THE ARBITRABILITY OF ANTITRUST-RELATED ISSUES AND THE COMPETITION ACT, 2002 - A CRITICAL ANALYSIS

Isha Khond, LL.M. (Corporate and Commercial Laws),
Maharashtra National Law University, Mumbai

ABSTRACT

The arbitration proceedings and competition law disputes are two opposite poles; the former is the method mutually opted by parties to solve the commercial disputes, whereas the latter is aimed to protect public interest. The arbitration proceedings are regulated by the Arbitration Act and the contract between the parties, while the antitrust-related issues are governed by the Competition Act, 2002. The author wants to analyse the interaction and consistency between these two laws in India and, by analysing India's approach to the arbitrability of competition law disputes, compare it with that of the EU and the United States. This paper is based on the notion that whether antitrust-related disputes can be settled through the arbitration proceeding without impacting public interest.

Keywords: Arbitration, Antitrust disputes, competition, arbitrability of competition law disputes.

Problem of Study

The Arbitrability of competition law disputes in India will be examined by undertaking comparative analysis with the US and the EU.

Research Questions

1. How does the competition law interplay with arbitration law?
2. To what extent are competition law disputes arbitrable under Indian law?
3. How does India's approach to the arbitrability of competition law disputes compare with that of the EU and the US?

Research Objectives

1. Understanding the interplay between the competition law and the arbitration law.
2. Navigating the scope and limits of arbitrability of competition law disputes in India.
3. Analysing the India's approach to the arbitrability of competition law disputes compare with that of the US and EU framework.

Research Methodology

In this paper, the doctrinal and exploratory research methodologies were followed. The research was done by relying upon the various primary and secondary research materials such as Judicial pronouncements, journals, articles, survey reports, etc. The analysis was made on the basis of the study of secondary data.

Scope of research

The comparative analysis of the arbitrability of antitrust-related issues in India is analysed with the US and EU frameworks. The scope of the research is restricted to the US and the EU frameworks since both jurisdictions have well-settled antitrust laws and a long-standing history of arbitration mechanisms, as well as the availability of information in the public domain and convenient accessibility of information in these jurisdictions.

Literature Review

1. *"Arbitrability of the Anticompetitive Disputes in India – A Comparative Traversal Through the Legal Frameworks in the US And EU*[1] *"*

   The author failed to navigate through the key provisions of the Arbitration Act and the Competition Act, 2002, which can be analysed to study the interplay of both. The author had not relied upon the reasoning and interpretation of landmark judicial pronouncements as a source while analysing the arbitrability of antitrust-related disputes.

2. *"Antitrust Laws in India & USA: A Comparative Analysis*[2] *"*

   In this paper, the author has incorporated all the relevant provisions of the Competition Act and arbitration laws in the Indian and the US jurisdiction for comparative analysis, However, author has not relied upon the landmark judicial pronouncements pertaining to the arbitrability of competition law disputes. The tests led down in the Vidya Drolia case were material while analysing the arbitrability of competition law disputes.

Introduction

"Useful function of a lawyer is not only to conduct litigation but to avoid it wherever possible by the achieving settlement or withholding suit"[3]

Arbitration is defined as a method of dispute resolution wherein a neutral or impartial person named as arbitrator decides the disputes between the parties under the arbitration agreement in a final and binding manner. The features of arbitration that are derived from the Arbitration Act are ad hoc and institutional arbitration, party autonomy, severability, impartiality, minimum interference from court, and competence-competence (competency of arbitrator to rule on his own jurisdiction).

[1] Suhas M S, 'Arbitrability of the Anticompetitive Disputes in India – A Comparative Traversal Through the Legal Frameworks in the US And EU' (2023 IJNRD Volume 8, Issue 1 January 2023 ISSN: 2456-4184 IJNRD.ORG) <https://ijnrd.org/papers/IJNRD2301179.pdf.>

[2] Anuja Paul, 'Antitrust Laws in India & USA: A Comparative Analysis' (2022 International Journal of Law Management & Humanities, ISSN 2581-5369).

[3] Dr. N.V. Paranjape, '*Studies in Jurisprudence & Legal Theory*' (first published 2023, Central Law Agency)125

The Competition Act, 2002, is to ensure fair competition in the market so that ultimate consumers get the best product at the best price. The Competition Act, 2002, is applicable where there arises a question of anti-competitive agreements. The act governs the establishment and functioning of the Competition Commission of India ("**CCI**"). The act empowers the CCI to regulate the prevention of appreciable adverse effects on competition, to investigate if any enterprise is abusing its position of dominance, and to regulate the combinations.

