ARBITRATION, COMPETITION LAW AND SECOND LOOK DOCTRINE: AN INDIAN PERSPECTIVE

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ABSTRACT

Historically, competition law enforcements agencies have eluded arbitration as a means of adjudicating competition law disputes owing to the technical nature of the disputes and the larger public interest involved. Competition Law deals with the competitiveness in the market and its impact on the consumer welfare. Therefore, the disputes include the adjudication of '*rights in Rem*' along with the individual claims of the aggrieved parties. Moreover, the Competition Act, 2002 provides for the exclusion of jurisdiction of the Civil Court in any competition related matter. These are the hurdles which restrict the arbitrability of anti-trust disputes in India. In Competition Commission of India v. Union of India, the Delhi High Court stated that the scope of investigation of the Commission is very different from the scope of investigation of the arbitral tribunal due to the lack of expertise of the tribunal. These problems have been faced by the judiciary of most countries while dealing with the arbitrability of competition disputes. Despite these shortcomings, the global acceptance of arbitrators determining competition issues has risen considerably post the Supreme Court of United States affirmation in 1985. The 'Second look Doctrine' developed by the Court in *Mitsubishi Motor Corp. v. Soler Chrysler Plymouth*

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provided a balance between the need for arbitration and the need for securing public interest. The Doctrine provided for a review of the arbitral award to foresee the proper compliance with the Competition laws of the land. Thereafter, most countries have moved in favour of arbitrating Competition matters and promoting the international consensus of the pro-arbitration culture. There is no conclusive judicial pronouncement of the issue in India and this paper discusses adopting the measures taken by other countries and allowing arbitral tribunals to decide competition disputes along with the assistance from the Competition Commission of India.

1. INTRODUCTION

Arbitrability of a dispute refers to its ability to constitute the subject-matter of an arbitration proceeding.[1] Different jurisdictions have had different stands with regard to the scope of arbitration. While certain jurisdictions like United States have been more liberal in allowing arbitration to cover most technical issues, others have refrained from opening the doors of arbitration to issues involving intricate disputes. Over time, arbitration has become the primary and the preferred forum for consensual dispute resolution. However, as the award passed by the tribunal to subject to judicial scrutiny, it is important to address the question of arbitrability of the subject matter of the dispute. Section 34 and Section 48 of the Arbitration and Conciliation Act, 1996 provide that the awards passed shall be set aside, if the dispute *per se* is not arbitrable.

Competition law disputes primarily concern the market and the welfare of the consumers. The enforcement and application of competition law by the

[1] Natalja Freimane, Master's Thesis, *Arbitrability: Problematic Issues of the Legal Term*, RIGA GRADUATE SCHOOL OF LAW, *available at* http://www.sccinstitute.com/media/56097/arbitrability-problematic-issues.pdf (last visited Apr. 9, 2019).

competition commissions aims to eliminate any anti-competitive tendencies from the market. The Indian Courts have restricted the domain of arbitration to disputes that deal with '*rights in personam*'.[2] Therefore, as certain aspects of competition disputes have a bearing on public interest such as cartel formation and other anticompetitive activities under Section 3, the arbitrability of competition law dispute is an underdetermined issue. It is a common understanding that Competition law and arbitration are contrary to each other's functioning. While Competition law seeks to promote the involvement of State in order to ensure healthy competition and welfare of the consumers, arbitration aims to exclude the involvement of the State and promote party autonomy.

The primary question that needs to be answered to determine the arbitrability of a dispute is whether it can be decided by a private arbitral tribunal or is it reserved for the public *fora* (Courts). Traditionally, Courts in most jurisdictions have excluded competition disputes from the ambit of arbitration. However, the judicial trend saw a positive change in 1985, when the Supreme Court of the United States, in *Mitsubishi Motor Corp. v. Soler Chrysler Plymouth*,[3] ruled in favour of the arbitrability of competition law issues, if it was part of the arbitration agreement. This stand was adopted by the European Court of Justice as well in the case of *Eco Swiss China Time Ltd. v. Benetton International N.V.*[4]

The general attitude of the Courts in India has been towards restricting arbitration to disputes of commercial nature. The Supreme Court in *Booz Allen & Hamilton, Inc. v. S.B.I. Home Finance Ltd.*, stated that adjudication of certain types of disputes are reserved for the Public Fora and cannot be subject to

