

PROBLEMS OF ACHIEVING LEGAL EFFICIENCY IN THE CONSIDERATION OF CLASS ACTIONS

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The paper examines the procedure for considering a class action in the Russian civil procedure in order to identify obstacles to the effective application of this institution. In developed foreign legal orders, group proceedings are a popular socially significant jurisdictional procedure for considering a large number of the same type of requirements, which allows optimizing the burden on the judicial system, ensuring the achievement of legal certainty and the effectiveness of judicial protection. As a result of the reform of group production, an institution *sui generis* appeared, which differs in many respects from foreign analogues. Given that group proceedings in Russia are still not in demand, the authors has identified obstacles to the intensification of this procedure, many of which indicate a superficial regulation of the procedural form.

The study used comparative legal, formal logical and systemic structural methods, which made it possible to give a comprehensive assessment of the identified gaps in the legal regulation of group proceedings in Russian civil, commercial and administrative litigation. The first of the identified problems is related to the lack of regulatory rules for certification of a group of persons. To initiate proceedings on a class action, it is necessary to join a significant number of co-plaintiffs, whose claims are based on homogeneous legal and factual circumstances. However Russian procedural codes do not regulate the criteria by which certification of a group should be carried out, and also do not establish rules for accepting

a court ruling on preparing a case for trial, allowing members to subsequently authorize. It is noted that for effective group proceedings it is necessary to issue an appropriate definition, which would define the criteria for the homogeneity of the grounds for claims and the method of protecting the violated right chosen by the applicant. The law should directly provide for the possibility of appealing against such a judicial act. Also, for the purposes of joining the requirements to protect the interests of a group of persons, it is proposed to publish a notice on the initiation of proceedings not only on the websites of the court and the defendant, but also in the official media.

The problems of implementing the qualities of the legal force of a court decision on a class action, such as exclusivity and prejudice, are also identified, since the law allows challenging the circumstances established when considering a class action when considering a personal claim of a member of a class who has not joined a class action in the future.

1. Introduction.

The institution for considering class action is intended to serve as a jurisdictional procedure for resolving claims for protection of a significant group of claimants. The effectiveness of this institution is dictated by its special public-legal goal – a fair and uniform resolution of mass homogeneous claims, ensuring legal certainty. The claims of many claimants against one defendant, based on homogeneous legal and factual circumstances, are resolved by one court, in one trial, and the force of the court decision applies to all members of the group, regardless of their personal participation in the case [1, p. 431; 2, p. 121].

The rules of class action litigations are known in foreign legal systems, primarily in common law countries, and this institution is actively developing in the countries of the continental legal system [3, p. 218]. In the Russian civil process, traditionally, following Germany [4, pp. 60-61], priority is given to a personal claim, and in conditions of cheapness and high speed of Russian justice, significant incentives for developing group litigation are not allocated. The initial model of group litigation provided by the regulations of chapter 28.2, Arbitration Procedural Code of the Russian Federation (put into effect from 21.10.2009), showed its lack of demand. In the order of group litigations, only a few dozen disputes were considered per year (the absolute majority of which are corporate). Federal Law No. 191-FL of 18.07.2019¹ introduced provisions on class actions into the Civil Procedural Code of the Russian Federation for the first time, and the procedure under consideration was reformed in Arbitration Procedural Code of the Russian Federation [5; 6]. The regulations for Administrative Procedural Code of the Russian Federation, in which only article 42 is devoted to a class action, have not changed. There is no doubt that the process of reforming

group litigation in Russia is a consequence of the effect of globalization and the convergence of the civil process on a global scale [7, p. 79]. This paper attempts to assess the effectiveness of the normative model of group litigation in the Russian civil process and to identify the problems preventing the intensification of this procedure.

