CLASS ACTIONS IN RUSSIA

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The article deals with the issues specific to Russia's system of class actions. The author of the article on the institution of class actions has taken in consideration the social and legal prerequisites for adopting such an institution as well as international best practices. Particular attention has been paid to the goals of class actions, such as forming a group, representing the interests of a group, financing a class action, as well as permissible limits to a class action.

Key words: collective action; civil procedural law; access to justice; goals of civil procedure; recovery of damages.

1. The significance and objectives of class actions

The institution of class actions, which has been developing over the past decade within the legal environment of different countries, is of high social importance being condition upon the specific circumstances of a particular society at the given level of development. The features of today's economic conditions determine the mass character of the processes, such as mass production, movement and consumption; thereby giving rise to the need for public judicial proceedings involving a large number of participants.[144] Societal needs initiated the idea of the private authorized attorneys to represent those for whome the access to justice was previously practically impossible, which, in turn, results in decision-making in the interest of society based on balancing the rights and obligations of various social groups.[145]

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144 M Cappelletti and B Garth, 'Access to Justice: The Worldwide Movement to Make Rights Effective. A General Report' in M Cappelletti and B Garth (eds), *Access to Justice* (Sijthoff, Giuffre 1979) vol I, 1, art 36.

145 B Garth, IH Nagel, SJ Plager, 'The Institution of the Private Attorney General: Perspective from an Empirical Study of Class Action Litigation' (1988) 61 S Cal L Rev 353, 360.

Access to justice is a basic right and plays a key factor in protecting and promoting other civil, cultural, economic, political and social rights. Studies carried out by international institutions – especially following the United Nations' declaration in the year 2000 of the Millennium Development Goals – indicate that the effectiveness of measures to resolve social issues is directly related to providing equal access to justice. Thus, the UN Special Rapporteur on Poverty and Human Rights has substantiated, in one of its reports within the context of the right to judicial protection, the necessity for all UN member countries to exercise the concept of class actions in order to protect the rights of socially vulnerable groups.[146]

In fact, the alternative to class actions in many cases is the lack of any claim; which, in turn, means there is no redress for a violation or infringement of rights. Indeed, many claims are not filed not because they are not of importance to the prospective plaintiff, but, rather, because of economic, social and/or psychological factors.[147]

Taking into account the various models of class action proceedings implemented in various legal systems, as well as the researches and practical views related to them, it may be noted that the main objectives of class actions are *providing access to justice, expediting proceedings and affecting public conduct*.

Access to justice is of particular significance in common law countries, where plaintiffs usually bear the financial burden of a claim, which includes establishing and presenting the facts of a case in court. In 1996, Lord Woolf noted in his report that access to justice is one of the main goals of any model of class actions.[148]

Due to the consolidation of a large number of claims into a general judicial procedure, a class action expedites proceedings for both the plaintiffs and the court, and also provides with more full representation of the interests of the parties affected by the misconduct of the tortfeasor. In countries under continental law, judges assume a significant burden of establishing the facts of a case. In this situation, a class action is aimed at expediting the process by decreasing the load on the court by combining cases of the same ilk that would otherwise overburden the registry.[149] At the same time, the need to resolve a large number of disputes arising from the same circumstances creates a related problem for the unity of judicial precedent, particularly in legal systems where a doctrine of stare decisis is not exercised. Class actions assist in resolving this problem.

The regulatory function of class actions is one of the most important features of this institution. To a large extent, due to the positive impact of the regulatory model of

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146 <http://www.ohchr.org/Documents/Issues/Poverty/A-67-278.pdf> accessed September 2013.

147 Ont Law Reform Comm'n, *Report on Class Action* (Ministry of the Attorney General 1982) vol I, 139.

148 Sir H Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice system in England and Wales* (Bernan Assoc 1996) ch 17, para 2.

149 J Walker, 'Introduction: Who's Afraid of U.S.-style Class Actions. A General Report' in D Maleshin (ed), *Civil Procedure in Cross-Cultural Dialogue: Eurasia Context* (Statut 2012) 421.

the American class action retains its essential features in spite of its serious criticism.. Prevention or positive *effect on public conduct* is a motivating factor in adopting and developing this institution. The very existence of a respective procedural law will restrain the impulses of potential respondents from taking counter action; thereby compelling them to implement voluntary regulation.[150]

The actual point of this article is not to incorporate all points of view related to the objectivess of class actions, but, rather, in our opinion, to be limited to the most important ones.

