
Looking at Arbitration as a method of resolving Competition Law Disputes in India

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There is a common belief that the arbitration law and competition law regimes stand diametrically opposite to each other with no point of intersection. It is so because competition law matters generally have the potential of affecting public at large (i.e. these involve *right in rem*), and are thus reserved for resolution by courts. Arbitration, on the other hand, results from a mutual agreement between the parties and is seen as an appropriate forum to resolve disputes involving right inter partes (or *right in personam*). Since the earliest of times, courts around the world have been reluctant to allow adjudication of competition law matters by an arbitral tribunal. However, this trend changed during the 1980s, and since then many prominent jurisdictions like that of the United States (U.S.), European Union (E.U.), Australia, Canada, and New Zealand have allowed arbitration of competition claims, thereby rejecting the earlier idea that competition claims are necessarily non-arbitrable in nature.

The position in India has however more or less remained the same. While there has not been any decisive judgment specifically dealing with the issue, the general practice of the courts has been to discourage arbitration of competition claims. This article analyses the grounds on which competition claims have been arbitrated in other jurisdictions and makes a case for allowing arbitration of such claims in India as well, with required reservations.

Position in the U.S. and E.U.

- **The Mitsubishi Motors Corp Case (1985) (U.S.)**

The landmark case that allowed arbitration of competition claims in the U.S. was *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth*.² In this case, the petitioners, including Mitsubishi (a Japanese manufacturer of automobiles) and CISA (a Swiss automobiles distributor), had entered into an agreement with the respondent Soler (a Puerto Rican automobile dealer) to sell and distribute the automobiles manufactured by Mitsubishi. The agreement stipulated arbitration as the agreed mode of dispute resolution. Allegations regarding breach of contract arose when the respondent failed to reach the expected sales volume. Arbitration proceedings began and the respondent alleged that the petitioners (i.e. Mitsubishi and CISA) had conspired to divide markets in restraint of trade. As per the provisions of Section 1 of the principal anti-trust statute of the U.S., the Sherman Antitrust Act of 1890, any such combination, or conspiracy, which is in restraint of trade or commerce is considered to be

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² 473 U.S. 616 [1985]

illegal. Thus, the respondent resisted settlement through arbitration as it involved an anti-trust claim and matter was taken to the court.

In this case, the USA Court of appeals for the First Circuit denied the adjudication of anti-trust claims through arbitration. When the decision was appealed before the US Supreme Court, it reversed the decision of the Court of appeals thereby allowing the arbitration of anti-trust claims involved. The U.S. Supreme Court cited the following rationales:

1. The Court found no reason to depart from the rigorous enforcement of arbitration agreements where claims relating to statutory rights were raised. The court said the concerned case also included claims under a statute (i.e. under the Sherman Antitrust Act).
2. Judgment given in this case was influenced by, and in furtherance of, America's pro arbitration policy.
3. The Court also justified the expansion of scope of arbitration to include statutory anti-trust claims by citing concerns of '*international comity, respect for the capacity of international tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of dispute*'.³

In this case, the exception of allowing arbitration of anti-trust issues was created in context of private anti-trust claims arising from 'international commercial arrangements' containing broad arbitration agreement. The Court further clarified that it cannot be assumed that the arbitral board would be incompetent to deal with such matters. It also provided for a double-check mechanism by way of the "second look" doctrine. As per this, the national courts were given the power to intervene at the time of award enforcement to ensure that legitimate interest in the enforcement of anti-trust laws has been properly addressed by arbitrators.

- **Eco Swiss China Ltd. case (1999) (EU)**

In the E.U., the case of *Eco Swiss China Time Limited v. Benetton Int'l NV*⁴ becomes relevant.