2. Certification of the group of persons

A class action allows protecting the interests of a large group of people when a legal dispute affects social issues or represents a certain resonance. To qualify a claim as a group, commonality of issues of legal and factual basis (commonality) and typicality of the stated claims (typicality) is necessary [8, p. 88-95; 9, p. 88; 10, p. 90; 11, p. 400]. In class action litigation, general interests prevail over private interests, which are predetermined by the massive nature of violations of the rights and legitimate interests of group members [12, p.46]. In other words, general questions of law prevail over the differences in the individual requirements of the participants [13, p. 139]. This rule of superiority determines the active role of the court considering the case.

The possibility to initiate consideration of a class action in the case when it is based on the circumstances of violation of creditors' rights not only in one, but also in homogeneous legal relations became the result of the reform of group litigation in Russia in 2019. On the one hand it creates conditions to intensify the application of the procedure considered, but on the other hand, it imposes on the court and the plaintiff-representative the obligation to consolidate all possible requirements.

The conditions for considering claims under the rules of group litigation are formulated in part 1, article 225.10, Arbitration Procedural Code of the Russian Federation; part 1, article 244.20, Civil Procedural Code of the Russian Federation; part 1, article 42, Administrative Procedural Code of the Russian Federation: 1) there is a common defendant (co-defendants) in relation to each member of the group of persons; 2) the subject of dispute are common or homogeneous rights and legitimate

¹ Federal Law No. 191-FL of 18.07.2019 "On Amendments to Certain Legislative Acts of the Russian Federation". Collection of Legislation of the Russian Federation. 2019. No. 29 (part 1). Article 3858.

interests of the members of group 3) the rights of the members of group of persons and the obligations of the defendant are based on similar factual circumstances; 4) using the same method of protecting their rights by all members of the group of persons. The procedure for establishing these criteria for group litigation in the literature is commonly referred to as certification of group.

2.1 Certification of the group of persons at the stage for initiating litigation

To initiate litigation on a class action, by the day of a person's appeal to the arbitration court, at least 5 members of the group must join the request (part 5, article 225.10, Arbitration Procedural Code of the Russian Federation), and at least 20 members of the group must join the court of general jurisdiction (part 5, article 244.20, Civil Procedural Code of the Russian Federation; part 2, article 42, Administrative Procedural Code of the Russian Federation).

Certification of group of plaintiffs while considering a class action must be carried out under the conditions of voluntary adherence of a group member to such requirement. This thesis follows from the content of the principle of dispositivity and competitiveness of the civil process, and it is based on the idea of autonomy of the will of the subjects of private law relations. Schwartz M.Z. notes that the voluntary nature of joining in a political and legal context is justified in the case of unification when considering claims arising from homogeneous legal relations, however, in the case of filing a class action, the involvement of group members should be carried out already forcibly, even against the will of such participants [14, p. 31]. Meanwhile, in some cases, even in a single disputed civil legal relationship, it is not allowed to use methods of protecting creditors' rights if all of them do not initiate its implementation. Thus, in this way not procedural, but substantive and legal mechanisms of protection should be applied, since the relations existing outside the judicial process between the subjects of disputed legal relationship is material in the original.

2.2. Certification of the group of persons during litigation in court of first instance

Joining the claim for protection of the rights and legitimate interests of the group of persons is possible before proceeding to judicial debate, meanwhile, the procedural law does not regulate the consequences of joining new members of the group to the claim already under consideration and joining the case as a third party who does not declare independent claims, members of the group of persons who disagree with the claim (part 2, article 244.23, Civil Procedural Code of the Russian Federation; part 2, article 225.10-2, Arbitration Procedural Code of the Russian Federation). Formally, in such cases, it is necessary to apply general regulations on considering the case from the beginning (part 8, article 46, Arbitration Procedural Code of the Russian Federation; part 4, article 51, Arbitration Procedural Code of the Russian Federation; part 2, article 43, Civil Procedural Code of the Russian Federation), however, taking into account the given significant subject structure, the repeated resumption of litigation from the beginning will contribute to an excessive delay in the terms of the trial. In this regard, the procedural legislation should contain a regulation that directly excludes the application of regulations aimed at reviewing the case anew in the event of any dynamics on the active side (including the case of replacing the plaintiff-representative). The issue for certification of the group should be resolved at the stage of preparing the case for trial, and after the conclusion of the preliminary court session, the change of the dispute subject structure should not affect the dynamics of the process.

