

# Modern Russian Class Action Model

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## ABSTRACT

The institution of class action has been consolidated in the procedural legislation of many countries all over the world. It is obvious that in each jurisdiction such institution has its own peculiarities. The analysis of the legislation of many countries makes it possible to distinguish several types of class actions. At the same time, such classifications exist separately and describe only one aspect of the studied institution. A number of criteria are highlighted that allow one to compare and classify existing class action models in a more general way. The analysis of such criteria allows us to highlight two models that are applied globally, i.e. limited and unrestricted class actions. The criteria used describe various aspects of legislative regulation as well as practical application of class actions: from the branches of substantive law, where it is possible to use a class action as a means of protecting rights to the possibility of using all existing methods of protection. The Russian procedural legislation also provides for the institution of a class action. This article attempts to analyze the current model of the Russian class action lawsuit in terms of the criteria mentioned above. As a result of the study it can be noted that a limited class action model is enshrined in the Russian procedural legislation, at the same time, it significantly expands the possibilities of citizens and organizations to protect their collective interests. Regarding the Russian legal system there are still some major disputes related to the protection of the rights of large groups of people on the Internet; however, the international experience shows that this is inevitable. In turn, one can say that an institution is enshrined into the Russian procedural legislation that makes it possible to effectively ensure the protection of “new” collective rights.

**Keywords:** *class action, class proceeding, opt-in and opt-out models, legal remedies, ways to protect rights*

action appeared in the procedural legislation, which in 2019 underwent significant reforms.

## 1. INTRODUCTION

Mass production and consumption have reached their climax in the 21st century. This resulted in conflicts related to the violation of rights and interests of large groups of people. In the contemporary world not only “traditional” rights (corporate rights, the rights of consumers of goods, works of services), but also “new” rights (the right to a favorable environment, the right to data privacy) are violated [1].

The latest notable examples of such violations are the case of the car manufacturer Volkswagen (the so-called Dieselgate case), the case of users of the social network Facebook, and the case of users of software products Google. In this regard, the priority task of the civil process is to ensure the collective interest protection as well as the rights of specific participants in large groups of individuals [2].

One of the most effective means of protecting large groups of individuals and their interests is class action. This institution has become widespread throughout the world: from the countries of general law (Great Britain, USA, Australia) to the civil law countries (France, Germany, Sweden, Brazil, Argentina, etc.) [3-4]

The Russian legal system also follows the trend of creating collective remedies. So, in 2009, the institution of class

## 2. MATERIAL AND METHODS

### 2.1. Analysis criteria

The key characteristics of a particular model of protection of large groups of individuals differ significantly, reflecting both political differences and differences in the history of the development of the legal system and the culture of specific countries. There are four main criteria in the literature by which one can compare the existing regimes (models) of class actions among which the following are distinguished:

- the scope of class action
- the subject of the right for legal recourse with a class action
- the procedure for forming a large group of individuals
- the ability to use monetary compensation as a way of protection [3].

**The first criterion** describes those directions or areas where class actions are applicable. So, if you look at the laws of common law countries, you could find that class actions can be brought in all categories of disputes. In many

civil law countries, the class action is limited to one or more industries. For example, in France, class actions can be brought against consumer protection cases related to the protection of labor rights, personal data protection disputes, environmental protection disputes, as well as cases related to antitrust laws.

In Germany, the institution of class action can only be used to consider cases on the protection of investors' rights in the securities market, on the protection of consumer rights, and on the protection of the environment. The scope of class actions in Spain, Sweden, Belgium, Brazil is limited to consumer protection cases and cases related to antitrust law. In accordance with the Recommendations of the European Commission dated 11.06.2013 'On general principles of collective protection by filing claims for recognition and claims for compensation for damages in case of violation of EU guaranteed rights and freedoms' No. 2013/396/EU, the application of class actions is limited to cases of consumer protection. Such restrictions are enshrined in the relevant legislation of Italy and the Netherlands.

**The second criterion** answers the question of who has the right to file a claim in defense of a large group of individuals. Internationally there are several options for the regulation. In general, according to this criterion, class actions are divided into public, organizational and private [5-6].

A private class action lawsuit is filed by a citizen or an organization and allows them to act on behalf of, but not mandated by, the group and sue to protect the rights of its members or an indefinite number of individuals. A public lawsuit involves the filing of a lawsuit by a public authority to protect the rights of a certain group of individuals or an indefinite number of individuals. An organizational claim is filed by a specialized public organization operating in a particular area of public relations, in defense of the rights of citizens or organizations whose rights have been violated in this area. Such claims are most often filed in defense of the rights of consumers, participants in the securities market [5].