[2] Booz Allen & Hamilton, Inc. v. S.B.I. Home Finance Ltd., (2011) 5 S.C.C. 532.
[3] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 723 F.2d 155 (1983).
[4] Eco Swiss v. Benetton [1999] E.C.R. I-03055.

arbitration.[5] Further, in the case of *Kingfisher Airlines v. Prithvi Malhotra Instructor*, the court ruled that even certain *Rights in Personam* can be reserved for the public fora.[6] Despite the general trend, there is no conclusive pronouncement on the question of arbitrability of competition issues. In one of the cases, the Delhi High Court stated that the mere presence of an arbitration clause would not stay the proceedings of the Court.[7] The case related to a concession Agreement with the Ministry of Railways. The other parties had filed a complaint before the C.C.I. alleging that the Railway Board had abused its dominant position by imposing increased charges and restricting access to infrastructure. The Court opined that the scope and focus of the C.C.I.'s investigations would diverse from that of the arbitral tribunal.[8]

Securing public interest and promoting arbitration culture are the primary policy objectives involved in this discussion. The *Mitsubishi* case tried to find a mutual ground between the two by implementing the 'second look doctrine' wherein the tribunal had to apply the anti-trust laws. Thus, the Court shall have the power to verify the application of competition laws in a just manner. The judicial trend seen in cases dealing with the issue of arbitrability of cases involving fraud is a positive aspect for the arbitration in competition disputes. The Supreme Court in *A. Ayyasamy v. A. Paramasivam*, ruled that all fraud disputes were arbitrable unless the dispute dealt with serious allegations of fraud.[9] As competition disputes involve a lot of stakeholders, including it under the ambit of arbitration would require devising a proper mechanism for the same.

[5] Booz-Allen & Hamilton, Inc. v. S.B.I. Home Finance Ltd.
[6] Kingfisher Airlines v. Prithvi Malhotra Instructor, 2013 (7) Bom. C.R. 738.
[7] Union of India v. Competition Comm'n of India, A.I.R. 2012 Del. 66.
[8] *Id.*
[9] A. Ayyaswamy v. A. Paramasivam, Civil Appeal No. 8245-8246 of 2016.

The paper shall aim to find the right balance for such a mechanism. Competition Advocacy is used to spread light on the possibility of several unexplored and peculiar ideas related to competition law. The possibility of arbitration of competition law disputes, especially in multi-jurisdictional disputes, can be considered as a viable option for dispute settlement. There are several concerns with such an arrangement; as it is believed that those engaged in hard-core cartels will use such private proceedings to prevent national authorities becoming aware of the conduct.[10] This paper will examine the scope of arbitrability of competition disputes in light of the growing use of arbitration to resolves diverse disputes and how competition advocacy can be used to promote its application.

2. ADDRESSING THE MAJOR CONSTRAINTS IN ARBITRATING COMPETITION DISPUTES IN INDIA

Before we delve into the prospect of extending the scope of arbitration to competition disputes, it is important to first lay out the inherent problems that exist in such a mechanism. Historically, most jurisdictions have refrained from allowing technical issues to be arbitrated.[11] The scope of a tribunal's investigation is said to be very different from the investigation carried out by the competition enforcement bodies. The primary issue with regards to arbitration of competition disputes is with the arbitrability of competition law itself. The

[10] Francesca Richmond, *Arbitrating Competition Law Disputes: A Matter of Policy*, KLUWER COMPETITION LAW BLOG (Aug. 2, 2018), http://competitionlawblog.kluwercompetitionlaw.com/2012/02/22/arbitrating-competition-law-disputes-a-matter-of-policy/ (last visited Apr. 9, 2019).

[11] Anshuman Sakle, *Arbitrating Competition Law Disputes in India*, CYRIL AMARCHAND MANGALDAS (July 28, 2018), https://competition.cyrilamarchandblogs.com/2017/12/arbitrating-competition-law-disputes-india/.