In this case, a tripartite agreement was entered into among the following parties: Eco Swiss, Benetton and Bulova. The agreement related to the manufacture and sale of watches carrying the name 'Benetton by Bulova'. The duration of the agreement was 8 years. Before the completion of the term of contract, Benetton issued a notice of termination. Consequently, Eco Swiss and Bulova initiated arbitration proceedings against Benetton. The arbitral tribunal, on the application of Dutch laws, found Benetton guilty for terminating the agreement prematurely and directed Benetton to pay damages.

³ 473 U.S. 616 [1985], 628-640

⁴ Case C - 126/97 [1999] ECR I-3055

Benetton then initiated proceedings to set aside the arbitral award before the Netherland Court. Benetton contended that ‘Rules of Competition’, to be followed by member states of EU, were provided under Articles 81, 82, 83 of the Treaty on European Community (TEC) [now Articles 101, 102, 103 of the Treaty on the Functioning of the European Union (TFEU)]. The cited provisions prohibited anti-competitive agreements between the parties that have the effect of distorting competition in internal markets, unless an exemption for the same is granted. Benetton contended that competition law was a community law and thus only national courts could decide such matters. Thereby, application was moved to annul the arbitration award under Section 1065(1)(e) of the Code of Civil Procedure (Netherland’s national legislation) on grounds of it being contrary to public policy.

The Netherlands Court refuted the contentions put forth by Benetton and upheld the award on the following grounds: “arbitration award is contrary to public policy within the meaning of Article 1065(l)(e) of the Code of Civil Procedure only if its terms or enforcement conflict with a *mandatory rule so fundamental* that no restrictions of a procedural nature should prevent its application.” It stated that the Netherlands law does not deem an arbitration award to be contrary to public policy merely because a prohibition stipulated by competition law is not applied in the terms or enforcement of the said award. The award can be set aside only when the rule cited to have been infringed is mandatory and fundamental.

In paragraph 40 of the said judgment, the Court also said that “national courts and tribunals are not in a position to give a preliminary ruling on questions of interpretation of Community law”. Thus, to obtain clarity and to ensure uniformity in interpretation, the subject matter was further referred to the European Court of Justice (hereinafter the ECJ). The ECJ stated in the interest of the efficient Arbitration proceedings, and said that in such cases review may be allowed by national courts. But the review by the national courts “should be limited in scope, and therefore, the annulment of the award should be permitted only in exceptional situations”. This was like a variation of the second look doctrine, as it gave powers to the arbitration tribunals to adjudicate competition law claims, and at the same time allowing the ordinary courts to look into the competition law issue again in case of complaints regarding non-observance of competition law.

A reason why arbitration was allowed in this case was because it dealt with ‘premature termination of an agreement’ and was concerned only with the rights of the parties involved.

- **Absolut - Systembolaget case (2015)**

This case further re-iterated the point that statutory competition law claims can be adjudicated through arbitration in some cases. The case was decided by Swedish Supreme Court.

In this case, allegations were made that some employees of a company called the Absolut Company (which is the manufacturer of the famous Absolut vodka) were bribing staff of another company called Systembolaget AB (which was Sweden’s alcohol retail monopoly). Absolut was one of Systembolaget’s suppliers. On prosecution of Absolut’s employees in relation to bribery charges, Systembolaget partially terminated the supply agreement with Absolut on grounds of material breach of contract. This essentially meant that Absolut was no longer allowed to deliver certain products.

Aggrieved by Systembolaget’s actions, Absolut initiated arbitration proceedings in Stockholm on the grounds that the impugned termination did not have any grounds either in law or agreement. It was contended that Systembolaget had abused its position of dominance by “unilaterally enforcing unreasonable terms and conditions on its suppliers”⁵ and further “refusing to purchase without objectively appropriate grounds”⁶. The arbitral tribunal came to the conclusion that the termination of the contract was allowed under the applicable civil law. Nonetheless, the tribunal held that Systembolaget had indeed abused its dominant position in violation of competition law provisions, and was directed to pay compensation.