But there is other opinion on the above mentioned issue, for example, N.A. Sutormin, analyzing the model of a class action in Australia, suggests giving priority to such a form of control by the court over forming a group of plaintiffs as authorization carried out at the trial stage [15, p. 99]. We believe that certification of the group at the stage of preparing the case for trial is still preferable, since only such procedure allows providing a balance between procedural savings and the availability of judicial protection. Foreign experience testifies to the objective necessity of making a preliminary court decision on the possibility for considering the relevant case according to the rules of collective litigation. The law

practice of American courts interpreting the criteria of plurality, generality, typicality and adequacy (Rule 23, the Federal Rules of Civil Procedure) has been creating procedural rules for qualification of a dispute as a group one for decades. In such preliminary proceedings, there is a very specific subject of proof, and an interim decision on considering the case according to the rules of group litigation is made without fail; it can be appealed in an instance order [5, pp. 165-166; 16, p. 1898; 17, 180]. Similar procedures are typical for the British group litigation order and representative proceedings [18, p. 12].

Russian civil procedural codes regulate the organization of the stage for preparing the case for trial in proceedings of class action unequally. So, in article 225.14, Arbitration Procedural Code of the Russian Federation and article 244.65, Civil Procedural Code, special rules for conducting the stage for preparing the case for trial are fixed, aimed at notifying potential group members, as well as their joining a class action related to certification of the group of persons, but Administrative Procedural Code of the Russian Federation does not contain relevant regulations [19, p. 39].

The tasks for preparing a case for a class action for trial, among others, are to resolve issues on a structure of group of persons and the possibility for identifying other persons being participants in disputed legal relations and involving them in the case (paragraph 3, part 1, article 225.14, Arbitration Procedural Code of the Russian Federation; paragraph 3, part 1, article 244.26, Civil Procedural Code of the Russian Federation). Thus, the certification of the group is one of the priority tasks of the stage for preparing the case for trial in the procedure under consideration. The achievement of procedural saving and efficiency depends on how correctly certification will be carried out [20, p. 156; 21, p. 148-149]. We are convinced that if the participants disagree with the criteria for certification of the group, reflected by the court in the ruling on preparing the case for trial, such a judicial act can be appealed in an instantiation procedure, because otherwise obstacles to effective consideration of the case will be created, the access to justice may be restricted

and legal criteria of certainty will be violated. According to a general rule, court regulations on preparing the case for trial in Russian civil process cannot be appealed, however, in group litigation such procedure becomes an analogue of English and American preliminary decision on certification of the group, on which the correctness of the final judicial act depends; this fact explains the proposal on the admissibility of an instance appeal.

For the purposes of joining the collective action of new members of the group, in the determination for preparing the case for trial, the person who applied to the court with the requirements is obliged to notify them. As follows from the contents of parts 2-4, article 225.14, Arbitration Procedural Code of the Russian Federation and parts 2-4, article 244.26, Civil Procedural Code of the Russian Federation, it is the court that determines the procedure for such notification: publication of a message in mass media, on the court's website, personal notification of group members. Precise application of these regulations creates prerequisites for increasing the risks of group members, since there is a possibility of not receiving information about the filing and acceptance of a class action. Russian procedural law does not set a specific procedure for informing potential members of the group personally about the initiation of group litigation, these issues must be resolved by the court independently and, obviously, impose the costs of notifying the participants on the plaintiff-representative, unless the agreement of the participants of the group of persons is provided in other respects (which follows from the plaintiff's obligation to send the defendant a copy of the claim with attachment and disclose available evidence in advance).