Arbitration and Conciliation Act, 1996 doesn't define the kind of cases that can be arbitrated. Section 7 of the Arbitration and Conciliation Act 1996 states that all the disputes arising out of a legal relationship, whether contractual or not are arbitrable. However, the restriction on the scope of the Act can be under Section 2(3) of the Act, wherein it states that the Act shall not affect any law by virtue of which certain disputes may not be submitted to arbitration. Moreover, Section 34(2) (b) and 48(2) of the Act entrust the Courts with the responsibility to set aside an arbitral award or refuse its enforcement in case "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force" or if the "award is in conflict with the public policy of India."

As there is no conclusive understanding that can be gathered from the Act, the source of inspiration is the case laws that have settled the proposition over the years. The Courts have maintained the stand that disputes that are not arbitrable include disputes pertaining to the rights and liabilities arising out of criminal offences,[12] insolvency and winding up,[13] testamentary issues like grant of probate,[14] succession certificate, admiralty suits,[15] foreclosure of mortgage,[16] and eviction or tenancy matters governed by special statutes.[17] The court in *Booz Allen & Hamilton, Inc. v. S.B.I. Home Finance Ltd.*, had opined that disputes that deal with '*rights in rem*' are reserved for the exclusive jurisdiction of the public fora i.e. the courts.[18] Therefore, only '*rights in personam*' can be adjudicated by private forums like the arbitral tribunal. The Court further restricted the scope of

[12] State of Orissa v. Ujjal Burdhan, (2012) 4 S.C.C. 547.
[13] Haryana Telecom Ltd. v. Sterlite Indus. (India) Ltd., (1999) 5 S.C.C. 688.
[14] Chiranjilal Goenka v. Jasjit Singh, (1993) 2 S.C.C.507.
[15] Osprey Underwriting Agencies v. O.N.G.C. Ltd., A.I.R. 1999 Bom. 173.
[16] Booz Allen & Hamilton, Inc. v. S.B.I. Home Finance Ltd.
[17] Fingertips Solutions v. Dhanashree Electronics, 2011 Indlaw CAL 805.
[18] A. Ayyaswamy v. A. Paramasivam.

arbitration in *Kingfisher Airlines v. Prithvi Malhotra Instructor*, wherein it held that even '*rights in personam*' shall not be arbitrable if they are reserved for adjudication by a public forum as a matter of public policy.[19]

Therefore, the two questions that arise with regard to the arbitrability of competition disputes are:

1. Whether the competition disputes involve a '*right in rem*'?
2. If, the dispute is involving a '*right in personam*', whether it has been reserved for the specialised public fora?

The arbitrability of competition dispute was looked into by the Court in *Union of India v. Competition Commission of India*.[20] In light of the existing arbitration agreement between the parties, the Railways challenged the C.C.I.'s jurisdiction to hear the dispute. However, the Delhi High Court was of the view that the scope and focus of C.C.I.'s investigation is very different from the scope of an enquiry before an Arbitral Tribunal. It allowed for the C.C.I. to hear the matter notwithstanding a valid arbitration clause. It was further observed that the Arbitral Tribunal would neither have the mandate, nor the expertise to prepare an investigation report which is necessary to decide the dispute in question.[21] Therefore, as it can be inferred, the primary ground of rejecting the arbitrability of competition law disputes was the lack of expertise of the arbitral tribunal to investigate and deal with the technical aspects of competition law.[22] Though these cases discussed the intricacies of allowing arbitral tribunals to decide competition related matters, they do not provide a blanket ban on its arbitrability.

[19] Kingfisher Airlines v. Prithvi Malhotra Instructor.
[20] Union of India v. Competition Commission of India, A.I.R. 2012 Del 66.
[21] *Supra* note 5.
[22] Man Roland v. Multicolour Offset, (2004) 7 S.C.C. 447.

Section 7 of the Arbitration Act provides an Arbitration agreement is a pre-requisite for an Arbitration under the Arbitration Act, 1996. The parties willing to arbitrate their anti-trust disputes must enter into an arbitration agreement. Further, as against the settled proposition that proceedings before the competition commission are "*in rem*", elements of both, private and public claims can be traced in competition law disputes. Section 19(1) of the Competition Act, 2002 allows any person to approach the Commission to inform about any contravention of Competition Act. Section 53 of the Act provides for the exclusive remedy of the aggrieved person. The claim, in that case, involves the resolution of only the determination of the rights and liabilities of the aggrieved person. The right in rem in such a situation is only between two parties and such an arrangement can be settled by resorting to mediums such as arbitration.