In common law countries, any member of a large group of individuals affected by an act/omission of a defendant has the right to seek the defense of that group. At the same time, this is possible only if certain conditions are met, the main one of which is that the representative plaintiff (a person who has filed a class action lawsuit) adequately represents the interests of the entire group.

In civil law countries, however, public and organizational class actions predominate. Some authors note that this is due to the fact that in the civil law countries the institution of complicity has received great development and application [5].

**The third criterion** is the way of forming a large group of individuals (or the way of involving potential group members in class proceeding). According to this criterion class actions (class proceedings) are divided into claims based on the "opt-out" and "opt-in" models [7].

In the opt-out lawsuits, all potential group members are assumed to be in the group unless they declare their unwillingness to join (that is, a wide range of people are members of the group). Such class actions have been

enshrined in the laws of the United States, Australia, Canada, Israel, and Colombia.

In the opt-in lawsuits, group members acquire this status only if their will is directly expressed for this [8]. According to the opt-in model parties who wish to be members of the group must take proactive steps to join the group. Such claims are common in the civil law countries (Germany, France, Norway, Finland, and Brazil).

**The fourth criterion** is the ability to use damages as a defense in a class action. The legislation of all countries that have implemented a class action is allowed to use such methods of protection of rights as a recognition of rights and injunctive relief (in the context of Article 12 of the Civil Code of the Russian Federation - suppression of actions that violate the right or create a threat of its violation).

At the same time, it is rare to secure the possibility of using such a method of protection as compensation for losses. Among the countries whose legislation allows the use of such method of protection are the USA, Sweden, Italy, Portugal, and the Netherlands (to a limited extent and through an amicable agreement).

At the same time, if to turn to the practice of the United States, not all categories of cases imply possibility of filing a class action for compensation for harm. So, in accordance with Rule 23 (b) (3) and Rule 23 (b) (1) (B) recovery of damages is possible in cases related to mass delicts caused by poor quality products, transport accidents, destruction of buildings, oil spills; in cases on the protection of the rights of participants in the securities market and in corporate disputes and other disputes on compensation for financial harm associated with illegal income [9].

These criteria allow the existing class action models to be subdivided into two groups, i.e. limited and unrestricted ones. It turns out that a class action can be called an unlimited action if the following conditions are met:

- claim can be brought against all categories of disputes;
- claim can be brought by individuals - members of a large group;
- developed according to the opt-out system;
- members of the group can use all methods of protection of rights, including damages [3].

In all other cases where some criterion are not included the class action should be considered limited.

### 3. RESULTS

#### 3.1. Characteristics of current Russian class action model

The Russian civil process does not stand still and is fully subject to the tendencies of internationalization and transnationalization, unification and harmonization [10], as well as the tendencies of convergence of two types of processes:, i.e. the investigative and adversarial processes.

The development of class action institution is a reflection of these trends. In this regard, one may believe it is possible to characterize the class action model enshrined in the Russian procedural legislation in terms of the above 4 criteria.

### 3.1.1. Introductory provisions

In 2009 [11-12], Federal Law No. 205-FZ introduced Chapter 28.2 ‘Consideration of cases on the protection of rights and legitimate interests of a group of individuals’ in the Arbitration Procedure Code of the Russian Federation, that is, in the Russian procedural legislation for the first time there appeared the institution of a class action, the model of which is comparable with international examples. The model of a class action enshrined in the Arbitration Procedure Code of the Russian Federation was quite reasonably criticized by the scientific community: The legal institution was not used in practice.

Firstly, scientists criticized the norms of the law that determine the conditions for filing a class action: the existence of a condition that all members of the group must be participants in one legal relationship created a situation in which it is precisely such a legal connection between potential members of the group (victims) that cannot arise. This condition also limited the use of remedies to the recognition requirements. Secondly, the procedural procedure for considering class actions, the rules on a court decision in a class action lawsuit were rather strongly criticized. Another disadvantage of the law was the lack of rules on the procedure for concluding a settlement agreement and executing a decision on class actions [13-15].

On 1 October 2019, Federal Law No. 191-FZ of 18.07.2019 ‘On Amendments to Certain Legislative Acts of the Russian Federation’ entered into force which introduced significant changes to the procedural rules for considering class actions in Russia. Let us note the general changes of a general nature. **Firstly**, the new law introduced the institution of class action in the Code of Civil Procedure (Chapter 22.3. - Consideration of cases on the protection of rights and legitimate interests of a group of individuals).

At the same time, Chapter 28.2 of APC was updated. **Secondly**, the rules on class action contained in the APC and CPC are unified and, in fact, they are identical with the exception of some peculiarities. However, the changes did not affect Art. 42, CACP. **Thirdly**, the main stages of the arbitration and civil proceedings are more clearly identified, reflecting the dynamics of the consideration of a class-action case [11].