The arbitrability of competition law disputes has been a matter of both theoretical and practical significance, i.e., whether the parties to an arbitration clause can submit to arbitration such disputes and whether the arbitrators themselves have the power to decide them."

"Arbitrability" refers to whether a dispute is capable of being settled by arbitration. Arbitrability depends on the subject and objective arbitrability of a dispute. If the subject of a particular dispute does not fall into the scope of the arbitration laws or is beyond the scope of arbitration, the same dispute is not capable of being settled by arbitration. A few examples of subjects that cannot be arbitrated are criminal, testamentary, certain property disputes, consumer disputes, IP disputes, etc. These subject matters are not arbitrable because these matters are civil personal disputes, determine the status of the party, the sovereign has rights to award punishments, involvement of third-party interest, etc.

In this paper, the researcher aims to analyse the arbitrability of antitrust-related disputes. The research is structured to verify in the verbatim of laws whether the antitrust-related disputes are arbitrable; if yes, what conditions and procedure is required to comply. In the analysis part, research is going to find the difference in the approaches adopted by India and the US and the EU and how these different approaches help to settle antitrust-related disputes in a robust manner without impacting public interest.

Navigating Competition Law Disputes: The Arbitrability Paradigm in India

Section 19(1) of the Indian Competition Act, 2002[4] provides that any person or entity who has suffered loss and any individual who has not suffered any loss can approach CCI to report the dispute. Here, an informant can be anyone; hence, this shows that competition law disputes are of a public nature. The issue of whether the competition law disputes, which can further be categorized into two types based on the right involved in the dispute, i.e., right in rem and right

[4] The Competition Act 2002, s 19(1)

in personam, are arbitrable or not has been addressed in the following judicial pronouncements.

In the case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. & Others*[5] the Hon'ble Supreme Court of India laid the foundation of the discussion of the determination of the arbitrability of competition law disputes. It was based on the subject of a dispute, wherein it was held that the arbitrability of competition law disputes is to be decided basis the nature of disputes. Whether the dispute falls into right in rem or right in personam, the prior one refers to the right that is against the world at large or all the individuals universally, which is a negative right in which the dispute is not arbitrable, whereas the latter refers to the right against a specific person or entity, which is a positive right that is arbitrable.[6] The Hon'ble Supreme Court of India applied the test by carving out the list of disputes that fall into right in rem; hence, such disputes are non-arbitrable. However, the competition law disputes were not included in that list.

Therefore, competition law disputes wherein rights in rem are involved, such as cartel and other anti-competitive agreements given under *Section 3* of the Competition Act, 2002[7], cannot be settled through arbitration, as in such disputes, the right is against the large public. However, competition law disputes wherein rights in personam are involved, such as disputes arising out of abuse of dominant position regarding distributive agreements, may be adjudicated by the arbitral tribunals.[8]

In case of *Union of India v Competition Commission of India*[9], despite having arbitration clause in the agreement, the Apex Court of India upheld the proceedings before CCI and held that Arbitration tribunal does not have the required expertise in investigating and adjudication of competition law disputes.[10]

In the case of *Vidya Drolia v. Durga Trading Corpn.*[11], the Honourable Supreme Court of India, while deciding the arbitrability of dispute, established the fourfold test. The fourfold test

[5] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. & Others [2011] 5 SCC 532
[6] Shahezad Kazi & Gladwin Issac, 'Supreme Court Of India Clarifies 'What Is Arbitrable' Under Indian Law And Provides Guidance To Forums In Addressing The Question'(10 Jan 2021) 6 <https://www.livelaw.in/law-firms/articles/supreme-court-clarifies-arbitrable-indian-law-168218>
[7] The Competition Act 2002, s 3
[8] Suhas M S, 'Arbitrability of the Anticompetitive Disputes in India – A Comparative Traversal through the Legal Frameworks in the US and EU'(2023 IJNRD Volume 8, Issue 1 January 2023 ISSN: 2456-418) www.ijnrd.org/papers/IJNRD2301179.pdf
[9] Union of India v Competition Commission of India AIR 2012 DELHI 66
[10] Union of India v Competition Commission of India, AIR 2012 DELHI 66
[11] Vidya Drolia v. Durga Trading Corpn. (2021) 2 SCC 1

gave a streamlined approach to determine when a dispute falls out of the ambit of arbitration. Analysing this fourfold test is essential to determine the arbitrability of competition disputes in India. The following criteria were laid down as a fourfold test for determining non-arbitrability of a subject in an arbitration agreement by the Honourable Supreme Court of India:

(i) "*When cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.*

(ii) *when cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;*

(iii) *when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and*

(iv) *when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).*"[12]

The analysis of the above-mentioned judicial pronouncements suggests that if a competition law dispute falls into any of the above-mentioned criteria or its proceedings require investigatory and adjudicatory expertise, which CCI possesses, the same will not be arbitrable.

