

THE CLASS ACTIONS
LAW REVIEW

FOURTH EDITION

Editor
Camilla Sanger

THE LAWREVIEWS

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PREFACE

Class actions and major group litigation can be seismic events, not only for the parties involved, but also for whole industries and parts of society. That potential impact means they are one of the few types of claim that have become truly global in both importance and scope, as reflected in this fourth edition of *The Class Actions Law Review*.

There are also a whole host of factors currently coalescing to increase the likelihood and magnitude of such actions. These factors include continuing geopolitical developments, particularly in Europe and North America, with moves towards protectionism and greater regulatory oversight. At the same time, further advances in technology, as well as greater recognition and experience of its limitations, is giving rise to ever more stringent standards, offering the potential for significant liability for those who fail to adhere to these protections. Finally, ever-growing consumer markets of increasing sophistication in Asia and Africa add to the expanding pool of potential claimants.

It should, therefore, come as no surprise that claimant law firms and third-party funders around the world are becoming ever more sophisticated and active in promoting and pursuing such claims, and local laws are being updated to facilitate such actions before the courts.

As with previous editions of this review, this updated publication aims to provide practitioners and clients with a single overview handbook to which they can turn for the key procedures, developments and factors in play in a number of the world's most important jurisdictions.

Camilla Sanger

Slaughter and May

London

April 2020

INDIA

*Sumeet Kachwaha and Ankit Khushu*¹

I INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

Class action provisions have existed in the Indian Code of Civil Procedure (CPC) since 1908. However, an elaborate framework relating to class actions came about through a 1976 amendment.² Broadly, the key provisions are:

- a* There must be numerous persons having the 'same interest'; the 'Explanation' to the relevant section clarifies that it is not necessary that they have the same cause of action. A Supreme Court judgment elaborates: 'either the interest must be common or they must have a common grievance which they seek to get redressed'.³
- b* A declaration of a suit as a representative suit requires court permission and this permission can be sought either by the plaintiff or a person defending the suit.
- c* As well as the general provisions, special provisions exist in the CPC for collective actions in relation to public nuisance or other wrongful acts affecting or likely to affect the public, whether or not any special damage has been caused to the person bringing the action.⁴ In relation to suits in respect of charitable or religious trusts, however, 'only a person who has an interest in the trust' may bring a representative action.⁵ In either case, court permission is required.

The legislative intent in permitting class actions is to reduce multiplicity of legal proceedings (and the risk of diverse or conflicting findings on a common issue).

i Consumer Protection Act

Class action-enabling provisions are also available under the Consumer Protection Act 1986 (CPA).⁶ Once again, it requires that persons sought to be represented have the 'same interest'.⁷ The complainant who first gets his or her complaint treated as a class action is entitled to lead the matter. Complaints filed previous to this action can continue or they may simply

1 Sumeet Kachwaha and Ankit Khushu are partners at Kachwaha & Partners.

2 Order I, Rule 8, The Code of Civil Procedure, 1908 (CPC).

3 *Chairman, Tamil Nadu Housing Board v. T.N. Ganapathy*, (1990) 1 SCC 608.

4 Section 91, CPC.

5 Section 92, CPC.

6 The Act is likely to be substituted by a new piece of legislation. However, no change is proposed in the class action provisions.

7 Section 2(1)(b), Consumer Protection Act, 1986.

join the lead complainant, withdrawing their individual complaints. Subsequently instituted complaints will not be entertained and they may instead, with permission from the consumer court, join the lead complainant.