As indicated, the law provides a cheap and simple obligation to publish a proposal to join the demand in the mass media [22, p. 26]. At the same time, the probability of a person receiving information through clearly undefined mass media is quite low, due to the breadth of distribution of mass information resources. Therefore, it is necessary to fix the obligation to publish a message on the possibility of joining a class action on the court's website, on the defendant's website (if there is such a resource), as well as to determine a specific

information resource in which messages on the possibility of joining a class action will be published without fail (by analogy with the publication of messages on bankruptcy or liquidation of legal entities). The simultaneous using several methods of notification for starting group litigation will ensure greater efficiency of the process [23, p. 60].

The USA courts often use e-mail, social media, messengers, information sites and other services to ensure proper notification when certifying a group [24, p. 986]. However, such a method for conveying information cannot be considered effective due to the lack of reliable information about the notification of a particular person (it will often be difficult to confirm that account belongs to a particular person).

In addition, in order to optimize the process of reviewing the claims of plaintiffs who have not joined the class action, it is necessary in the future to introduce electronic legal proceedings services, including “Justice Online super-service”², when filing a claim in electronic form, to automatically check previously considered class actions against the same defendant and notify the plaintiff about it. The modern level of digitalization of judicial proceedings involves an active using the resources of State Automated System “Justice” and “Electronic Justice” system (<http://arbitr.ru>) by the courts, allowing to personalize the participants of the dispute from the relevant directories by identifiers (Taxpayer Identification Number, Main State Registration Number, passport data, Insurance Number of an Individual Personal Account, etc.). Therefore, information about the initiation of proceedings on a class action must also be transmitted to the relevant systems used by the courts.

Effective notification of the group members and reflection of relevant information in the resources of electronic court proceedings software systems is necessary not only to consolidate applications for joining the requirements, but also to minimize the risks of parallel consideration of personal claims of members of such group with an identical subject, based on homogeneous circumstances, to the

same defendant. Now, in fact, the risks of simultaneous consideration of a personal claim and a collective claim from homogeneous legal relations are shifted to the defendant. The legal nature of group litigation does not allow simultaneous consideration of identical personal and group claims, therefore, proceedings in the case of a person who filed an independent claim are suspended, including the case, if the claim filed to protect the rights and legitimate interests of a group of persons is filed later than appeal to the court of the specified person (part 6, article 225.16, Arbitration Procedural Code of the Russian Federation; part 6, article 244.25, Civil Code of the Russian Federation; part 5, article 42, Administrative Procedural Code of the Russian Federation). In this regard, in order to ensure the effectiveness of distributing the court’s decision on a class action to all members of the relevant group, it is necessary not only to certify carefully the participants in the disputed legal relations, but also to ensure their proper notification.

3. The judgment validity qualities on class actions

All types of claims can be resolved in group litigation: recognition, award and transformative claims. Meanwhile, those persons, joined the application for the protection of rights and legitimate interests of the group of persons, receive direct protection through the dissemination of deliverability quality (obviously, opt in model can be used in this way). However, the potential for extending the decision on a class action to all members of the group of persons who did not join the class action undoubtedly exists at least in the recognition requirements and transformative claims. Special requirements are imposed on the court’s decision in group litigation, since it must clearly define the group of persons receiving protection from a court decision so that when considering subsequent personal claims of persons who did not join the application, there would be no questions with the prejudicial meaning of these judicial acts [25, p. 374]. Based on the regulation content of part 7, article 225.16, Arbitration Procedural Code of the Russian Federation (there is no similar regulation in the Civil Procedural Code of the Russian Federation) the right to file a personal claim after considering

the case in the order of group litigation belongs to the creditor only in “valid” cases, which, distracting from unsuccessfully formulated regulation [26, pp. 295-296], means the right of the plaintiff to present an independent claim in the cases where such a person needs individual judicial protection. So, when the right of a group member cannot be recognized as protected by the decision on a class action (for example, when the person claims for an award).