2. Class (representative) actions in Russia

The institution of class (representative) action is contained within the civil procedural law system in Russia: class actions, known in theory under the civil process as *public* and *organized*, have long been used to protect the rights of an indefinite number of persons.[151] Private class actions have also been adopted although this is a relatively new institution in Russia's civil procedural law system.

In the meantime, even though the special article 'Reviewing cases on protecting the rights and legal interests of a group of parties' was added to the Arbitration Procedural Code in 2009, regulation of relations to protect group rights is still fragmentary and oftentimes contradictory.

Today's comprehension of the social functions of justice and the role of the courts in society necessitates the understanding of the prospects of developing the institution of class action within Russia's civil procedural law system. The social purpose of justice as of a system designed to protect legal rights and defend the rule of law is enshrined in Russia's current civil procedural legislation as an objective of the judicial procedure. This leads to striving to improve the civil process by introducing institutions that protect individual rights as well as those of a collective interest.

When looking at the practice of foreign countries, one may see that these models of protecting collective rights have their own flaws, and they are constantly developing. Using the institution of class action in these countries gives rise to disputes in legal science and in the system of social relations. Should the Russian legislators copy foreign practice, or should the country adopt this practice by taking into account its current social, economic and cultural conditions?

Let us start with the fact that class actions are known and to a certain extent have currently been adopted in the main legal systems: common law and continental law. Consequently, at the current level of development of the law, the question is not whether there should be protection of collective rights; but, rather, which model of protection of collective rights should be created. And in this regard, convergence

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150 Per H Lindblom, 'Swedish report' in Maleshin (ed) (n 149) 529.

151 D Maleshin, *Russian Civil Procedural Law System: Doctor of Law Dissertation Abstract* (Moscow 2011).

and cross-integration of the civil procedural law systems of different countries is an effective means to develop the system of class actions.

Once the Russian Government approved the plan of action (the Road Map) for the development of competition and antitrust legislation,[152] the situation has become clearer to a certain degree. The direction of expected development, at least, seems to indicate the using of the basic elements of the American system, such as multiple damages and fees for successful law firms that have financed class action proceedings.

3. Problems of class actions

Five problematic areas may be indicated in improving the institution of class action:

1. Access to justice
2. Public oversight
3. Representing a group's interests
4. Limits of class actions
5. Basis for class actions

3.1. Access to justice

The main goal of class actions is to improve access to justice in order to protect rights collectively. The alternative to a class action in many cases is no claim at all, given that the time and money spent do not encourage those affected by an infringement to initiate separate claims.

As is well known, civil and arbitration proceedings in Russia are reviewed under the rules of two separate and independent procedures: civil proceedings that are regulated by the Civil Procedural Code; and arbitration proceedings that are regulated by the Arbitration Procedural Code.

The institution of private class (group) action is stipulated only in the Arbitration Procedural Code, under which civil cases and other economic disputes are reviewed in respect of legal entities and individual entrepreneurs. The institutions of public and organizational class actions are stipulated in the Civil Procedural Code.

When speaking about private class action as stipulated in the Arbitration Procedural Code, we come to the paradoxical conclusion that although it has been developed to improve access to justice, it actually serves a directly contradictory purpose.

So, what is the matter? In theory, in the civil process there are two main models of forming a class action: opt in or opt out, which correspondingly involves parties'

[152] Decree of the Russian Government No 2579-r of 28 December 2012 <http://asi.ru/upload_docs/Rasp_PravRF_28-12-2012_2579p.pdf> accessed September 2013.

deciding whether to join the class action, or whether not to join the class action. The Russian phenomenon does not apply to either model, for it is not held to imply the element of individual's will in the process of formation of the group. Indeed, there is not much significance in a party's stating that it will join a class action, as the legal status of such a party does not generally differ from the legal status of a party that has not made such a statement. This is because the Arbitration Procedural Code does not permit a party to refuse to join a class action.