ii Companies Act

There is a bit of a background to the introduction of class action provisions under the Companies Act in 2013. A few years prior to this, India witnessed a huge corporate scandal when the founder chairman of a leading information technology company, Satyam Computers, confessed that the company's accounts were fabricated and about US\$1 billion cash showing in the company books was in fact missing. A consumer protection organisation sought to bring a collective action before the consumer court.⁸ The complainants chose to approach the consumer court rather than the normal civil court, as a complex matter like this would have entailed inordinate delays given the backlog for civil suits in India. However, the consumer court rejected the complaint *in limine* as it follows a summary procedure and does not entertain matters that are likely to involve complex factual issues. An appeal by the complainant to the Supreme Court was also unsuccessful.⁹ The complainant then chose to abandon its claim. In essence, in the absence of a collective action mechanism under the Companies Act (and as the alternative avenues were found to be wanting and unsuitable), the Indian investors in the company were largely left remediless. In contrast, the American investors in the same company were able to recover damages in the US courts through a class action.¹⁰

This vacuum was filled via a 2013 amendment to the Companies Act, which now empowers the National Company Law Tribunal (the Tribunal) to declare an action a class action. In class action litigation provisions under the Companies Act, there are certain departures from the CPC provisions, the most significant being a minimum number of members needed to join an action for it to be declared a class action.¹¹ Further, the Companies Act avoids the expression 'same interest' and instead the Tribunal is required to consider (among several other factors) whether there are questions of law or fact common to the class and whether the claims or defences of the representing party are typical of the class it seeks to represent. Representative action provisions, however, do not apply to a banking company.

8 *Midas Touch Investors Association v. M/s Satyam Computers Services Ltd.*, CC 71/2009.

9 *Midas Touch Investors Association v. M/s Satyam Computers Services Ltd.*, Civil Appeal No. 4786/2009.

10 *Re: Satyam Computer Services Ltd. Securities Litigation*, U.S. District Court, Southern District of New York, No. 09-MD-2027 (BSJ).

11 Section 245(3), Companies Act, 2013 sets out the number of members or depositors required to file a class action suit:

- a Required number of members: for companies having share capital, no fewer than 100 members or a prescribed percentage of total members whichever is less, or a member or members holding a prescribed percentage of the shareholding in the company. For a company without share capital, not less than one fifth of the total number of its members.
- b Required number of depositors: minimum 100 depositors or a prescribed percentage of the total depositors, whichever is less, or a depositor or depositors to which the company owes the percentage of the total deposits as prescribed.

iii Competition Act

The class action came to be recognised under India's new Competition Act in 2002. The basic structure is the same as under the CPC (i.e., that the loss or damage has been caused to numerous persons with the same interest and the Tribunal has granted permission to one or more of those persons to litigate on behalf of the class). The Competition Act provides that the class action CPC provisions apply. However, to date, the class action provisions under the Competition Act have not been tested.

iv Public interest litigation

There is an altogether different dimension of representative suits in India in the form of public interest litigation (PIL). This is a unique and expansive jurisdiction carved out by Indian courts in which any person (without the need to disclose any *locus standi* or special grievance) can espouse a public cause. These petitions lie before the high courts or the Supreme Court of India, in exercise of their writ jurisdiction. Indian courts have been extremely liberal in entertaining PIL suits (to the extent of being accused of crossing their legitimate constitutional bounds and transgressing into the realm of the legislative and the executive). PIL suits, however, are highly popular, resorted to regularly, and here to stay. They cover virtually every conceivable facet of public life, including the right to a clean environment, food, water, education and medical care.

The defining features of a PIL action are that the court disregards *locus standi* and procedural compliance. It is even willing to entertain a simple letter from a public-spirited person and *suo moto* convert it into a writ petition. However, the petitioner must be seen to be acting bona fide and not for personal gain or profit. A PIL judgment is binding on everyone, whether they have notice of the proceedings or not and whether they were afforded an opportunity of being heard or not. Indeed, the nature of the parties is amorphous and the petitioner is not *dominus litus*.¹² PIL is viewed as non-adversarial, with the judge taking on a proactive role and not being confined to the pleadings or evidence produced by the petitioner. Public policy doctrines such as *res judicata* and estoppel are inapplicable.

Illustrative PIL cases

The body of case law concerning PIL is immense and diverse. A few illustrative cases are set out below to give a flavour of the scope and ambit of this jurisdiction.