### 3.2.2. Analysis

The first criterion is **the scope of the class action**. If we turn to the text of the APC and the Code of Civil Procedure (CPC), it can be noted that the range of cases in which class actions may be brought is not defined. This is one of the differences between this regulation and the previous edition of Chapter 28.2 of the APC, which directly indicated the

possibility of filing class actions in corporate disputes, as well as disputes related to the activities of professional participants in the securities market. The Supreme Court of the Russian Federation has supplemented this list with cases on bringing to supervisors to subsidiary liability in bankruptcy cases and cases on challenging regulatory legal acts.

Currently, both codes state that a claim under the group proceeding rules is possible if the relevant conditions are met. At the same time, there are no restrictions on the categories of cases either in the APC and CPC, or in other laws. Accordingly, class actions can be brought for any claim.

The next criterion is the **subject of the right to file a class action**. It was noted above that there are several global models: Class actions can be brought by individuals, public entities and specialized non-profit organizations.

According to the provisions of Art. 225.10 APC RF and Art. 244.20 of the Code of Civil Procedure of the Russian Federation, the following persons have the right to appeal to an arbitration court/court of general jurisdiction with a class action:

- a citizen and an organization that are members of this group of persons;
- body, organization and citizen who are not members of this group of persons, in cases directly provided by law.

Accordingly, it can be stated that procedural legislation grants the right to go to court with a class action lawsuit for a wide range of subjects, including public ones. These will include the prosecutor, state and local authorities, consumer protection societies, etc.

It is important to note that the existence of the right of a particular person to file a class action is verified as part of the group certification procedure [16].

In relation to the Russian model let us consider the **criterion of procedure of group formation**, i.e. the “opt-in” and the “opt-out” models. Based on the analysis of several norms enshrined in both the APC and the CPC, it can be seen that in order to become a member of a large group of individuals, a potential participant must take a number of active actions, in particular, apply for joining the corresponding group. Such actions are performed not only at the stage of consideration of the case, but also even before the filing of the relevant claim. Therefore, it can be concluded that a class action lawsuit in Russia is generally based on the “opt-in” model. However, in the science of the procedural law this conclusion is rather controversial [13].

Speaking about the procedure for forming a group, one of the important changes in the legislation on class actions should be noted. So, in accordance with the new rules, joining a large group is possible throughout the entire consideration of the case until the transition to the stage of judicial pleadings (previously, joining the group was limited by the terms determined by the court). Such a connection can be carried out not only by sending appropriate statements by mail or on purpose, but through the use of information and communication technologies.

**The last criterion** determines the possibility of using various methods of protection, including the recognition of rights, suppression of actions that violate the right or create a threat of its violation, and compensation for damages. In 2019, the APC and CPC established new conditions for filing a class action, including the following:

- 1) a common defendant in relation to each member of the group of individuals;
- 2) the subject of the dispute is the general or similar rights and legitimate interests of the members of the group of individuals;
- 3) the rights of the members of the group of individuals and the obligations of the defendant are based on similar factual circumstances;
- 4) the use by all members of the group of individuals the same way of protecting their rights.
- 5) at least five persons - members of the group of persons for the Arbitration Procedure Code of the Russian Federation, and at least twenty persons - members of the group of persons for the Code of Civil Procedure of the Russian Federation, have joined the demand to protect the rights and legitimate interests of this group of persons.

It can be seen that the legislator has abandoned the previously existing condition of a single legal relationship, the construction of which was difficult to imagine neither theoretically nor practically. The only possible examples of such legal relations could be common property relations. As a consequence, only claims for recognition satisfied this condition for initiating class proceedings.

The consolidation of new conditions, in the absence of legal restrictions on the scope of the class action and the methods of protection used, allow us to conclude that in accordance with the existing model of the class action, it is allowed to bring claims for recognition, prohibition and award. This circumstance significantly expands the scope of the use of a class action in Russia.

#### 4. CONCLUSION

To conclude our analysis of the Russian class action model, it should be noted that the class action in Russia is still limited. It is generally limited by only one thing - the rules for forming a group, namely the opt-in system. This does not mean that the current class action system is “bad” or “good”. In this case, the restrictions relate only to the involvement of the largest number of participants in class proceeding.

There are quite good reasons for not using the “opt-out” system, the main of which is the danger of abuse of the right to file a class action [15, 16]. From the point of view of other criteria by which the analysis was carried out, it can be noted that the Russian model is practically unlimited: there is an opportunity to use all methods of protection in all areas of the law.

At the same time, the right to file a class action is granted to the widest range of subjects. In this sense, procedural law provides ample opportunities to protect collective rights and interests through class action.

Accordingly, we can make a general conclusion that the modern Russian model of a class action is more consistent with the global development trends of this institution.

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