A court decision in group litigation is made according to the general rules established by the procedural law. Therefore, in the case of resolving claims involving individual protection of group members, joined the application, the operative part of the judicial act should contain conclusions applicable to the claims of each of these creditors (part 4, article 225.17, Arbitration Procedural Code of the Russian Federation; part 4, article 244.28, Civil Procedural Code of the Russian Federation) [27, p. 99]. Meanwhile, the specific of the procedure under consideration suggests that the adopted resolution applies to all persons who joined the claims, as well as to persons who did not join the claim. According to the regulations of part 2, article 225.17, Arbitration Procedural Code of the Russian Federation; and part 2, article 244.28, Civil Procedural Code of the Russian Federation the circumstances entered into legal force by a court decision in a previously considered case on protection of the rights and legitimate interests of the group of persons are not proved again when the court considers another case at the request of a member of this group of persons, who has not previously joined or refused to join the claim for protection of the rights and legitimate interests of the group of persons, made to the same defendant and on the same subject, except in the cases if these circumstances are disputed by this member of the group of persons.

This regulation indicates a deviation from the general qualities of the validity of a court decision, such as general obligation, exclusivity, prejudice, irrefutability and enforceability. Special attention should be paid to the prejudice characteristic of the circumstances established by the entered into force judicial act on group litigation.

Firstly, the statement of part 2, article 225.17,

Arbitration Procedural Code of the Russian Federation draws attention to itself: the circumstances established by the arbitration court ... are not proved when considering an identical personal claim by the arbitration court. The disposition of part 2, article 244.28, Civil Procedure Code of the Russian Federation, states only the court, without specifying the “court of general jurisdiction”, although such specification does not occur in the text of Civil Procedure Code of the Russian Federation, so there is no need looking for a conceptual meaning in this difference. According to part 3, article 69, Arbitration Procedural Code of the Russian Federation, the decision of the court of general jurisdiction that has entered into force in a previously considered civil case is mandatory for the arbitration court. The prejudicial significance of the facts established by the court of general jurisdiction when considering the case of administrative proceedings is also beyond doubt³. The prejudicial significance of the circumstances established by arbitration courts for the courts of general jurisdiction is established by part 3, article 61, Civil Procedural Code of the Russian Federation and part 2, article 64, Administrative Procedural Code of the Russian Federation.

When considering class actions, the courts apply the general rules of competence, and the arbitration court will consider a class action only if the claims of all participants who joined the claims will fall within the competence of this court [28, p. 94]. Nevertheless, in practice, situations are acceptable in which members of the same group will be both businessmen and citizens who do not have the status of an entrepreneur [29, p. 239]. Let's imagine a situation of violation by a management company of the rights of owners of premises in an apartment building owned by different citizens – businessmen and consumer citizens. For example, for a long period, the management company charged the amounts of services not provided unilaterally to all

³ Resolution of the Plenum of the Supreme Court of the Russian Federation dated 25.12.2018 No. 50 “On the practice of consideration by courts of cases on challenging regulatory legal acts and acts containing explanations of legislation and having regulatory properties”, item 38. Bulletin of the Supreme Court of the Russian Federation. 2019. № 2.

owners, and beyond the obligations under the property management agreement, and the citizens recovered the amount of unjustified enrichment in the order of group litigation. Is it possible that the arbitration court, considering a group claim of businessmen against the management company, will not exclude the fact established by the court of general jurisdiction that the management company did not provide the relevant services from the subject of proof? Of course, in this situation there is a basis for exemption from proof.

Applying the regulations of part 2, article 225.17, Arbitration Procedural Code of the Russian Federation and part 2, article 244.28, Civil Procedural Code of the Russian Federation in isolation from the general regulations on exemption from proof is unacceptable; otherwise it would mitigate validity qualities of the court decision and violate the principle of legal certainty. Prejudicial connection of judicial acts between all courts of Russian judicial system is explained by the unity of function for administration of justice and adoption of judicial acts on behalf of the government.