*M C Mehta v. Union of India*¹³

Mr M C Mehta is an acknowledged environmentalist. In 1985, he filed a writ petition in the Supreme Court of India seeking court directions on environment-related matters, including relocation of polluting and hazardous industries outside Delhi. The Court has since kept the petition on record and, from time to time, entertained environmental issues brought before it. Various orders (on a diverse range of environmental issues) have been passed. These include orders concerning lead-free gasoline; cleaning up of major rivers; controlling crop burning

12 Aman Hingorani on 'Public Interest Litigation'; *Annual Survey of Indian Law 2017*, Vol. LIII, Chapter 24, p. 634.

13 *M.C. Mehta v. Union of India*, (2020) SCC OnLine SC 29.

(which leads to smoke pollution across North India); restricting construction activities when pollution levels spike; disposal of waste and garbage; traffic congestion; and phasing out overaged vehicles from the city of Delhi.

Vishaka v. State of Rajasthan

In this case,¹⁴ the Supreme Court was approached by a group of social activists and non-governmental organisations seeking the Court's intervention to prevent and address sexual harassment in the workplace. The Supreme Court held that there was a legal vacuum as neither the civil nor penal laws adequately address sexual harassment in the workplace and that enactment of legislation on this may take time. The Court virtually legislated by prescribing rules for both the private and the public sector to follow. Briefly, the Court imposed a duty on the employer to put in place systems to prevent and deter sexual harassment in the workplace and for resolution (or prosecution) of complaints relating to sexual harassment. Inter alia, the Court required an employer to set up complaint committees (to be headed by a woman). The complaint mechanism must ensure time-bound complaint redressal and maintain confidentiality. If the complained of conduct amounted to a criminal offence, the employer would be required to take action in accordance with the law by making a complaint to the appropriate authority. If it amounted to a civil wrong or misconduct, appropriate action was to be initiated in accordance with the applicable service rules.

The Orissa Mining Corporation case

In this case,¹⁵ two multinationals had sought the requisite permissions from the Ministry of Environment, Forest and Climate Change to undertake mining and industrial activities in a forest area. The Ministry granted the preliminary permissions but rejected the final permits. The rejection was pursuant to certain recommendations by a government committee appointed by the Ministry, which expressed concern regarding adverse effects on the region's indigenous tribal people and their lifestyle. The Supreme Court concluded that the mining activities already undertaken were illegal as they exceeded the government permits. Further, it concluded that the mining activities threatened the stakeholders' traditional lifestyle, which they were entitled to protect. Going forward, the Court required greater involvement of the village-level bodies in the decision-making processes concerning forest-related industrial or mining activities.

Endosulfan (pesticide) case

The Supreme Court in this case¹⁶ took cognisance of certain press reports that a pesticide, endosulfan, posed serious health risks. This pesticide was used widely on crops and fruit trees. Controversially (because the measures taken were merely on the basis of press reports), the Supreme Court put an immediate ban on the production, distribution, use and sale of endosulfan and directed the seizure of stocks. It then appointed a committee headed by the Director General of the Indian Council of Medical Research and the Agriculture

14 *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

15 *Orissa Mining Corporation v. Ministry of Environment and Forest*, (2013) 6 SCC 476.

16 *Democratic Youth Federation of India v. Union of India and Ors.*, (2011) 15 SCC 530.

Commissioner to conduct a study on the adverse affects of endosulfan. Months later, the Court modified its interim order and permitted exports of endosulfan to countries that permitted its use and in relation to which Indian exporters had existing purchase orders.

