

Class Actions 2021

Contributing editors
Jonathan D Polkes and David J Lender



Publisher

Tom Barnes
tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent
adam.sargent@gettingthedealthrough.com

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Class Actions 2021

Contributing editors**Jonathan D Polkes and David J Lender****Weil Gotshal & Manges LLP**

Lexology Getting The Deal Through is delighted to publish the sixth edition of *Class Actions*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on India and the Netherlands.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Jonathan D Polkes and David J Lender of Weil Gotshal & Manges LLP, for their continued assistance with this volume.



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Juris Corp, Advocates and Solicitors

OVERVIEW

Court system

1 | Outline the organisation of your court system as it relates to collective or representative actions (class actions). In which courts may class actions be brought?

Although various statutes provide for class action suits in India, they are not a very popular civil remedy. Class actions or collective or representative suits in India can be brought in the following courts.

Civil courts

Class actions or representative suits can be brought before the appropriate civil courts with requisite territorial and pecuniary jurisdiction, under Order I, Rule 8 of the Civil Procedure Code 1908 (CPC), with leave of the court (eg, suits on behalf of persons belonging to the same caste or community, such as in the *Ram Mandir* case).

Tribunals and forums

National Company Law Tribunal

Section 245 of the Companies Act 2013 (the Companies Act) provides for filing a class action when the management or the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, and securities class action are provided for under section 37 of the Companies Act and can be filed by any person, group of persons or any association of persons affected by any misleading statement or the inclusion or omission of any matter in the prospectus.

Applications, which are in the nature of class actions or representative suits, can be brought on behalf of the financial creditors, referred to in section 21(6A)(a) and (b) or on behalf of homebuyers under section 7 of the Insolvency and Bankruptcy Code 2016 (the IB Code). Homebuyers were also included in the definition of financial creditors under the IB Code in 2018 and can now also maintain a class action against a developer that has defaulted.

Consumer forums

Class actions are specifically permitted under section 35(1)(c) of the Consumer Protection Act 2019 (CPA). A claim under the CPA can be filed by one or more consumers, registered voluntary consumer associations, the central or state government, legal heirs, guardians or legal representatives of the consumer. A consumer under the CPA can be an individual, a firm, a Hindu undivided family, a cooperative society, an association of persons, a corporation, a company, or a body of individuals or any other artificial juridical person.

The class actions will need to be filed before the appropriate court with the requisite territorial and pecuniary jurisdiction. Class actions can be filed against, for example, manufacturers, service providers, sellers and e-commerce companies. They can also be filed by homebuyers against developers.

Competition Commission of India

Class actions have been recognised under the Competition Act 2002 (the Competition Act) under section 53N(4) as a way to seek compensation on account of any loss or damage shown to have been suffered owing to an appreciable adverse effect on competition (AAEC) in the relevant market because of an anticompetitive agreement, the abuse of dominance by an enterprise or orders under section 42A (compensation in the case of the contravention of the orders of the Competition Commission of India) or under subsection (2) of section 53Q (contravention of orders of Appellate Tribunal) of the Competition Act. Class actions are permissible only after the AAEC is ratified by the Appellate Court. The provisions of Order 1 Rule 8 of the CPC will apply to these matters. However, no class action has been filed under the Competition Act to date.

Labour courts and industrial tribunals

Class actions are permitted under the Industrial Disputes Act 1947 (IDA). The IDA permits collective bargaining by employees and workers that are represented by their trade unions.

Supreme Court of India and the high courts of various states

Public interest litigation (PIL), filed for various matters of public interest, including environmental, human rights and socio-economic issues by any public-spirited person who may not be impacted by these issues, is also permissible and widely used in India.

Frequency of class actions

2 | How common are class actions in your jurisdiction? What has been the recent attitude of lawmakers and the judiciary to class actions?

Class actions, although not popular, are being used more frequently in India on account of various new amendments and pieces of legislation that have been enacted over the years. The most common types of class actions that have been adjudicated in India over the years have been PILs and class actions under the IDA. However, the concept has not been able to gain footing mainly owing to following reasons.

- Several Indian statutes providing for class action (eg, the CPA, Companies Act and IB Code) require the person or persons approaching the court to be representatives of or from a pre-specified portion of the class. Such a percentage is not always achievable, particularly in a large class (eg, consumers of goods from major manufacturers, shareholders and homebuyers).
- Cost of litigation: various litigation expenses, including stamp duty, court fees, counsel fees and other expenses, make it difficult to sustain class action suits in India. Additionally, lawyers are not allowed to charge contingency fees, often making it difficult to secure quality legal representation for pursuing class actions.
- Third-party funding (TPF) hasn't found its feet in India and there is no clear framework for TPF. Though not prohibited by the courts,

TPF arrangements, if found to be unconscionable or extortionate, may be set aside by the courts.

- Litigation in India can be long and cumbersome, and the courts often order the losing party to pay the costs of the winning party. This is another great deterrent to filing class action suits without the backing of adequate funds.