The Comparative analysis of Arbitrability of competition law in The US and the EU Perspective

The statutory position in the USA and the EU provides that antitrust disputes can be presented to arbitration tribunal in case of international contracts.[13][14]

In the US, for the enforcement of Antitrust, a tribunal is always involved, whereas in the EU, the enforcement of Antitrust cases is always done by the competition commission and the same cannot be referred to enforcement bodies or an arbitral tribunal. Hence, the reluctance to submit

[12] Ibid.
[13] Neelam Meshram, 'Arbitrability of Competition Law Issues: An Indian Perspective' (The RMLNLU Law Review Blog) <https://rmlnlulawreview.com/2018/02/01/arbitrability-of-competition-law-issues-an-indian-perspective/>
[14] Mitsubishi Motors Corp v Soler Chrysler Plymouth 473 US 614 (1985); Eco Swiss China Time Ltd v Benetton Int'l NV 1999 ECR I-3055.

antitrust disputes to arbitration aligns with the broader goals of the EU, which fundamentally opposes delegating such matters to enforcement authorities.[15]

(a)The EU Perspective

In Eco Swiss China Time Ltd. v. Benetton International NV[16], The Court of Justice, while reiterating the duties of courts to settle the competition law disputes under EU competition law, upheld the arbitral award, and hence, arbitration under EU competition law was approved.[17] The arbitral tribunal derives power from here to adjudicate the competition law disputes.

Enforceability of the arbitration awards under the EU's competition law framework

If an arbitration award is against the public policy of the member states of the EU, the European Court of Justice has absolute power to set it aside. In case the disputes are against public policy, the competition law will be applicable over the parties despite the fact that the parties have agreed that the future dispute is governed by any particular law.[18]

Articles 101 and 102 of the Treaty on the Functioning of the European Union promotes full arbitrability of competition law disputes. However, all the competition law disputes that are arbitrable are subject to judicial review.

(b)The US Perspective

Earlier, arbitrability of antitrust disputes in the US was restricted. Moreover, in Mitsubishi Motors Corp. v. In Soler Chrysler-Plymouth, Inc.,[19] the Hon'ble Supreme Court of the US held that antitrust disputes can be adjudicated and settled by the arbitration proceedings in an international contract. However, it was also mentioned that such arbitration proceedings shall be carried out by the arbitrators who are well versed in and acquainted with antitrust law. After this landmark judicial pronouncement, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., the scope of arbitrability of antitrust disputes has broadened in the US. The primary

[15] Aniket Panchal and Mehar Kaur Arora, 'The Arbitrability of Antitrust Related Issues And The Competition Act, 2002' (2021, CBCL, NLIU) <https://cbcl.nliu.ac.in/arbitration-law/the-arbitrability-of-antitrust-related-issues-and-the-competition-act-2002/>
[16] Eco Swiss China Time Ltd. v. Benetton International NV Case No. C-126/97, [1999] E.C.R. I-3055 (1999).
[17] Md. Zafar Mahfooz Nomani and Aijaj Ahmed Raj, 'Competition Dispute Resolution under Arbitration Mechanism: A Comparative Study of European Union and India' (2019) ISSN: 2455-4030 <https://multistudiesjournal.com/assets/archives/2019/vol4issue5/4-5-15-701.pdf>
[18] Ibid.
[19] Mitsubishi Motors Corp. v. In Soler Chrysler-Plymouth, Inc. 473 U.S. 614 (1985)

legislation that governs the antitrust disputes in the US is the Federal Arbitration Act,[20] the settlement of disputes arising out of interstate or foreign commercial contracts. The US courts have consistently upheld the arbitration clauses even in domestic antitrust disputes.[21] The Department of Justice Antitrust Division and the Federal Trade Commission are empowered to resolve specific antitrust disputes through arbitration. The Administrative Dispute Resolution Act of 1996[22] empowers agencies to use binding arbitration if concerned rules are adhered to. In a nutshell, the courts in the US have accepted that the competition law disputes are arbitrable if the parties in the dispute have given their consent for arbitration proceedings.[23] The arbitration tribunal does not prohibit the parties from getting the remedies under the competition laws or restrict the regulatory and supervisory rights of courts or competition law tribunals.[24]