II THE YEAR IN REVIEW

i **Vivek Kumar Singh v. Sweta Estates Pvt Ltd**

In this case,¹⁷ a group of purchasers of housing flats sought to move the consumer court by way of a class action. The respondent, however, resisted on the ground that the majority of the complaints would be time-barred as they were merely trying to piggyback to overcome the statute of limitations. The consumer court accepted this argument, holding that the complainants were not similarly placed (in as much as some actions were time-barred). Further, the grievances were not common and the ingredients of commonality and a common class were missing.

ii **Surender Pal Singh v. DLF Homes Panchkula Pvt Ltd**

In this case,¹⁸ certain allottees of apartments in the respondent's housing development project approached the consumer court seeking classification of their complaint as a class action on behalf of allegedly 'similarly placed consumers' (including those not arrayed as parties in the complaint). The court declined to permit this as a class action, holding that the parties were seeking conflicting reliefs. One set of complainants sought possession of their flats with 8 per cent interest on the sums paid for the delay caused, whereas the other set wished to surrender their flats and have a refund of monies paid with 18 per cent interest. The court held that the reliefs claimed were not identical on behalf of the complainants, including those who had not been arrayed in the complaint.

iii **Anjum Hussain & Ors v. Intellicity Business Park Pvt Ltd & Ors**

In this case,¹⁹ the complainant, who had booked office space in a project consisting of residential and office units, sought to bring a class action on account of delays in completion. The consumer court declined to treat it as a class action, holding that although the grievance was common it was not shown who (from the class) would be covered as a 'consumer' under the definition provided under the Act. This decision was, however, reversed by the Supreme Court of India on appeal, with the Supreme Court stating that the 'sameness of interest' was not to be confused with the 'same cause of action': 'It is true that each of the allottees is interested individually in fighting out the demand separately made or going to be made on him and thus separate causes of action arise in the case, but that does not make Order I, Rule 8 inapplicable.' The Supreme Court also held that the class action provisions must receive a liberal interpretation, such as to subserve the object of the provisions' enactment.

17 *Vivek Kumar Singh v. Sweta Estates Pvt. Ltd.*, (2018) SCC Online NCDRC 357.

18 *Surender Pal Singh v. DLF Homes Panchkula Pvt. Ltd.*, (2018) SCC Online NCDRC 531.

19 *Anjum Hussain & Ors. v. Intellicity Business Park Pvt. Ltd. & Ors.*, (2019) 6 SCC 519.

iv K S Varghese and Ors v. St Peter's and Paul's Syrian Orth and Ors

In this case,²⁰ two factions of a church had been in dispute over several decades. The Supreme Court had intervened in 1958 and then again in 1995. In the latest round, the Supreme Court held that the principles of *res judicata* would apply and that the findings of its 1995 judgment would continue to be binding on the parish members (including those not born at the time of the most recent litigation).

III PROCEDURE

i Commencing proceedings and procedural rules

The discussion below is relevant for class actions (other than PIL actions).

As seen, a class action in India necessarily requires court permission. Before granting the requisite permission, the court shall (at the plaintiff's expense) cause notice to be issued to all persons sought to be represented. Where personal service is not feasible (including for the reason that large numbers of persons are involved), service through public advertisements may be effected as the court may direct. A person who seeks to be represented or defended may apply to the court to be made a party to the suit. A decree passed in the suit is binding on all persons on whose behalf or for whose benefit the suit is instituted or defended.

ii Damages

Historically, Indian courts have been conservative in awarding damages. There are no jury trials. The basic principle for awards of damages is restitution and compensation. However, in environmental degradation cases, damages can be extensive and in some cases punitive as well.

In cases of public wrongs, courts tend not to calculate damages precisely or base them on any expert evidence; instead, the court takes a broad-brush approach and orders what it considers just and appropriate given the totality of the facts. In representative suits, damages will either be awarded to identified individuals (sometimes through court-appointed commissioners) or, in environmental cases, simply awarded in favour of the government exchequer towards restoration of the harm done.

iii Costs

One significant feature of Indian law is that actual or realistic costs are never awarded and an exercise of assessment of costs is not undertaken (as it is in American or English courts). Section 35 of the CPC deals with the subject of costs. It states that costs shall be at the discretion of the court but subject to limitations as may be prescribed in law. The general rule is that costs shall follow the event. However, where the merits are evenly balanced or there is a fair question of law involved, the parties are left to bear their own costs.