However, the judicial attitude to class actions, particularly PILs, has always been encouraging. One of the instances in which the National Company Law Appellate Tribunal (NCLAT) and Supreme Court of India (SC) demonstrated this attitude was the matter of homebuyers under the IB Code, where they championed the rights of homebuyers to seek redressal under the IB Code. Owing to various judgments passed by the NCLAT and the SC, the legislature ultimately passed an amendment to the IB Code, including homebuyers within the definition of financial creditors.

Additionally, sometimes courts may grant a class-wide remedy on their own. In *Dr Virendra Pal Kapoor v Union of India and Ors*, 2014 (105) ALR 76, where an individual senior citizen approached the Allahabad High Court regarding the mis-selling of a unit linked policy, the Court not only declared the policy to be void but also issued class-wide directions to the Insurance Regulatory and Development Authority of India, the insurance sector regulator, to examine all existing insurance products issued by the insurer and take the suggested actions if any further breaches were found.

Lawmakers have also, in recent times, made several amendments in various laws to enable and encourage class actions; for example, the CPA provides for the formation of the Central Consumer Protection Authority (CCPA), which among other things has been enjoined with the duty to promote, protect and enforce the rights of consumers as a class.

Legal basis

3 | What is the legal basis for class actions? Is it derived from statute or case law?

Class actions in India are derived from both statute and case law. The legal basis of class actions is derived from statute under the CPC, the CPA, the Companies Act or the Competition Act. However, the concept of PIL is derived from case law. The concept of PIL was first elaborated by Justice P N Bhagwati in the matter of *S P Gupta v Union of India*. The foundation of the concept was a relaxation of a fundamental rule of litigation, namely, locus standi. It recognised and empowered public-spirited persons, who were not part of the affected class, to bring matters of public interest to the courts on behalf of socially disadvantaged or underprivileged persons who are unable to seek redress owing to financial, socio-economic and other constraints.

In some cases, the government may specifically legislate to provide for the institution of class actions by enactment of a statute: for example, after the Bhopal Gas Tragedy, the Government of India (GOI) enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985, under which the GOI had the exclusive right to represent the plaintiffs in India and elsewhere in the matter.

Types of claims

4 | What types of claims may be filed as class actions?

A variety of claims can be filed as class actions before various Indian courts under different laws. These include consumer claims, oppression and mismanagement suits, antitrust complaints and securities claims. Apart from these, various socio-economic, environmental and public interest actions can also be brought by way of PILs.

Insofar as restrictions regarding the types of claims that may be litigated as class actions are concerned, very few express restrictions can be seen within the categories of matters where class actions are

permitted. Under section 245 of the Companies Act, class action cannot be brought against banking companies. However, otherwise, courts have not expressly forbidden any particular claims as not being capable of being litigated as a class, provided that the stipulated requirements for filing class actions thereunder, such as the minimum participation threshold, locus standi and notice, are fulfilled.

Relief

5 | What relief may be sought in class proceedings?

Relief that may be sought in class actions varies according to the law under which the action is filed. These include the temporary and permanent relief of injunction, interlocutory orders and other final orders as provided for in the statute, including damages, compensation and permanent injunction.

Under the Companies Act, relief can be granted against the company and its directors, auditors or any other functionaries. This relief may include injunctive relief and other relief by way of damages, compensation and so on. Section 53N(4) of the Competition Act, which permits class actions, provides for compensatory relief. The IDA provides for a variety of relief, including retrenchment compensation, the payment of wages, reinstatement, the fixation of fair wages, the grant of paid holidays, and bonuses.

Section 39 of the CPA provides several specified types of relief, including repairing or replacing the product; refunding the consumer for defective goods and services; the withdrawal of hazardous goods; providing compensation for loss or injury suffered by the consumer owing to negligence; and the costs of filing and pursuing the complaint. In addition, the CPA also provides for granting punitive damages and, in certain cases, imprisonment.

In the case of PILs, relief is generally sought and given in the form of a writ in the nature of habeas corpus, prohibition, mandamus, certiorari or quo warranto.

Initiating a class action and timing

6 | How is a class action initiated? What is the limitation period for bringing a class action? Can the time limit for bringing a class action be paused? How long do class actions typically take from filing to a final decision?

The procedure for initiation of class action suits varies according to the statute under which it is filed.

Specialised class action can be initiated by shareholders or depositors of a company (not a banking company) under section 245 of the Companies Act for the prevention of oppression and mismanagement.

Additionally, section 37 of the Companies Act provides for a securities class action by a person or class affected by any misleading statement or the inclusion or omission of any matter in the prospectus under the sections 34–37 of the Companies Act.

The CPA also provides a clear framework of procedure. The National Consumer Disputes Redressal Commission earlier stated that it would not admit class actions that do not pass the threshold of having an adequate percentage of the class participating in the action. In addition, the CPA also provides for the creation of a CCPA to look into such class action lawsuits for matters pertaining to the violation of consumer rights, unfair trade practices or false or misleading advertisements before they are heard by the consumer forum.

