participation of citizens as subjects of a dispute in various legal relations. The content of the powers of the contractual representatives and their limits should be specifically stipulated in accordance with the requirements of Articles 182 of the Civil Code of the Russian Federation, 53 Code of Civil Procedure of the Russian Federation. Since the power of attorney must reflect all the powers vested in the authorized person, this person, by virtue of the law and the power of attorney issued, is obliged to act in the interests of the authorized person, the “default” in the text of the Law on the right of the consumer of financial services to appeal through a contractual representative cannot be justified. It seems advisable to supplement Part 5 of Article 16 of the Law with a legal provision on the possibility of contacting a financially authorized consumer through a contractual representative (by proxy) with the submission by such a representative of documents confirming his status and authority. This situation will actually facilitate the participation of consumers in resolving the conflict in the pre-trial stage by contacting the financial ombudsman in any of the possible, most preferable and convenient forms for him.

6.4. The financial commissioner's lack of responsibility for the decisions made: is this the way it should be?

Obviously, the activities of the financial commissioner are strictly linked to his personal autonomy, not accountable to any state bodies and officials. Voronov (2018) rightly pointed out the concern about the possibility of the ombudsman retaining absolute independence when he makes decisions on the merits of disputes.

> If the court satisfies the claims of the financial organization, legal expenses from the financial representative shall not be recoverable. A deliberately unlawful decision is a circumstance that does not have legislatively established evaluation criteria, and therefore is difficult to prove. (Kondratovich, 2019, para 3)

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Basing on this, given the lack of legal norms on the possibility of assigning property responsibility to the ombudsman, A. G. Kondratovich formulated the conclusion about the prematureness of the approval of the significance and effectiveness of the introduced institution of dispute resolution at the pre-trial stage.

The absence in the Law on the Financial Commissioner of legal provisions of a regulatory nature regarding its responsibility for the quality, objectivity and impartiality of its decision actually "undermines" and minimizes the formulated principle of consumer protection. The absence of such legal norms can adversely and irrevocably affect the authority of the financial plenipotentiary formed by consumers of financial services, whose institution of activity has only recently begun to function.

7. Conclusion

The study conducted confirms the need for regulatory adjustment of certain legal provisions of the Law on the Financial Commissioner, including the provisions on the clarification of the legal status of the financial ombudsman with regard to his responsibility for decisions made.

The interpretation of the Law allows us to argue that the introduced procedure for pre-trial settlement of disputes by the financial ombudsman, which is becoming mandatory for all subjects of the financial market, does not increase the guarantees of consumer protection of financial services, on the contrary, imposing on the consumer the need for a "personal" passage of a "two-stage" system of out-of-court conflict resolution (avoiding contractual representation) and increasing the period of actual receipt of funds from a financial organization. At the same time, there are no guarantees of the final resolution of the conflict at this pre-trial stage.

Extrajudicial resolution of disputes between financial institutions and consumers of their services by contacting the financial representative at the pre-trial stage will have significant effectiveness in comparison with the judicial procedure of defense only when this quasi-judicial procedure is more accessible, highly effective for the disputing parties and more productive. The aim of the study was achieved: gaps and contradictions of the current legislation in this part were identified and suggestions were made to address them.

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