Various high courts have framed rules prescribing a schedule of costs awarded in suits and these are at a very modest scale (rarely exceeding a few hundred dollars). To illustrate this, Section 35A of the CPC (last amended in 1977) states that if a claim or defence is found to be false or vexatious to the knowledge of the concerned party, the court may award 'exemplary costs' against it, which, however, shall not exceed 3,000 rupees (about US\$42).

20 *K.S. Varghese and Ors. v. St. Peter's and Paul's Syrian Orth. and Ors.*, (2017) 15 SCC 333.

The courts have taken judicial notice that unscrupulous litigants may take advantage of the fact that costs are either not awarded or are awarded only nominally.²¹ At the same time, it is felt that heavy or actual costs may be an impediment in pursuance of a legal right or defence (and therefore, contrary to public policy). The Law Commission of India (an advisory body to the government and Parliament), in a report of May 2012,²² recommended that more reasonable costs should be awarded. Nonetheless, its recommendation for Section 35A of the CPC concerning false or vexatious costs claims is merely to increase the cap on costs from the existing 3,000 rupees to 100,000 rupees. This indicates that realistic costs amounts are still some distance away.

iv Settlement

Once a court certifies an action as a class action, it can neither be withdrawn nor abandoned and no agreement, compromise or satisfaction can be entered into unless the court has given (at the applicant's expense) notice in the prescribed manner to all interested persons.²³ The legislation, however, is silent as to how the court is then to proceed. In particular, there is no provision for a 'fairness hearing' (as known in, for instance, the US courts). The absence of clarity in the legislative framework has led the Indian courts to proceed in an ad hoc manner and falter many times.

The following is illustrative of this situation.

The Supreme Court of India found itself in a peculiar situation over PIL in the *Olga Tellis* case.²⁴ The city of Mumbai (then known as Bombay) sees a continuous influx of migrants, who settle in shanties because of the unaffordability of regular housing. These dwellings sometimes spill over onto public pavements. In 1985, the city sought to evict the pavement dwellers, but it did not offer them any alternative shelter. There was public outrage as this was just prior to the outbreak of the monsoons. (Mumbai has heavy torrential rains during the monsoon months). Moved by the plight of the pavement dwellers, a citizens' group approached the High Court of Bombay, through a leading senior advocate who 'candidly conceded' in court that his clients were not claiming any fundamental or legal right on the part of the pavement dwellers to stay on the pavement, rather they were only looking at a humanitarian approach to tide them over the monsoon period. On the strength of this, the eviction was halted. However, when the monsoons had passed, the pavement dwellers stayed put and some other organisation now petitioned the Supreme Court directly (under its writ jurisdiction) contending that the pavement dwellers had a fundamental right to stay on the pavement unless alternative accommodation was made available. The new set of petitioners representing the pavement dwellers claimed that they had nothing to do with the previous set (who had given the undertaking to the High Court). The problem was compounded because, in a PIL suit (where the CPC does not apply), no public notice was given and neither was the matter declared a representative action under the provisions of the CPC. Unfortunately the Supreme Court did not provide any guidance for future reference and simply dismissed the argument relating to *res judicata*, stating that there can be no estoppel of fundamental rights

21 *Salem Advocates Bar Association, Tamil Nadu v. Union of India*, (2005) 6 SCC 344.

22 'Costs in Civil Litigation', Law Commission of India, Report No. 240.

23 Order I Rule 8(4), Code of Civil Procedure, 1908.

24 *Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors.*, (1985) 3 SCC 545.

and therefore any concession in the lower court (under a mistake of law) would not affect the fundamental rights of pavement dwellers to approach the Supreme Court and the Court ruled on the merits in favour of the pavement dwellers.