PILs filed by public-spirited individuals follow the same procedure as writ petitions. However, they may be initiated by the court suo moto against the state or public authorities. Courts have been known to take cognisance of letters or news articles to suo moto initiate PILs.

Insofar as limitation periods for filing various class actions are concerned, they are governed by the statute under which the class

action is sought to be initiated. However, if the statute itself is silent on the limitation for bringing forth any action, reliance will be placed on the provisions of a specialised statute known as the Limitation Act 1963, which provides limitation periods for various actions and suits in India. The Limitation Act prescribes a maximum period of three years for any cause of action for which no specific period has been prescribed. There is no limitation period prescribed for class actions under sections 245 or 37 of the Companies Act. Therefore, it may be presumed that the period will be three years. Under section 62 of the Competition Act, the Limitation Act provides a limitation period of one year for filing a claim for compensation. The CPA provides a limitation period of two years for filing a class action. It is also pertinent to mention that the courts in India do have the power to condone delays and, at times, upon being shown sufficient cause, a class action may be entertained beyond the expiry of its limitation period.

However, litigation in India can be tedious and time consuming and it involves multiple appeals, sometimes crossing multiple tiers, all the way to the SC. Class actions under various laws may typically take four to seven years from filing to final decision. However, PILs sometimes offer speedy remedy.

CLASS FORMATION

Standing

7 | What are the standing requirements for a class action?

Several statutes that provide for filing class actions stipulate standing requirements that need to be fulfilled by the person filing the action.

Class action suits filed under Order I, Rule 8 of the Civil Procedure Code 1908 (CPC) can only be admitted after obtaining the permission of the court.

It is a mandatory requirement under several laws to notify persons of the class sought to be represented. Class actions instituted under Order I, Rule 8 of the CPC, the Consumer Protection Act 2019 (CPA) and section 245 of the Companies Act 2013 (the Companies Act) all stipulate this.

In several cases, a minimum threshold of the members of the class that must be participating in the action is prescribed (eg, class actions under section 245 of the Companies Act).

Indian law, in most statutes where class actions are permitted, permits private individuals, licensed associations, organisations and so on to represent the interests of the entire class. Ordinarily, class actions cannot be filed by someone without locus standi (ie, the person must be part of the class he or she is representing). However, public interest litigation (PIL) has relaxed the need for locus standi, with the aim of enabling public-spirited persons to bring to the notice of the courts the voice of the underprivileged, poor and suffering who are unable to approach the courts themselves for remedy owing to socio-economic restraints. Additionally, even in cases where this requirement is not relaxed (eg, the Competition Act 2002 (the Competition Act) and the CPA), class actions can be brought by the government or government agencies on behalf of the affected class.

Participation

8 | Do members of a class have to opt in or opt out of the action? Are class members notified that an action has been commenced on their behalf and, if so, how?

While some statutes providing for class actions in India do, with varying efficacy, provide for either opt-in or opt-out provisions, in several statutes there is no specific provision for opting in or opting out. However, interested parties can generally opt in or implead in these matters with permission of the court. Several laws stipulate as a requirement the

need to notify members of a class that an action has been commenced on their behalf, providing them the opportunity of impleading or, where such provision is made, opting out. These include actions brought under the CPA and section 245 of the Companies Act.

In the case of an action brought under Order I, Rule 8 of CPC, members of a class have the option of impleading themselves in an action brought on their behalf (opting in).

Rule 86 of the National Company Law Tribunal (NCLT) Rules 2016 provides that a member of a class action is entitled to opt-out of the class action under section 245 of the Companies Act at any time after the institution of the class action under the Companies Act, with the permission of the NCLT.

Certification requirements

9 | What are the requirements for a case to be filed as a class action?

The requirements for a case to be filed as a class action vary depending on the law under which they are being filed.

- One important requirement for filing a representative suit under the CPC Order I, Rule 8 is the requirement for obtaining the permission of the court.
- The requirements relating to the minimum number of persons that must be included in a class action vary under different laws.
- CPC Order I, Rule 8 allows one claimant to lead an action on behalf of the class, and the decree of the action will be binding on all members of the class. However, such a class action must be admitted after obtaining the permission of the court and giving notice to all class members.
- The Companies Act provides for one lead litigant (who is a shareholder or depositor) to conduct the suit on behalf of the class. To bring a class action, it provides for a minimum number of claimants, namely a minimum of 100 or a prescribed percentage of the total number of its members (whichever is less); any member or members singly or jointly holding not less than a prescribed percentage of the issued share capital; or, in the case of companies without share capital, one-fifth of the total number of members. In the case of depositors, a similar minimum threshold has been prescribed. In the case of homebuyers under the Insolvency and Bankruptcy Code 2016 (the IB Code), a minimum threshold of 100 or 10 per cent of the homebuyers, whichever is lower, is required to take a defaulting developer to the NCLT.
- The CPC, CPA and Competition Act do not require any specified minimum number of claimants for bringing a collective action, though these actions are filed with the consent of the court and notice is given to persons on whose behalf the class action is to be filed. However, in the matter of *Amrish Kumar Shukla v Ferrous Infrastructure*, the National Consumer Disputes Redressal Commission held that a complaint on behalf of only some of the class, for example 10 out of a 100 flat buyers, will not be maintainable as it will not achieve the object of the provision.
- Class actions under the Industrial Disputes Act 1947 (IDA) have to be filed by a registered trade union on behalf of the workers.
- The requirements for filing a PIL, though relaxed according to the locus standi, require the court to be satisfied as to the bona fides of the petitioner. If the court has any doubts as to the motivations or justification of the PIL, it may require a security deposit with the court before hearing the PIL. If the court feels that any particular PIL was brought for some private grievance in mala fides, it may impose exemplary fines and costs on the petitioner.