Secondly, the aspect of the above regulations that attracts attention is related to the possibility of challenging the circumstances established by the courts by the group members who refused to join the claim, or who did not join the claim. Obviously, such a decision of the legislator is a consequence of choosing more compromise model of a class action [30, p. 214] (with the features of opt in and opt out models at the same time), but this compromise has a destructive potential for the institution of a class action as a whole, reducing it to just a slightly larger model of active procedural participation. On the one hand, the qualities of legal force prevent the defendant, who does not have the right to challenge the established circumstances when the court considers the personal claim of such a member of the plaintiffs' group. On the other hand, such a regulatory decision within implementing the principle of competition is flawed. Challenging the established circumstances may give rise to additional lawsuits and entail significant financial and time costs for the defendant. In addition, possibility for changing established factual circumstances may create a

situation of legal uncertainty for the defendant for an extended period of time.

If the plaintiff in a personal claim disputes the circumstances established earlier by the court while considering class action and can refute them, the defendant must also have the right to refute the relevant circumstances. Otherwise, it would indicate a balance violation of interests between the parties and derogation from the principles of equality and competition. In global practice, the validity of a court decision in the aspect of the *res judicata* principle applies to all, except those excluded as not certified, members of the group. And the novelty of the Russian law on the possibility of challenging the established circumstances looks at least illogical. Careless application of the cited regulation can neutralize the significance of group litigation, which consists in ensuring the unity of law enforcement practice and excluding the adoption of conflicting acts by different courts.

We believe that Russian procedural law allows such challenge insofar as, when presenting a personal claim, the plaintiff has the right to choose a different way to protect the violated right; therefore, the qualification of the circumstances constituting the basis of the claim can be different. In this way it is necessary to note that a group member who has not joined the claim or refused to join has the right to prove that the basis of his claim is a different legal and factual composition, that the circumstances of his case are unique, and only then the subject of proof should be permissible to adjust, and as a consequence, granting the defendant the right to challenge the circumstances, the plaintiff's claims are based on.

The consequence of the qualities of the *res judicata* decision on a class action are also the rules of part 3, Article 225.17 of Arbitration Procedural Code of the Russian Federation and part 3, Article 244.28 of Civil Procedural Code of the Russian Federation on the right of the court to impose on the defendant the obligation to bring information on the decision taken in the case to all members of the groups. The assignment of this obligation to the defendant and the specifics of such performance are directly dependent on the certification of the group carried out by the court.

Unlike the opt out model, the Russian model of a

class action does not yet assume the possibility of giving the qualities of enforceability of the decision in relation to the participants of the group of persons who have not joined the stated requirements. Nevertheless, since the qualities of prejudice decisions on class actions have their own specifics, in the reasoning part of decision the circumstances should not be only established sufficiently and definitely enough, equally significant for the potential group of persons, but criteria are also provided for identifying participants in similar material legal relations as participants in the same group of persons.

4. Conclusion

Russian model of group litigation is something intermediate between the opt in model and the opt out model, because it is possible to initiate proceedings on a class action and to consider it only if there is a real minimum number of co-plaintiffs, but at the same time, certain qualities of the validity of the court decision (general obligation and prejudice) will apply to persons, those who did not join the stated requirement.

In the USA and in England, the decision of many issues of a class action process is left to the discretion of the court; this fact is consistent with the tradition of justice in these countries. The Russian civil process is based on the idea of a detailed settlement of the procedural form; therefore, we are convinced that preserving the identified gaps is unacceptable. Partially, the problems can be solved by means of guidance clarifications of the Supreme Court of the Russian Federation, in which the model of Russian group litigation features of procedural and material legal relations with the participants of the group of persons can be characterized. However, the procedures for certification of the group require legal regulation.

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