Recently, in the case of the proposed acquisition of Aleris by Novelis, the US antitrust division settled this antitrust dispute under the Administrative Dispute Resolution Act (1996). In this case, the arbitration proceedings were imposed to adjudicate the antitrust dispute in which the proposed acquisition of Aleris by Novelis was challenged by the Department of Justice. The arbitration was carried out in ten-day-long proceedings. This is the first time when the US antitrust division utilized its authority to settle the antitrust dispute under the Administrative Dispute Resolution Act (1996) and received an arbitral award in their favour holding that the aluminium ABS constitutes a relevant product market.[25]

Critical Analysis

In the US, following the landmark judicial pronouncement in the Mitsubishi case, the second look doctrine emerged. It refers to the fact that the competition law disputes are deemed arbitrable subject to the application of US competition law in the arbitration proceedings. During the enforcement of the arbitral award, the court can systematically review the arbitral

[20] Federal Arbitration Act, 1926, Acts Congress (US)
[21] Aarya Dubey, 'Antitrust and Arbitration: A Comparative Examination of Cross-Border Challenges' (USLLS ADR) <https://usllsadrblog.com/antitrust-and-arbitration-a-comparative-examination-of-cross-border-challenges/ >
[22] The Administrative Dispute Resolution Act, 1996, Acts of Congress (US).
[23] Melody Chan, 'Navigating the challenges in arbitrating competition law issues' (March 5 2024) <https://www.aoshearman.com/en/insights/navigating-the-challenges-in-arbitrating-competition-law-issues> accessed 14/09/2025
[24] Ibid.
[25] Aniket Panchal and Mehar Kaur Arora, 'The Arbitrability Of Antitrust Related Issues And The Competition Act, 2002' (2021, CBCL, NLIU) <https://cbcl.nliu.ac.in/arbitration-law/the-arbitrability-of-antitrust-related-issues-and-the-competition-act-2002/> accessed 14/09/2025

award to determine whether competition law has been complied with or not. This approach is known as the second look doctrine.

This mechanism ensures that the private international arbitrators, while adjudicating the competition law dispute do not act against the spirit of competition law, and fairly decide the dispute.

Moreover, according to the EU's approach, the European Competition Commission frequently serves as amicus curiae in arbitration proceedings and also involves the application of competition law for regulation execution.

Drawing inspiration from the existing mechanisms in the US and EU for the arbitration of competition law disputes, India can also adopt an approach wherein the parties who consented to the arbitration in the case of competition law dispute and if the same dispute does not fall into the four-fold test and is not against the public policy, it can be adjudicated by the arbitrator.[26]

The process can be made more accountable by adopting the second look doctrine wherein the arbitrator is required to apply competition law and the arbitral award may be subject to review.

Section 27 of the Arbitration Act provides that evidentiary assistance can be sought from the court, hence, it allows tribunals to seek assistance from the CCI on competition-related disputes. As a result, the CCI will accomplish a dual role as *parens patriae* and *amicus curiae* in the arbitration proceedings.[27]

Conclusion and Suggestions

Analysing the latest judicial pronouncements pertaining to arbitration demonstrates that the Indian judiciary has been emphasizing the settlement of disputes through arbitration proceedings. It is evident that in arbitration proceedings, judicial and regulatory intervention has become minimal to align the arbitration with global standards. The motive is to attain the

[26] Aniket Panchal and Mehar Kaur Arora, 'The Arbitrability Of Antitrust Related Issues And The Competition Act, 2002' (2021, CBCL, NLIU) <https://cbcl.nliu.ac.in/arbitration-law/the-arbitrability-of-antitrust-related-issues-and-the-competition-act-2002/>