Systembolaget then filed an application before the Court of Appeal on the grounds that the arbitral tribunal did not have the jurisdiction to adjudicate on the competition law aspects involved in the dispute. It was also contended that the award contravened rules of a public policy nature. The arbitral award was additionally challenged on the ground that the compensation was awarded based on “*excessive application*” of competition law in an unlawful manner.

The Court of Appeal rejected Systembolaget’s annulment claim. Matter was taken to the Swedish Supreme Court. The Supreme Court affirmed the judgment of the Court of Appeal, and held that “an arbitration award is invalid under the public policy provision if it prescribes a course of action that has been prohibited by the Competition Authority or a public court”⁷. If the impugned award does not violate any competition law provisions, it cannot be set aside. The Supreme Court made reference to the provisions of the Swedish Arbitration Act and in effect concluded that “arbitrability of an issue relating to competition law is not *per se* contrary to the Arbitration Act”⁸. With respect to the contentions concerning “over-application” of competition rules in deciding compensation, the Supreme Court held that excessive application cannot be construed as a failure on the part of the

⁵ Case No. T 5767-13, Judgment of the Swedish Supreme Court in the case concerning Systembolaget and the Absolut Company, accessible at <https://www.arbitration.sccinstitute.com/views/pages/getfile.ashx?portalId=89&docId=2476621&propId=1578>, pg 4

⁶ Id

⁷ Id, at pg 7, para 14.

⁸ Supreme Court relied on Section 1, paragraph 3 of the Swedish Arbitration Act which provides for the following: “Arbitrators may rule on the civil law effects of competition law as between the parties”.

arbitral tribunal to comply with competition rules. Such incorrect conclusions maybe financially cumbersome, but they are not sufficient grounds to set aside the award.

This case is a recent example, among the few rulings, that uphold arbitrability of competition law in Europe. Thus, there is a clear trend in favor of arbitrability of statutory rights as an efficient mechanism of resolving disputes rather than taking recourse to civil courts.

Position in India

Do competition law claims always constitute right in rem?

Arbitration in India is governed by the provisions of the Arbitration and Conciliation Act, 1996 (hereinafter the 'Arbitration Act'). The Arbitration Act does not clearly define what is arbitrable or what is non-arbitrable. However, a broad understanding of the matters that are considered non-arbitrable has been given by the Supreme Court (S.C.) in the case of *Booz- Allen & Hamilton Inc. v. SBI Home Finance Ltd.*⁹. In this case, it was held that matters involving *right in personam* are arbitrable while those involving *right in rem* are non-arbitrable. The difference between a judgement in rem and a judgment in personam thus becomes pertinent. The Court in the case *Tribhovandas M. Rugani vs Vimal Vasandrao Dhurandhar*¹⁰ held that the distinction between a judgment in rem and a judgment in personam is that in the former the point adjudicated upon, which is always as to the status of the res, is conclusive against all the world as to that status, and in the latter the point is only conclusive between the parties

So, while determining the arbitrability of competition law claims in India, our first question is whether competition claims in India are always in the nature of right in rem or could they also be in the nature of right in personam?

Section 3 of the Competition Act prohibits the parties from entering into anti-competitive agreements that might have appreciable adverse effect on competition within India. This includes horizontal agreements (which are deemed to be anti-competitive per se), like cartel activities, as well as a number of vertical agreements (for which the anti-competitive impact has to be ascertained by rule of reason) that might impact right in rem.

⁹ (2011) 5 SCC 532

¹⁰ (1980) 82 BOMLR 404

However, there are also other kind of disputes under the Competition Act which have a bearing only on the parties involved. For example: cases in which a powerful enterprise abuses its dominant position in relation to a distributorship agreement, such abuse of dominant power affects only the rights of the distributor concerned. A relevant example could be the case of *Real Estate Developers Association v. Department of Town and Country Planning*,¹¹ wherein the aggrieved builders were compelled by the defendant for the payment of external development charges. The CCI held that the defendants had abused their dominant position, by imposing unfair and discriminatory conditions, thereby safeguarding the rights in personam of the aggrieved builders. Another example could be malpractices in instances of bidding (bid rigging), particularly those in which a private contract is entered into between some of the bidders, to the exclusion of other bidders. If the pre-decided bid wins, it would be unfair on part of the bidders so excluded in that particular case (thereby involving right in personam).