10 | How does a court determine whether the case qualifies for a class action?

Different legislation provides for different procedures for determining whether a particular case qualifies for a class action. Generally, the determination of whether a case qualifies as a class action is done on a preliminary basis and is decided within the first 12 months of the matter.

The CPA, as amended in 2019, provides for the creation of a Central Consumer Protection Authority to look into such class action lawsuits before they are heard by the consumer forum.

For a class action under Order I, Rule 8 of the CPC, the plaintiff would need to file the suit seeking the court's permission for instituting the same, which is only granted after the court has, at the claimant's expense, served a notice to all interested persons or members of the class either individually or by public advertisement.

Class action claims made under the Companies Act before the NCLT by a shareholder or depositor under section 245(1), are considered by taking into account various factors laid out under section 245 and Rule 85(1) of the NCLT Rules 2016, including the eligibility, necessity and desirability of a class action, before accepting the action.

An action by homebuyers under the IB Code will be admitted if it fulfils, along with other requirements for an application under section 7 of the IB Code, the minimum threshold requirement of 100 homebuyers or 10 per cent of the homebuyers, whichever is lower.

Section 53N of the Competition Act clearly provides that class actions for compensation may only be filed before the Appellate Tribunal after either the Competition Commission of India or the Appellate Tribunal on appeal has determined in a proceeding that violation of the provisions of the Competition Act has taken place, or if provisions of section 42A (compensation in the case of the contravention of the orders of the Competition Commission of India) or subsection (2) of section 53Q (contravention of orders of Appellate Tribunal) of the Competition Act are attracted.

The Supreme Court of India (SC) has from time to time come up with guidelines regarding PILs, providing specific categories of matters that fall under the definition of PILs and outlining when matters would be eligible to be treated as such. Matters that qualify under these guidelines are laid before the court for consideration, and only on the court's satisfaction as to the bona fides of the matter are they admitted.

Consolidation

11 | Is there a process for consolidating multiple class action filings?

There is no specific procedure for consolidating multiple class action filings in most laws in India that provide for class actions.

The Companies Act provides for the consolidation of similar applications pending in different jurisdictions in section 245(5)(b), which states that 'all similar applications prevalent in any jurisdiction should be consolidated into a single application and the class members or depositors should be allowed to choose the lead applicant'.

In other class actions, civil courts, high courts and the SC may and do use their discretion to collectively hear matters where the grievance and the question at hand are identical or of the same nature. Generally, all courts and tribunals in India have been known to use their discretion to consolidate or hear collectively similar actions.

PROCEDURE

Discovery

12 | How does discovery work in class actions?

There is no special procedure prescribed for discovery in class actions under the Civil Procedure Code 1908 (CPC). The general rules of the CPC providing for the discovery, production and admission of documents and the stages at which this discovery is necessary or permissible (namely, Orders XI, XII and XIII) will be applicable in class actions as well.

There is no such separate procedure prescribed under the Consumer Protection Act 2019, the Companies Act 2013 (the Companies Act), the Industrial Disputes Act or the Competition Act 2002. Generally, class actions under these statutes will also follow the same rules of discovery as applicable to other proceedings under the respective statutes.

Privilege and confidentiality

13 | What rules and standards govern non-disclosure of documents on the grounds of professional privilege, litigation privilege or other confidentiality considerations?

There are no specific rules as to the non-disclosure of documents on the grounds of professional privilege for class action suits in India. The Indian Evidence Act 1872 provides for the protection of privileged communications under sections 126 and 129 between an advocate and a client, forbidding an advocate from disclosing privileged communications and protecting the client from being compelled to disclose the privileged communications.

Testimony

14 | What rules apply to submission of factual and expert witness testimony? In what circumstances will the court order witness-examination?

There is no specific procedure prescribed for the submission of factual and expert witness testimony in class actions under any of the statutes that cover filing class actions.