[27] Kanishka Bhukya, 'Harmonizing Arbitration and Competition Law Disputes: Pursuing Consistency In Adjudication'(23, June 2023) <https://aria.law.columbia.edu/harmonizing-arbitration-and-competition-law-disputes/>

enforcement of commercial contracts speedily, which will help to grow the economy and accomplish the ease of doing business objective. In addition to this, the legislature and regulatory bodies like the RBI and the SEBI have introduced major amendments in commercial laws and rules and in regulations, respectively, in this decade. The objective is attaining the ease of doing business in the Indian jurisdiction with minimal compliances and aligning the compliances with global standards. Analysing these changes in the policy affirms that permitting the settlement of competition law disputes through arbitration will boost the ease of doing business. The pros of opting for arbitration for redressal of the competition law dispute are maintainability of confidential information related to the business or reputation-damaging information of the business, settlement of the dispute in a time-bound manner, timely enforcement of contracts, which will lead to steady economic growth, and chances of receiving more foreign investment in India. The parties can frame customized rules to settle down the dispute efficiently and also cost-effectively. However, arbitration in competition law disputes has its cons, such as transferability if the competition law dispute is detrimental to the public at large, lack of uniformity in arbitral awards, and party autonomy in arbitration for settlement of competition law disputes may impact the public interest economy negatively.

Therefore, based on the analysis pertaining to the arbitrability of competition law disputes, the author opines that statutory laws and judicial pronouncements have ambiguities, and the clear line has not been drawn to demarcate which competition law disputes are arbitrable and which are not. The author opines that permitting arbitration to settle the competition law disputes which do not have adverse effect on the public at large, fair competition in the market and Indian economy may be permitted and inspiration can be drawn from the second look doctrine in US and same may be implemented in India to attain the ease of doing business, settling disputes in timely manner, providing a safe place for foreign investments to India and aligning the laws with global standards.

Bibliography/References

- Ajar Rab, 'Defining the Contours of the Public Policy Exception: A New Test for Arbitrability in India' (Indian Journal of Arbitration Law) http://www.nls.ac.in/wpcontent/uploads/2020/12/IJALVolume_7_Issue_2_Ajar_Rab.pdf.

- Solanki and A Tanwar, 'Arbitrability of Competition Law Disputes in India' (TDM, January 2021) <www.transnational-dispute-management.com>

- Suhas M S, 'Arbitrability of the Anticompetitive Disputes in India – A Comparative Traversal through the Legal Frameworks in the US and EU' (2023) 8(1) IJNRD https://ijnrd.org/papers/IJNRD2301179.pdf.

- Kanishka Bhukya, 'Harmonizing Arbitration and Competition Law Disputes: Pursuing Consistency in Adjudication' (Columbia ARIA, 23 June 2023) https://aria.law.columbia.edu/harmonizing-arbitration-and-competition-law-disputes/.

- Aayushi Singh and Pavitra Dubey, 'Arbitration: A Viable Solution for Antitrust Disputes' (Chanakya Centre for Alternative Dispute Resolution) https://ccadr.cnlu.ac.in/blog/arbitration/arbitration-a-viable-solution-for-antitrust-disputes/

- Vaibhav Sangam Mishra and Janmejay Singh, 'Alternative Dispute Resolution and its Comparative Study with India and USA' (2021) 1(3) Jus Corpus Law Journal https://www.juscorpus.com/wp-content/uploads/2021/03/11.-Vaibhav-Sangam-Mishra-Janmejay-Singh.pdf.

- Anuja Paul, 'Antitrust Laws in India and USA: A Comparative Analysis' (2022) International Journal of Law Management and Humanities. Melody Chan, 'Navigating the Challenges in Arbitrating Competition Law Issues' (A&O Shearman, 5 March 2024) https://www.aoshearman.com/en/insights/navigating-the-challenges-in-arbitrating-competition-law-issues.

- Aniket Panchal and Mehar Kaur Arora, 'The Arbitrability of Antitrust Related Issues and the Competition Act, 2002' (CBCL, NLIU, 2021) https://cbcl.nliu.ac.in/arbitration-

law/the-arbitrability-of-antitrust-related-issues-and-the-competition-act-2002/.

- Neelam Meshram, 'Arbitrability of Competition Law Issues: An Indian Perspective' (RMLNLU Law Review Blog, 1 February 2018) https://rmlnlulawreview.com/2018/02/01/arbitrability-of-competition-law-issues-an-indian-perspective/.

- Md Zafar Mahfooz Nomani and Aijaj Ahmed Raj, 'Competition Dispute Resolution under Arbitration Mechanism: A Comparative Study of European Union and India' (2019) https://multistudiesjournal.com/assets/archives/2019/vol4issue5/4-5-15-701.pdf.

- Shahezad Kazi and Gladwin Issac, 'Supreme Court of India Clarifies "What is Arbitrable" under Indian Law and Provides Guidance to Forums in Addressing the Question' (*Live Law*, 10 January 2021) https://www.livelaw.in/law-firms/articles/supreme-court-clarifies-arbitrable-indian-law-168218.