Other activities of enterprises (mostly variations of abuse of dominance) which restrict or deny the entry of its competitors in relevant market (by imposing unfair conditions), or instances where enterprises indulge in practices like predatory pricing (i.e. a sharp reduction in the price of sale of goods or price of provision of services with the sole objective of eliminating the existing competitors from the market) are examples of anti-competitive behavior which have a direct bearing on the parties involved and thus involve right in personam.

Are competition law claims reserved for exclusive jurisdiction of CCI?

The fact that despite involving only *right in personam* in certain situations, Indian courts have time and again discouraged arbitration of competition law claims. A reason behind this could be the judgement given by the Bombay High Court in the case of *Kingfisher Airlines Ltd. v. Captain Prithvi Malhotra*¹² which held that even if a dispute involves ‘action in personam’ it would still be non-arbitrable if its resolution is reserved for public forums as a matter of public policy. This brings us to our second important question: Whether adjudication of competition law disputes in India is reserved for exclusive jurisdiction of the Competition Commission of India (CCI)?

Section 61 of the Competition Act explicitly bars civil courts from adjudicating matters which the Competition Commission (CCI) or the Appellate Tribunal (NCLAT) are empowered under the Act to determine. Furthermore, Section 2(3) of the Arbitration Act also states that arbitration shall not apply to certain disputes that may not be submitted to arbitration by virtue of any other law for the time being in force. The abovementioned Section 61 of the Competition Act has time and again been interpreted by the Indian courts as granting exclusive jurisdiction to the CCI to try competition cases.

¹¹ Competition Commission of India, Case number 40 of 2017

¹² (2013) 7 Bom C.R. 738

For instance, in the case of *Union of India v Commission of India*¹³, the agreement entered into between the parties involved an arbitration clause. Claims relating to abuse of dominant position arose and matter was taken up by CCI. One of the parties challenged CCI's jurisdiction. The Delhi High Court held that the 'scope and focus' of investigations conducted by CCI would be substantially different from that of the arbitral tribunal. It also said that the kind of issues raised before the CCI were entirely different from contractual obligations dealt before an arbitral tribunal. Thus, the proceedings were allowed to continue before the CCI despite the existence of an arbitration clause. Thus, bar to the jurisdiction of civil courts has time and again been construed as bar to the arbitration of competition claims when nothing like this has been explicitly mentioned in the statute. Such interpretation of the Competition Act provisions needs to be changed and a more liberal approach must be followed.

Conclusion

Viewing the current trends in India and approach followed by different courts, it seems highly unlikely that competition law disputes will be considered arbitrable in near future. However, there is ample scope to allow the same. The most common reasons cited for not allowing arbitration of competition claims include lack of required tools, expertise, and skills on part of the arbitrators. However, this does not hold true in today's era which comprises of highly skilled, knowledgeable, and experienced arbitrators. This concern can be easily addressed by ensuring that only those with the knowledge and specified years of work experience or expertise in competition law shall be allowed to act as arbitrators specifically with respect to the competition claims. Further, we can also allow the CCI to look into the matter if any of the parties complain that their interests have been hampered.

Considering the pace of development and the ever-increasing inflow of foreign investments, it is imperative that India changes its stance and adopt practices that are at par with world jurisdictions. This will smoothen the entire process as most of such transactions rely on arbitration as the preferred mode of dispute resolution, but due to the presence of competition claims the dispute has to be submitted to multiple forums. A uniform approach allowing arbitration of all claims with some precautions, at-least of disputes involving purely inter-partes claims, seems to be the need of the hour.

¹³ A.I.R. (2012) Del 66