The general provisions of the CPC that provide for the submission of factual and expert witness testimony (namely Orders XV, XVI, XVIII and XIX) apply wherever provided for and in all the special statutes on class actions. However, the National Company Law Tribunal (NCLT), being the special tribunal for the Companies Act and the Insolvency and Bankruptcy Code 2016 (vide the NCLT Rules 2016 (Rules 39 and 40)) provides for the submission of evidence before the NCLT. Rule 40 of the NCLT Rules specifically provides for the examination of witnesses.

DEFENCE

Defence strategy

15 | What mechanisms and strategies are available to class-action defendants?

The defence mechanisms available to class action defendants are many and varied. They include:

- demonstrating to the court that the class in question does not exist and the matter is not eligible to be filed as a class action;
- demonstrating that the class action is filed without meeting any of the thresholds or criteria required to be fulfilled under the specific statute under which action is sought to be initiated;
- demonstrating that the basis of the impact or wrongdoing on which the class action is filed is not attributable to the defendant; and
- that the party that filed the class action did so mala fides and not for the benefit of the class, but to air a private grievance or for harassment (this is particularly relevant in case of public interest litigation).

Joint defence agreements

- 16 | What rules and standards govern joint defence agreements? Are they discoverable? What are the advantages and disadvantages of these agreements?

Joint defence agreements are not commonly found in the Indian legal system. No rules and standards governing these agreements have been prescribed.

SETTLEMENT

Approval of settlements

- 17 | Describe the process and requirements for approval of a class-action settlement.

There is no specific procedure for the approval of a class action settlement. Order XXIII Rule 3 and section 89 of the Civil Procedure Code 1908 (CPC) encourage the settlement of cases out of court. However, representative actions under the CPC cannot be withdrawn, and settlement agreements cannot be reached unless the court gives notice of this settlement or withdrawal to all interested parties of the class, at the expense of the plaintiff. Civil courts in India may also refer a pending case for mediation in India under section 89 of the CPC.

The Industrial Disputes Act 1947 provides for the settlement of industrial disputes, providing for a compulsory round of conciliation before the matter can be taken up by the appropriate adjudicating authorities. The Act provides the procedure under which a conciliation officer shall hold conciliation proceedings in an attempt to reach a fair and amicable settlement between the parties to the dispute. The Act encourages negotiation and collective bargaining for resolving disputes.

Section 442 of the Companies Act 2013 provides for the settlement of disputes by mediation between the parties during the pendency of proceedings before the National Company Law Tribunal or the National Company Law Appellate Tribunal. The Consumer Protection Act 2019 also provides for pretrial mediation in Chapter V of the Act, which provides the discretion to the Central Authority to, if it sees scope for a settlement, refer a matter to mediation. The Consumer Protection Mediation Rules 2020 were notified on 15 July 2020 for regulating the procedure of such mediation.

The Competition Act 2002 does not provide for settlement. However, the Draft Competition Amendment Bill 2020 provides for the settlement of disputes. It permits a party undergoing an investigation by the Competition Commission of India (CCI) to move an application for settlement or voluntarily undertake certain commitments. In the case of *Tamilnadu Film Exhibitors Association v CCI & Ors* (Madras High Court), it was held that settlements and commitments would be valid under the scheme of the Act as long as they did not enable the continuance of anticompetitive activities, restrict the freedom of trade or prove to be prejudicial to the interests of consumers.

Objections to settlement

- 18 | May class members object to a settlement? How?

Insofar as the in representative actions under the CPC are concerned, settlement agreements cannot be reached and suits cannot be abandoned or withdrawn without the permission of the court and a notice being given by the court regarding the same to all the interested parties or persons, at the expense of the plaintiff.

However, generally, in other matters, parties that have chosen to either opt in or opt out (as provided for in the statute), or that are considered members of the class, cannot object to a settlement.

Separate settlements

- 19 | How are separate class action settlements handled?

There is no specific concept of separate settlement in India.

JUDGMENT AND APPEAL

Preclusive effect

- 20 | What is the preclusive effect of a final judgment in a class action?

The preclusive effect of a final judgment in a class action is generally to bind all the members of the class, with a few distinct exceptions.

A final judgment passed in a class action under the Civil Procedure Code 1908 (CPC) Order I, Rule 8, filed by an individual on behalf of the class, will be binding on all members of the class. However, an appeal can be filed against the judgment.

In the case of consumer class actions, the decision in one action will bind all the consumers on whose behalf or for whose benefit the complaint is filed, as provided for in Order I, Rule 8(6) of CPC.

Similarly, in the case of class actions under the Companies Act 2013 (the Companies Act), the Industrial Disputes Act 1947 (IDA) or the Competition Act 2002 (the Competition Act), orders passed in representative suits bind all members of the class.

A similar situation will be seen in the case of public interest litigation. However, the courts may, at their discretion, admit subsequent petitions from other members of the class if it is felt that this is necessary on account of new facts and circumstances or to prevent a miscarriage of justice.

Appeals

- 21 | What type of appellate review is available with respect to class-action decisions?

Various types of appellate review are available in India for different types of class actions.

