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The Indian Class Actions: How Effective Can They Be?

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I. Introduction

With the enactment of the Companies Act of 2013, India greatly enhanced its class action devices. In doing so, India follows a pro-class action trend that can be found in many other countries in the world. But how effective will India's new regime be? Although others have already ventured tentative opinions on this question,¹ in this article we undertake the first comprehensive assessment. In order to do so, we draw upon five metrics that have been identified in the comparative class action literature as important drivers of how effective a nation's class action devices are: 1) how broad the substantive scope of the devices are, 2) who can initiate the devices, 3) who makes up the membership of the class in the actions, 4) what remedies are available to the class, and 5) how the actions are financed.

In Part II, we explain these five metrics in more detail. In Part III, we describe India's class action devices. We then make an assessment of how effective they are based on our metrics. We find that India's class action devices fare well on most of the metrics, but, if improvement is to be made—and we take no view on whether doing so would be socially desirable—the greatest potential for improvement lies in new financing mechanisms. In particular, India might consider eliminating the loser-pays rule and embracing contingency fees for lawyers and third-party investors. In Part IV, we offer concluding remarks.

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¹ See Arjya Majumdar & Sneha Bhawnani, *Class Action Suits—Genesis, Analysis, and Comparison*; Vikramaditya Khanna, *Enforcement of Corporate and Securities Laws in India*; Arindam Ghosh & Moin Ladha, *Getting the Deal Through: Securities Litigation India*; Cyril Amarchand Mangaldas, *Navigating Disputes Environment in India*; Jasleen K. Oberoi, *Class/Collective actions in India: Overview*.

II. The Five Metrics of Class Action Effectiveness

Comparative class action scholars have attempted to identify the characteristics that make a nation's class action devices more or less effective. Of course, there will always be idiosyncratic circumstances in every nation that belies easy categorization. We have read, for example, many complaints about how slow some of India's courts can be in resolving litigation;² no class action device will be very effective if a nation's courts are overburdened. Nonetheless, scholars³ have identified five metrics that have at least significant bearing on how effective a nation's class action devices are likely to be:

- How broad is the scope of the class action device? Is it largely trans-substantive or does it embrace only certain causes of action?
- Who has standing to initiate the class action device? Private parties? Nonprofits? The government? All of the above?
- Who is included as class members? Only those who opt in? Or everyone unless they opt out?
- Which remedies are available in the class action device? Compensatory damages? Extra-compensatory damages? Injunctive and declaratory relief?
- How can the class actions be financed? Lawyer contingency fees? Third-party financing? Fee shifting? Government subsidies?

We discuss each of these metrics in more detail below and explain how each one is thought to bear on the efficacy of the class action. But it is important to note that we take no position here on whether it is socially desirable to maximize the effectiveness of class action devices. Rather, we identify these metrics simply to give policymakers a clear understanding of the knobs they can turn and buttons they can push if they want to make their class actions more or less effective.

² <http://www.livemint.com/Companies/OhvhdZ4oAPmUCy5Ji9bWjM/Class-action-suits-in-company-law-explained.html>

³ See Deborah Hensler, *Can Private Class Actions Enforce Regulations? Do They? Should They?*

Scope: Our first metric is how broad the substantive scope of the class action device is. It is obvious that the broader the scope, the more effective the device will be, everything else equal. For example, some countries, like the United States, the class action device is “trans-substantive”: the device is available in almost every lawsuit that is filed, no matter what the cause of action. In other countries, this is not the case. For example in South Korea, the class action device is only available in securities and consumer protection cases.⁴

Standing: Our next metric is who has standing to initiate the class action device. In some countries, like the United States, private parties who are injured can initiate the lawsuits, but, in other nations, only nonprofit organizations or the government can do so. (In fact, in the United States, all three can.) The most effective class action devices include private individual enforcement. The reason for this is apparent: there are more potential plaintiffs among the individuals who have been injured by wrongdoing than they are among nonprofit organizations or the government. More potential plaintiffs means it is more likely a class action will be initiated when wrongdoing takes place. Although nonprofits and governments are also useful litigants, especially when individuals may not have the knowledge or incentive (because, for example, it is not profitable) to initiate an action, we do not think entity standing is nearly as potent as individual standing.

Membership: Our next metric is who is included as class members: only those who opt in, everyone unless they opt out, or everyone without any opportunity to opt out. There is an extensive literature showing that mandatory and opt-out class actions, like those in the United States, are much more effective than opt-in class actions (even though the latter are much more popular in the rest of the world). The reason is simple: inertia is very powerful; when given a choice, people often do nothing. Thus, mandatory and opt-out class actions inevitably include more class members, and, as such, pose a much greater threat to wrongdoers.

⁴ PAUL G. KARLSGODT, *World Class Action: A Guide to Group and Representative Actions Around the Globe*, 463, 465 (2012)

Remedies: Our next metric is which remedies are available in the class action. The more flexible the class action is with regard to remedies, the more effective it will be. Sometimes wrongdoers can only be brought to justice with damages, but sometimes they can only be brought to justice with injunctive relief. The most effective class actions permit the recovery of either remedy.