The issue was soon to be revisited. Lack of clarity on the procedure to be followed (and the absence of any court-led procedures) led to an alarming situation in the *Bhopal Gas Leak* case. By way of background, the Bhopal Gas Leak Disaster in December 1984 (in the city of Bhopal) was the worst industrial accident known to mankind. A major American multinational chemical company, Union Carbide Corporation, was involved. The government stated that over 3,000 people had died and another 30,000 suffered serious injuries. As Union Carbide was a US-based corporation, India immediately saw multitudes of ‘ambulance-chasing’ lawyers descend on the city and get people at large to sign over power of attorney to the lawyers, and in this way purporting to represent the victims. This led the government of India to step in and enact special legislation, the Bhopal Act,²⁵ conferring exclusive powers on the central government, inter alia, to represent all victims and deal with the claims to the claimants’ best advantage. By virtue of the Bhopal Act, the central government ousted the claimants and took over the right to be represented in the matter (whether within or outside India) to the same extent as the original claimants. The Bhopal Act specifically allowed the government to enter into a compromise with Union Carbide but failed to provide any procedure or guidelines to be followed.

Armed with the Bhopal Act, the government filed a civil suit in the Bhopal civil court before a special court constituted for this purpose, and claimed a total of US\$3 billion for the victims (making it the largest damages case in the world at the time).

The matter reached the Supreme Court of India on an interlocutory application by the government seeking interim compensation for the victims. The Supreme Court played a proactive role and nudged both parties to agree on an overall settlement of US\$470 million. The settlement was worked out in an in-chamber hearing (and not in open court). No victims group was notified or heard. The Court later disclosed that it had arrived at this figure basically by bridging the gap between the US\$500 million the central government sought from Union Carbide and the US\$420 million that Union Carbide was willing to pay. While the Indian government found the court-suggested figure acceptable, it was apprehensive about public reaction, the political backlash and the possibility that the victims would feel let down. So the government essentially left it to the Supreme Court to mandate the settlement. The Supreme Court agreed to do so but it faltered at rendering a non-speaking ‘order’ requiring the government to settle the claim for this figure in full and final settlement. This led to a huge public outcry about not only the perceived inadequacy of the figure, but also the failure to hold a ‘fairness hearing’ and the lack of transparency as to how the figure was arrived at. The Supreme Court realised that it had overstepped itself and *suo moto* issued a supplementary order extensively setting out the reasoning behind the process it had adopted in arriving at the figure of US\$470 million and why it considered this to be just and equitable given the facts of the case. The Court said that it was setting out its reasons in order to be of assistance in relation to the review proceedings, which had by then been initiated to challenge the settlement order.

25 The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985.

The Union Carbide settlement was questioned for decades afterwards and remains under a cloud to this day. The Supreme Court faced severe criticism, with the entire matter pointing back to the fundamental lack of clarity or guidance on the settlement of mass torts in India.

Soon thereafter, the Supreme Court was once again faced with a mass tort situation (the *Oleum Gas Leak* case). This concerned an ageing chemical factory located in north Delhi. In December 1985, a sulphur dioxide tank mounted on a steel structure collapsed under its weight, which led to a massive leakage of oleum gas, causing panic, harm and inconvenience to a large section of the people. Fortunately (given the nature of the gas) not many were seriously injured. There were a few reported cases of death, but causal effect was not established. The Supreme Court was already seised of the matter, as a writ petition seeking closure and relocation of the industry outside Delhi was pending consideration, and when the gas leak took place, the Court took up all issues including compensatory damages resulting from the leak. The Supreme Court entrusted the matter to the Delhi Legal Aid and Advice Board and under directions from the Court, claims were invited. Five thousand claims came to be filed in the civil courts of Delhi and pursued by the Delhi Legal Aid and Advice Board at no cost to the victims. At a certain point in time, the matter came up before the Supreme Court on an interlocutory issue and the Court felt that the matter was one that should be settled. Having recently suffered loss to its reputation (in the Union Carbide settlement), the Court chose to tread far more carefully this time. It did not monitor or drive the settlement process (much less suggest a settlement figure). The Supreme Court did, however, add that a plaintiff refusing to settle the matter in accordance with the advice of the legal aid committee would cease to enjoy the benefit of legal aid and would have to pursue the case independently. The legal aid committee invited the plaintiffs for settlement talks in small batches. The insurance company was also invited to be available. With a promise of ready cash, all 5,000 claims were settled within a month, without any outcry or expression of grievance on the part of any of the victims; in this case at least there was a happier ending.