An order passed under Order I, Rule 8 of the CPC cannot be appealed, being excluded from the list of appealable orders under Order 43, Rule 1. However, parties may, if eligible, apply for a revision of the order under section 115 of the CPC.

Orders passed by the National Company Law Tribunal under the Companies Act can be appealed before the National Company Law Appellate Tribunal (NCLAT) under section 421 of the Companies Act. An appeal from NCLAT will be heard before the Supreme Court of India (SC) under section 423 of the Companies Act.

An appeal from an order passed by the NCLAT under the Competition Act will be heard before the SC under section 53T of the Act.

Insofar as class actions under the IDA are concerned, under section 17, an award made by the labour court or industrial tribunal shall be final and binding and shall not be called into question by any court in any manner. However, it is possible to obtain special leave to appeal to the SC, if there is a change in conditions after the dispute has been adjudicated or if the award is ultra vires of the IDA.

Orders passed by the district consumer forums can be appealed before the state commissions under section 41 of the Consumer Protection Act 2019. Appeals from state commissions will be heard before the National Consumer Disputes Redressal Commission (NCDRC) under section 51 of the Act. Orders passed by the NCDRC can be appealed before the SC under section 67 of the Act.

REGULATORY ACTION

Regulators

22 | What role do regulators play in connection with class actions?

Regulators play a very important role in class actions. Regulators in India, such as the Securities Exchange Board of India (SEBI) and the Insurance Regulatory and Development Authority of India (IRDAI), are created solely to regulate specific market segments and have an active and supervisory control over them. In their capacity as regulators, SEBI, IRDAI and other such regulators pass directions and, in event of non-compliance, actively file and pursue actions on behalf of the market participants whose rights they have been created to protect, to ensure compliance and proper conduct of business in the market.

The SEBI Investor Protection and Education Fund has been set up so that SEBI can undertake legal proceedings in the interests of investors in securities that are listed or proposed to be listed. The definition of 'aid' in this context is quite wide and includes, as SEBI might find necessary, the provision of funding to investors' associations to initiate class actions. However, this was withdrawn by SEBI in 2014.

Private enforcement

23 | Describe any incentives the civil or criminal systems provide to facilitate follow-on actions.

Follow-on or piggyback claims are included in the Competition Act 2002 under section 53N. The procedure of a follow-on action was kept fairly simple in the Act to facilitate these claims.

The ease of the procedure, the fact that in the follow-on action the violation is already established and does not need to be re-examined and the fact that the enquiry is specifically limited to determining the eligibility and quantum of compensation due to a person applying for the same, provides an incentive to parties who have a very light burden of proof to file these actions. However, few actions have been filed in this regard in India.

ALTERNATIVE DISPUTE RESOLUTION

Arbitration and ADR

24 | What role do arbitration and other forms of alternative dispute resolution play in class actions? Can arbitration clauses lawfully contain class-action waivers?

Alternative dispute resolution (ADR) plays a role in class actions in India.

Section 89 of the Civil Procedure Code 1908 (CPC) provides for and encourages the settlement of disputes through ADR. However, unless parties to a class action have an arbitration agreement, which in larger classes is nearly impossible, arbitration cannot be conducted in class actions. Therefore, the ADR mechanisms that most often play a part in class actions are mediation and conciliation.

Mediation

The Consumer Protection Act 2019 (CPA) provides for pretrial mediation in Chapter V, which provides the discretion to the Central Authority to, if it sees scope for a settlement, refer a matter to mediation.

Civil courts in India may also refer a pending case to mediation in India under section 89 of the CPC. In addition, section 442 of the Companies Act 2013 (the Companies Act) provides for the Mediation and Conciliation Panel for mediation between parties during the pendency of proceedings before the National Company Law Tribunal (NCLT) or the National Company Law Appellate Tribunal (NCLAT).

Conciliation

Section 4 of the Industrial Disputes Act 1947 (IDA) also provides for the appointment of conciliators to promote the settlement of industrial disputes.

Court-ordered mediation

25 | Do courts order pretrial mediation in class actions? Does the appointment of a mediator make it more likely that the court will approve a settlement?

The courts exercise their discretion and refer class actions to mediation wherever the statute provides for such pretrial mediation.

Civil courts in India may refer a pending case for mediation in India under section 89 of the CPC.

The CPA also provides for pretrial mediation in Chapter V, which provides discretion to the Central Authority to, if it sees scope for a settlement, refer a matter to mediation. The Consumer Protection Mediation Rules 2020 for regulating the procedure of such mediation were notified on 15 July 2020.

Section 4 of the IDA provides for the appointment of conciliators to promote the settlement of industrial disputes.

Section 442 of the Companies Act provides for the Mediation and Conciliation Panel for mediation between parties during the pendency of proceedings before the NCLT or NCLAT.

FEES, COSTS AND FUNDING

Contingency fees

26 | What are the rules regarding contingency fee agreements for plaintiffs' lawyers in a class action?