Financing: Our last metric is how the class action device is financed. Some countries, like the United States, allow lawyers or investors to finance class actions in exchange for a share of any recovery. Other countries do not allow contingent investments of this sort, but, rather, require the class to foot the bill on their own. Many countries shift some or all of the winner's attorney's fees to the other side. Some countries, like Canada, provide public subsidies to litigants to bring class actions. Which financing method is most effective? We think it is one that permits investments in class action recoveries by lawyers or others, preferably without a loser-pays rule. The loser-pays rule is both a help and a hindrance to financing litigation: on the one hand, the class can rely on fee shifting to help finance the case if it succeeds; on the other hand, the class has to worry about paying the defendant's attorney's fees if it loses the case. For this reason, we think loser pays on its own is not a very effective financing scheme. The same is true of public subsidies. Although in some ways these subsidies mimic third-party investments, the limited level of assets available in the public funds we are aware of are no match for the unlimited assets of the private sector.

III. How Effective Are India's Class Actions?

A. India's Class Actions

Although the Companies Act of 2013 has received most of the attention, India has long had various class action devices and they remain on the books. In this section, we briefly describe all of the class action devices we have been able to identify in Indian law.

The Civil Procedure Code, 1908: Under Order 1, Rule 8 of the Civil Procedure Code, one or more persons may bring an action in civil courts on behalf of all other similarly interested persons.⁵ It appears there are no limits on the subject matter of class action

⁵ *Order I, Rule 8 of Civil Procedure Code, 1908*

suits that can be brought under Rule 8, except for actions that cannot be filed in the civil courts at all, such as securities lawsuits.⁶

The Consumer Protection Act of 1986: Under the Consumer Protection Act, a consumer can file in various special consumer courts an action on behalf of all other similarly interested consumers.⁷ These actions are limited to consumer protection violations. The consumer courts can order the defendant to pay compensation for all the illegal goods it sold to the class, not just the goods bought by the representative complainant.⁸

Public interest litigation: Under Articles 32 and 226 of the Constitution of India, individuals and entities can represent a class of others in suits against public officials.⁹ These suits must be filed in the Supreme Court or the High Courts and can only be filed for one of the five constitutional writs.

The Competition Act of 2002: Under Section 53 of the Competition Act, one person can file suit in the Competition Appellate Tribunal on behalf of other similarly interested persons challenging anti-competitive agreements and market positions,¹⁰ including compensation to recover losses suffered due to anti-competitive conduct.¹¹

The Companies Act of 2013: Under Section 241 of the Companies Act, either 1) any member of any company who owns at least one-tenth of the company's shares, 2) one-tenth of the company's shareholders, or 3) 100 shareholders, can bring suit in

⁶ http://www.business-standard.com/article/economy-policy/civil-courts-have-no-jurisdiction-over-sebi-act-105121901082_1.html - Section 15Y and Section 20A of the Securities and Exchange Board of India Act, 1992.

⁷ Section 2 (I)(b)(iv) of Consumer Protection Act, 1986. A complainant can file a complaint with the 'District Consumer Disputes Redressal Forums' for claims of up to INR 2 million, to the 'State Consumer Disputes Redressal Commissions' for claims of between INR 2 million and INR 10 million, and to the 'National Consumer Disputes Redressal Commission' for claims of more than INR 10 million. Sections 11(1), 17(a)(i), and 21(a)(i) of Consumer Protection Act, 1986.

⁸ <http://economictimes.indiatimes.com/tech/software/satyam-investors-seek-rs-5000-cr-compensation-over-share-crash/articleshow/4507499.cms>

⁹ <http://www.legalserviceindia.com/article/1171-Public-Interest-Litigation.html>

¹⁰ Section 19(1) of Competition Act, 2002

¹¹ Section 53N(4) of Competition Act, 2002

the National Company Law Tribunal if they believe the affairs of the company have been or are being conducted in a manner prejudicial to the public interest or to the shareholders.¹² Relief under Section 241 is limited to injunctive orders.¹³ Section 245 goes further. It allows depositors as well as shareholders to initiate suit,¹⁴ and it permits the recovery of damages and anticipatory injunctive orders in addition to other injunctive orders.¹⁵ But, unlike Section 241, Section 245 does not apply to banking companies.¹⁶ Moreover, the Central Government of India has a power to exempt a class or classes of companies from any provisions of the Companies Act as required by the public interest.¹⁷

B. How Does India Fare on the Five Metrics?

Scope: As far as we can tell, these various class action devices pretty well cover the entire field of litigation in India. That is, India's laws appear to offer trans-substantive class-wide relief. The Competition Act takes care of antitrust claims. The Consumer Protection Act takes care of consumer claims. The Companies Act takes care of securities claims. The Constitution takes care of many suits against the government. And the Civil Procedure Code would seem to take care of anything else. The scope of India's class action device is surprisingly comprehensive. Other than the piecemeal nature of India's laws, we do not see much room to improve the scope of India's class action devices.