The settlement of representative suits is very much work in progress. No lessons have been learnt from the past. Neither legislation nor court judgments have furnished the requisite guidance and, as can be seen above, when situations arise, the courts end up reinventing the wheel once more.

IV CROSS-BORDER ISSUES

i Overview

India's judicial systems and traditions are moored to its English past. The commercial laws are all based on English common law and English case law is routinely referred to and relied upon.

Politically, India has a quasi-federal structure with each state headed by a high court, and the Supreme Court as the final court on all issues of law or fact. (The Supreme Court also enjoys original writ jurisdiction in relation to protection or enforcement of fundamental rights).

The Indian judiciary is known to be fair and independent. There is no xenophobia in relation to foreign litigants and the rule of law prevails. Indeed, there is not a single instance of a foreign arbitral award not being enforced by the Supreme Court of India. The main issue with the Indian judicial system concerns delays. A normal civil action can take well over a decade in the court of first instance itself. Writ petitions offer a quicker remedy but are available only against the state (for its acts or omissions) and are not appropriate for claiming

damages. Accordingly, India is not an attractive forum for bringing civil suits or actions in damages. Arbitration proceedings, however, do get seated in India and are dealt with under the efficient Arbitration and Conciliation Act (based on the UNCITRAL Model Law).²⁶

ii Discovery

The general approach to discovery is conservative. The plaintiff is expected to have the evidence to establish its case, without the need for any elaborate discovery. A request for discovery must be shown to be relevant and proportionate. American-style discovery, or 'roving' or fishing expedition-style discovery, is not permitted.

iii Enforcement of foreign judgments

The CPC has two regimes for enforcement of foreign judgments:

- a* enforcement of a foreign judgment from a 'reciprocating territory'; and
- b* enforcement of a foreign judgment from any other territory.

In both categories, enforcement can be resisted on six stated grounds, which generally boil down to denial of due process, or public policy. Where a reciprocating territory is involved, a foreign judgment is treated as a final decree of the court, which can be executed straight away, whereas a judgment from a non-reciprocating territory requires the initiation of a fresh suit based on the foreign judgment. The Indian courts will presume the foreign judgment to be conclusive on matters directly adjudicated between the parties.²⁷

V OUTLOOK AND CONCLUSIONS

Two diverse paths are available in India in relation to class action litigation: the first is the regular mechanism available under the CPC, which in turn forms the template for allied statutes providing for class action (including the Companies Act 2013, the Competition Act 2002 and the Consumer Protection Act 1986). A good part of the action, however, lies through the robust mechanism available by recourse to the high courts (or directly to the Supreme Court) through the PIL instrument.

26 United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985.

27 Section 13, CPC sets out the grounds exclusively upon which a foreign judgment can be challenged, which are the same as the grounds relating to foreign judgments of a reciprocating jurisdiction. (Section 44A, CPC). The six grounds on which a foreign judgment can be challenged may be summarised as follows:

- a* the foreign judgment has not been pronounced by a court of competent jurisdiction;
- b* it has not been given on the merits of the case;
- c* it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law in India (where applicable);
- d* the proceedings in which the foreign judgment was obtained are opposed to natural justice;
- e* it has been obtained by fraud; or
- f* it sustains a claim founded on a breach of any law in force in India.

Public policy grounds have been interpreted by the Indian Supreme Court as encompassing circumstances that are contrary to: fundamental policies of Indian law; the interests of India; and justice and morality.

Indian courts are liberal in matters of injunctive relief (including mandatory injunctions) and do not insist on security by way of costs as a condition for grant of any such injunction. Nonetheless, an action for damages is not attractive because of the inordinate judicial delays.

Indian courts need to focus on settlement mechanisms in representative actions and put in place a detailed mechanism to this effect. Equally, the PIL mechanism needs judicial attention, to provide for notice to the affected class and an appropriate methodology for gathering their views.

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