Contingency fees for the plaintiff's lawyers (contingent on the outcome of the suit) are prohibited in India. Indeed, lawyers are expressly prohibited from funding their clients in litigation. This is one of the primary reasons why class action suits continue to be few and far between in India.

Cost burden

27 | What are the rules regarding a losing party's obligation to pay the prevailing party's attorneys' fees and litigation costs in a class action?

In India, the courts generally follow the practice of ordering the losing party to bear the litigation costs of the winning party. The main goal of this is to discourage vexatious litigation. However, the costs awarded may differ depending on the matter. It may also vary depending on the type of litigation and bona fides of the losing party as perceived by the court. Indian courts generally do not have any mechanism for calculating and awarding realistic costs and they are awarded more as a token than at actuals.

Sections 34, 35, 35A and 35B of the Civil Procedure Code 1908 (CPC) provide for awarding to the winning party the costs incurred in maintaining litigation expenses, along with interest at a prescribed rate, compensatory costs for false or vexatious claims and costs for delays. However, the limit of compensatory costs under section 35A is presently capped at 3000 rupees.

The Supreme Court of India (SC), in the case of *Sanjeev Kumar Jain v Raghbir Saran Charitable Trust & Ors* in 2011, observed that, as far as civil litigation was concerned, though it is in favour of awarding actual realistic costs, as the law presently stands, there is no provision for awarding 'actual costs' and awarding costs has to be within the limitation prescribed by section 35. Hence, in any matters where the CPC is applicable, section 35 will have to be followed.

In the matter of *State of Uttaranchal v Balwant Singh Chauhal* (2010) 3 SCC 402, the SC held that sanctions of 'exemplary costs' must be used as a deterrent against frivolous and vexatious public interest litigation. The same had been provided for in the SC Rules 2013. In the matter of *Suraj Mishra v Union of India*, on 8 May 2019, the SC imposed exemplary costs of 50,000 rupees for filing a frivolous public interest litigation (PIL) and further debarred the petitioner from instituting PILs in the future.

Calculation

28 | How are costs calculated? What costs are typically recovered? Does cost calculation differ in the litigation and settlement contexts?

The calculation of costs in most class actions in India will not differ from the ordinary mode of calculation of costs under the relevant statutes.

Costs are awarded before the civil courts at the discretion of the court. The courts in India may, at their discretion, decide the magnitude of the costs to be awarded or may completely dispense with them. While Order XXA, Rule 1 of the CPC empowers courts to award costs on the basis of expenditure, in practice, courts rarely award these realistic costs. The courts may also, depending on the case at hand, award compensatory costs if the conduct of the opposing party delayed or prolonged litigation or if the claim of the party turns out to be false or vexatious.

Under the Consumer Protection Act 2019, costs can be awarded by the district forum under section 38 for adjournments, at a rate as specified by the regulations thereunder. Further, under section 39, if the district forum finds in favour of the complainant's case, it is empowered to provide adequate costs to the parties. Similarly, section 52 provides for costs for adjournments to be awarded by the state and national commissions.

Regarding proceedings under the Companies Act 2013 (the Companies Act), Rule 113 of the National Company Law Tribunal (NCLT) Rules 2016 authorise the NCLT to award costs incidental to any proceedings before it as it deems fit and may also impose exemplary costs on the defaulting party.

Third-party funding

29 | Is third-party funding of class actions permitted?

Yes, there is no specific provision of law prohibiting the third-party funding (TPF) of class actions. In fact, Order XXV, Rule 1 of the CPC was amended in the states of Maharashtra, Gujarat and Madhya Pradesh to allow third-party funders to plead a case. In addition, Rule 2 was included in Order XXV of the CPC in Uttar Pradesh permitting the securing of costs of litigation from third parties. Any TPF arrangements in India will have to pass the test laid down by the courts, of not being unconscionable, extortionate or against public policy.

However, lawyers in India are not permitted to fund litigation for their clients.

Public funding

30 | Is legal aid or other public funding available for class actions?

There is no specific legal aid available for class action suits. However, the Legal Services Authority Act 1987 provides for free legal aid to certain classes of people, such as women, children, disabled persons, members of socially backward classes and indigent persons.

In addition, the government of India has been known to pass specialised laws and intervene or approach courts on behalf of certain classes of persons in cases where such need is felt (eg, Bhopal Gas Leak (Processing of Claims) Act 1985).

Another avenue where public funding may be availed of for class action suits is the Investor Education Protection Fund set up under the Securities Exchange Board of India to, inter alia, provide funds to depositors or shareholders for pursuing class actions under sections 245 and 37 of the Companies Act, among others.

Insurance

31 | Are adverse costs, adverse litigation judgment or after-the-event insurance available?

Adverse costs, adverse litigation judgment or after-the-event insurance is not available in India. However, certain types of insurance cover the costs of litigation in relation to the liability insured in the case of any claims made against the insured entity.

Professional indemnity insurance is available for doctors, engineers, architects, lawyers and others that provides coverage against professional risks and legal claims.