The Arbitration Procedural Code of the Russian Federation (art 225.16(4)) stipulates that a court must not review a statement of claim if it discovers that such a statement of claim has been submitted by a party that has not chosen to exercise its right to join a class action against a same respondent on a same matter. In this case, the court explains to the plaintiff that it has the right to join a class action. If the court has already ruled on a class action case, and the decision has entered into force, then the proceedings on such a case cease.

If a party does not exercise its right to join a class action, then it does not have the right to appeal the court's decision. If such a party does not exercise its right because of a justifiable reason, such as not having received enough information on the court's reviewing of the class action, such a situation seems unjustified. In general, this means that a party that does not exercise its right to join a class action, but does not express its wish not to join such a class action, will not have access to justice.

According to the justified opinion of lawyers, this rule contravenes the very principle of class action, which is the right of each party to a class action to choose whether to participate in the class action proceedings, or whether not to participate in them.[153]

This situation contravenes the provisions of the Constitution of the Russian Federation and the provisions of the Arbitration Procedural Code itself. This serious flaw is the starting point to improving the Russian institution of private class action.

3.2. Public oversight

One of the main objectives of the system to protect collective rights in general and the institution of class action in particular, as already noted, is changing the conduct of those participating in social relations. Taking into account the political and socio-economic conditions of developing of the Russian state and law, we may talk about the excess of state regulation. Today, it is important for Russia to strengthen public oversight, to which we could confidently attribute the institution of class action.

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[153] GO Abolonin, 'Class Actions in Russian Arbitration Procedural Legislation: Prospects of Development' (2011) 3 Civil and Arbitration Process 43.

Granting the public institutions and private individuals the right to file a claim as a group of parties would be an effective means of public oversight in protecting the rights of (i) consumers; (ii) those who have suffered from environmental infringements; (iii) participants of financial markets; (iv) participants of corporate relationships, etc. Improving the institution of class action as a means of public oversight would allow for the 'possibility of expressing, in an orderly fashion, mass dissatisfaction in the frames of the legal process, where those participating could be an antidote against social collapse that exists where neither the courts nor the administrative bodies are able to defend the rights of citizens at the individual level'.[154]

3.3. Representing a group's interests

As noted above, Russian civil procedural legislation provides for claims, namely public and organizational class actions, which may be filed specially by authorized representatives to protect an unspecified number of persons.

Public interests are protected by protecting the rights of an unspecified number of persons. It is possible from these considerations that legislators have not provided for the possibility of filing class actions other than in those instances stipulated in federal law. For example, this concerns protecting the rights of an unspecified number of consumers.

The right to file a claim to protect an unspecified number of persons is granted only to those parties indicated in federal law: state and municipal bodies, as well as public organizations; and not one of the mentioned parties is obligated to file a claim to protect an unspecified number of persons, while separate individuals are not permitted to file a claim to protect collective interest.

The problem could be resolved by, firstly, introducing the institution of private class action into the civil process; and, secondly, by expanding the list of parties authorized to file public and organizational class actions.

It appears necessary to liberalize the approach to determining the qualified plaintiff 'as per ideology', which should include not only accredited organizations, but also organizations specifically created to conduct proceedings. On the other hand, it is necessary to use the capacity of law firms properly permitted to represent the interests of a group of parties. The practice of foreign countries shows that law firms specializing in class actions file a significant number of such claims.[155]

The effectiveness of class actions is largely determined by the financing of the collective processes, which depend on a significant amount of legal fees in processes where a large number of persons are participating. Foreign practice indicates that when taking into account the social and cultural specifics of this or that country,

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[154] *Report on Class Actions* (n 147) 130.

[155] See eg V Waye and V Morabito, 'The Dawning of the Age of the Litigation Entrepreneur' (2009) 28 Civ Just Q 389, 425.

financing could come from state funds, social funds, or from law firms working on a success fee basis.[156] At the same time, it should be noted that the professional community is talking about the crisis in the class action system in the United States, emphasizing the need of a clear change.[157] To a significant degree, this is related specifically to those who represent class action groups in several cases being the initiators of class action in order to earn substantial fees.