Standing: Nor do we see much room to improve who can initiate these class actions: under every class action law, private

¹² Section 241(1) of the Companies Act, 2013

¹³ Section 242 of the Companies Act, 2013

¹⁴ Section 245(1) of the Companies Act, 2016

¹⁵ <http://www.livemint.com/Companies/OhohdZ4oAPmUCy5Ji9bWjM/Class-action-suits-in-company-law-explained.html>; Majumdar, Arjya B. and Bhawnani, Sneha, *Class Action Suits – Genesis, Analysis and Comparison* (December 12, 2016).

¹⁶ http://www.business-standard.com/article/finance/rbi-exclude-banks-from-class-action-110090600031_1.html; Section 245(9) of the Companies Act, 2016

¹⁷ Section 462 of the Companies Act, 2013

individuals can initiate suit. As we explained above, these are the most important litigants. Moreover, it also appears to us that under many if not all of these laws, the government¹⁸ and other entities can file these suits.¹⁹ If there is any room for improvement here, it is to further expand the standing of these entities, but again, we think India's class actions are already operating at near maximum effectiveness on this metric.

Membership: It is not entirely clear to us how some of India's class action devices comprise their classes. We gather that, under the Civil Procedure Code, the class actions are the not-very-effective opt-in variety.²⁰ We also gather that, under Section 245 of the Companies Act, the class actions are the very effective opt-out variety.²¹ But we are not sure whether the other class action laws are opt in, out opt, or even whether the class actions are mandatory. We would like to find more information on this matter.

Remedies: Under the Civil Procedure Code and the Constitution, it appears that only injunctive or other equitable relief is available.²² Under the Consumer Protection Act, it appears that only damages are available.²³ But under the Companies Act²⁴ and the Competition Act²⁵ both injunctive relief and damages are

¹⁸ *Maggi Ban: Govt Files Case Against Nestle, Seeks Rs 640 Cr In Damages*, INDIAN EXPRESS (August 12, 2015, 11:54 AM), <http://indianexpress.com/article/india/india-others/govt-to-seek-rs-426-crore-in-damages-from-nestle-india-over-maggi/>.

¹⁹ PAUL G. KARLSGODT, *World Class Action: A Guide to Group and Representative Actions Around the Globe*, 525 (2012) (describing public interest suit filed by Investors Grievances Forum); Jasleen K Oberoi, *Class/Collective Actions In India: Overview*, in CLASS ACTIONS GLOBAL GUIDE (2016) (describing Consumer Protect Act suits filed by non-governmental entities against Ola and Uber). But see PAUL G. KARLSGODT, *World Class Action: A Guide to Group and Representative Actions Around the Globe*, 525 (2012) (describing denial of standing under Consumer Protect Act to Midas Touch Investors' Association).

²⁰ Cyril Amarchand Mangaldas *supra* note 11, at 26.

²¹ Rule 87(3), The National Company Law Tribunal Rules, 2016, pt. II sec. 3 (July 22, 2016).

²² Oberoi, *supra* note 65.

²³ <http://economictimes.indiatimes.com/tech/software/satyam-investors-seek-rs-5000-cr-compensation-over-share-crash/articleshow/4507499.cms>

²⁴ Sen, *supra* note 8.

²⁵ Section 53(N)(1), Competition Act

available. If India wanted to make its class action devices more effective, it might consider expanding the relief available under the Civil Procedure Code and the Consumer Protection Act.

Financing: Here, is where we think there is most room to improve the effectiveness of India's devices. India follows the loser-pays rule, which, as we noted, is both a hindrance and a help to class actions; on its own, it is not a very effective financing device. Even worse, under the Companies Act, frivolous actions not only must pay the defendant's fees but can be fined by the court as well. Moreover, India does not allow lawyers to finance class actions by taking a stake in the outcome (i.e., contingency fees). All of this seriously undermines the effectiveness of the class action devices. On the other hand, we have found nothing in Indian law that prevents third-party investors from financing class actions by taking a stake in their outcomes—this is a popular method of financing in other countries that follow loser-pays and do not allow contingency fees for lawyers—and India does offer the possibility of a public subsidy to finance class actions under the Companies Act. It is too early to tell how generous the public subsidies will be, but, if a robust third-party presence takes hold in India, the current financing mechanisms may prove somewhat effective. Nonetheless, much more could be done: eliminating the loser-pays rule and explicitly embracing financing by lawyers and others with contingent stakes in the outcome.

IV. Conclusion

In this Article, we describe five metrics that the comparative class action literature has identified as significant drivers of the effectiveness of class action devices. We find that the Indian class action regime fares well on many of these metrics, with the most noteworthy exceptions the remedies that are available in some class actions and the financing mechanisms that are available in all the class actions. If India wished to improve the effectiveness of its class actions, we would recommend expanding the remedies available under the Civil Procedure Code and the Consumer Protection Act as well as transitioning away from loser-pays in class actions and toward contingency fees for lawyers and third-party investors.