Transfer of claims

32 | Can plaintiffs sell their claim to another party?

Selling claims is not prohibited by any law in India, although it is very uncommon.

However, some such instances have been seen in the recent past where parties have essentially sold or transferred their claims in litigation to third parties in exchange for funds. In 2018, M/s Patel Engineering Ltd sold its litigation claims for 21,690 million rupees to the investor, Eight Capital. Further, in 2019, M/s Hindustan Construction Co Ltd obtained litigation funding by transferring its interests and rights in various claims worth 20,000 million rupees to an investor group led by BlackRock Inc for a sum of 17,000 million rupees.

Distributing compensation

33 | If distribution of compensation to class members is problematic, what happens to the award?

There is no specific provision for the distribution of compensation to class members in India.

Compensation in some cases may be awarded for an actual measurable financial loss along with interest. In such cases, the distribution of compensation is clear. The courts may also, in matters where such distribution is not clear, at their discretion, provide for some formula, method or ratio of distribution of compensation that they think fit.

In the *Bhopal Gas* case, the SC enhanced the compensation amount from 2,500 million rupees to US\$470 million. Originally, in this matter, the SC specifically directed that this amount should be utilised only for the satisfaction of the claims of the victims for compensation determined according to the law. Later, on an application, the SC directed that the balance amount of 15,030 million rupees was to be disbursed as pro rata compensation to the persons whose claims have been settled and approved, an action plan showing the modus operandi for disbursement.

UPDATE AND TRENDS

Legal and regulatory developments

34 | What legislative, regulatory or judicial developments related to class actions are on the horizon?

One of the major significant changes for class actions in India has been the recent introduction of the new Consumer Protection Act 2019 to replace the earlier Act. The new Act empowers the Central Consumer Protection Authority to investigate and pursue class action claims,

among other things. The new Act also widens its coverage to include e-commerce, which may result in a new type of class action.

Coronavirus

35 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Government of India (GOI) has taken the following steps and measures to address the pandemic and its financial fallout.

- The Reserve Bank of India (RBI) has inter alia issued regulatory packages and provided the following relaxations:
 - a moratorium of three months on the payment of instalments of all term loans outstanding as on 1 March 2020, which was further extended by a period of three months (ie, up to 31 August 2020); and
 - the exclusion of the period of moratorium from the number of days past the due date for the purpose of asset classification under Income Recognition and Asset Classification norms and the exclusion of the extended moratorium or deferment period from the 90-day non-performing asset norms, in respect of all accounts that were standard as on 1 March 2020.
- The GOI increased the threshold of default under section 4(1) of the Insolvency and Bankruptcy Code 2016 (the IB Code) from 100,000 rupees to 10 million rupees.
- The GOI excluded of the period of lockdown from the timeline of any activity that could not be completed because of the lockdown in relation to a corporate insolvency resolution process (CIRP) and any liquidation process.
- The GOI notified a special procedure that treats corporate debtors undergoing CIRP as distinct persons liable to take a new registration for the filing of goods and services tax (GST) and resolves difficulties being faced by entities under the CIRP in relation to the payment of GST and past GST liabilities.
- The GOI suspended insolvency proceedings under the IB Code for new defaulters for a period of six months (extendable to one year) and prohibited them from filing an application for initiating the CIRP of a corporate debtor for defaults occurring during this period.
- The GOI and RBI have also taken several measures to infuse liquidity into the financial sector and the economy through various measures. The RBI launched the targeted long-term repo operations aimed at small and medium-sized non-banking financial companies (NBFCs) and housing finance companies (HFCs). The RBI also provided refinancing facilities and liquidity facilities to various banks and reduced repo rates and took several other measures to boost economic activity in the market. The GOI took several measures to bring liquidity into the markets by providing emergency working capital for businesses, including micro, small and medium enterprises, in the amount of 3 trillion rupees, providing for a special equity scheme for NBFCs, HFCs and micro-finance institutions and a credit guarantee scheme of partial credit guarantee for NBFCs, among various other measures.
- The courts and tribunals in India have been hearing urgent matters through videoconferencing.

The best practices for businesses during the covid-19 crisis are:

- conducting thorough housekeeping on contracts to ensure that any requirements laid down in law for invoking force majeure or obtaining any concessions are compiled as necessary;



Shubhabrata Chakraborti

shubhabrata.chakraborti@jclcx.com

Dhruv Malik

dhruv.malik@jclcx.com

Madhura Kulkarni

madhura.kulkarni@jclcx.com

302, Century Bhavan, 3rd Floor

Dr Annie Besant Road, Worli

Mumbai 400 030

India

Tel: +91 22 6720 5555 / +91 22 4057 5555

www.jclcx.com

- working on modifying and modulating their daily business operations to optimise and enhance the efficiency of the workforce and business operations; and
- having a solid plan for the future of the business and laying down detailed plans for every contingency possible to ensure smooth sailing.

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