On the other hand, this is still a theoretical problem for Russia, not only because the judicial practice has not yet formed; but also because until now the largest problem is related to defending the lawyers' and law firms' fees in court, to which the American and European legal services markets are accustomed. The last emphasis to a large extent relates to the lack of unified standards of legal practice in Russia that could be provided by the legal profession itself, as this is done in the majority of European countries and in the United States.

3.4. Limits of class actions

Speaking about the limits of class actions, it should be noted that only private class actions (which, once again, because of the specifics of our civil process, are stipulated in the arbitration procedural code, but not stipulated in the civil procedural code) allow for the recovery of damages caused by an infringement. Public and organizational actions do not provide for such a possibility, and their outcomes may only establish the fact of an infringement and forbid such illegal actions in the future. As a result, it is not possible in reality to establish a violation of rights.

> In 2010, the Federal Anti-monopoly Service of the Russian Federation (the 'FAS') established the fact that a number of large Russian oil companies had abused their monopolistic positions for more than a year, and possibly longer, by maintaining artificially high prices on fuel, including gasoline. According to the preliminary calculations of analysts, the difference between the fair price and the artificially high price for gasoline could have been as much as 20%, which in absolute terms could total billions of dollars for the entire period of the violation. The FAS established this fact, and a court upheld the charges, meaning that the evidence had been impeccable; however, the rights of millions of drivers were not redressed, as our civil procedural system did not have the funds to consolidate a corresponding claim.

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156 See eg B Alarie, 'Rethinking the Approval of Class Counsel's Fees in Ontario Class Actions' (2007) 4 Can Class Action Rev 15; V Morabito, 'Contingency Fee Agreements with Represented Persons in Class Actions – An Undesirable Australian Phenomen' (2005) 34 Common L World Rev 201; S Issacharoff and GP Miller, 'Will Aggregate Litigation Come to Europe?' (2009) 62 Vand L Rev 179, 199; Austl Law Reform Comm'n, *Grouped Proceedings in the Federal Court* (Report No 46, 1988) para 252.

157 See eg L Rickard, 'The Class Action Debate in Europe: Lessons from the U.S. Experience' *The European Financial Review* (London, 4 December 2008) <http://www.europeanfinancialreview.com/?p=151> accessed September 2013.

This situation could be resolved by introducing a presumption of group representation on the part of the public organization created to protect the interests of its members. Such an organization must be legally competent to file a claim to recover damages, form a fund from the adjudicated amount, and distribute such an amount among the class action participants.

3.5. Basis for class actions

Given that public and organizational class actions do not have much real effect on redressing violations of rights because of the limitations on protecting such rights, it is worth touching upon the issues of private class actions.

The problem here is that the legislator has established the criteria of a general legal relationship as a basis for consolidating claims, namely to file a class action. This definition of 'legal relationship' is the most complicated and disputed in legal science. The courts oftentimes interpret the community of a legal relationship narrowly, which occasionally leads to refusal to review seemingly obvious class actions by referring to non-adherence to the criteria of a general legal relationship.

> The founding parties of banking funds – which were created by accumulating said founders' money through contracts of adhesion; and which were managed by a bank trustee – filed a class action against the bank for inadequately fulfilling its duties, seeking compensation for losses. The courts of three instances subsequently refused to review the dispute, stating that the applicants were not participants in a single legal relationship, inasmuch as their claims were based on individual contracts; therefore, they differed from each other in terms of their amount and formulation of losses. The case was sent to the Presidium of the Supreme Arbitration Court, which upheld the lower courts' acts.

In order to avoid this unsubstantiated limitation on private class actions, it is necessary to reject the current criteria of general legal relationship and use an approach similar to the one used in the US Federal Rules of Civil Procedure 1938[158] to consolidate group claims as per the law and facts, as well as typical claims.

Summarizing the abovementioned problems, it is worth emphasizing that effective development of one institution is not possible without adequately developing the procedural system itself as well as related areas. To a large extent, Russian legislators still are to resolve the issues described above, thereby modernizing the civil procedural system and creating the conditions to form and use class actions. Russia has the potential to create such a class action system – one that would be devoid of the flaws in foreign practice and would take into account the specifics of Russian legal culture.

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[158] The Federal Rules of Civil Procedure, 28 USC Rule 23.

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