The next hurdle is whether the Competition Act provides for exclusive jurisdiction of the Commission. Section 5 of the Arbitration Act, 1996 provides a non-obsolete clause which states that an arbitration agreement eliminates the jurisdiction of any other court. However, the Indian Courts have ruled in exclusion of arbitration in matters where the act provides for the rights of the parties to be adjudicated by specialised tribunals.[23] Moreover, the preamble and Section 61 of the Competition Act, 2002 provide for the exclusion of jurisdiction of civil courts. Therefore, going by the understanding developed by the Courts, arbitration of disputes where a specialised tribunal has been created is not permitted.[24] Therefore, if this analysis of the aforementioned cases is to be extended to the Competition Act, then it would restrict the arbitrability of

[23] Natraj Studios v. Navrang Studios, A.I.R. 1981 S.C. 537.
[24] HDFC Bank v. Satpal Bakshi, (2013) 134 D.R.J. 556; Kingfisher Airlines v. Prithvi Malhotra Instructor.

competition disputes. Despite these constraints, there is a growing consensus in the global community with regard to the resolution of competition matters through arbitration.[25] Therefore, prior to examining the path to moving towards arbitration of competition disputes in India, it is important to see the position in different countries.

3. APPROACH TO ARBITRABILITY OF COMPETITION MATTER IN OTHER COUNTRIES

The position with regard to the arbitrability of competition disputes is clearer and settled in other jurisdictions like the United States and the European Union. After the initial hostility towards arbitration, competition enforcement bodies have become more acceptable of arbitrators handling technical and facts intensive disputes. The pro-arbitration wave has seen more trust being levied on arbitrators in regard to competition disputes being covered under the realm of arbitration agreements. Given below is the approach of different jurisdictions to allow arbitration of competition law issues.

3.1 THE POSITION IN THE UNITED STATES

Historically, the Courts in U.S. had rejected the arbitrability of competition disputes on the grounds that the Sherman Act is designed to promote the national interest in a competitive economy. As antitrust violations can affect millions of people, such issues, which are crucial to the economic base of a

[25] James Segan, *Arbitration Clauses and Competition Law*, 9 J. EUR. COMP. L. & PRAC. 7, 423–30 (2018).

country, cannot be left to the mercy of uncontrolled private arbitral tribunals.[26] However, the trust associated in arbitration has increased and arbitrators today are dealing with highly technical issues. The tide changed direction in the late 20th century and the Supreme Court of United States became open to the prospect of arbitrating competition law issues. The landmark case, *Mitsubishi Motors Corp. v. Sole*r *Chrysler Plymouth* provided the stamp of approval on arbitration of transactions that violated the U.S. anti-trust laws.[27] The Court highlighted the fact that the arbitrators were dealing with complex problems and that arbitrators having expertise in competition law could be selected to adjudicate competition disputes.[28]

The judgement in the *Mitsubishi* case was given in light of *Scherk v. Alberto Culver Co.* ruling, where the Court has ordered arbitration in regard to a claim under the Securities Exchange Act, 1934.[29] Justice Blackmun noted that adaptability and access to expertise were the hallmarks of arbitration and considerations of potential complexity alone could not be a factor to question that arbitral tribunal ability to decide the matter. The most important aspect of the ruling was the dicta of Justice Blackmun, which was later known as the 'second look doctrine'. He stated that the national Courts of the United States will have the opportunity during the enforcement of the award to ensure that the anti-trust laws have been addressed. Therefore, though to ensure the efficacy of the arbitration process, the substantive review of the award shall be minimum,

[26] American Safety Equipment Corp. v. J.P. Maguire, 391 F.2d 821 (2d Cir. 1968); Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 (1974); Jacques Werner, *Application of Competition Laws by Arbitrators: The Step Too Far*, 12 J. INT'L ARB. 21, 23 (1995).
[27] John Beechey, *Arbitrability of Anti-trust/Competition Law Issues - Common Law*, 12 ARB. INT. 2, 179-90 (1996).
[28] Mitsubishi Motors Corp. v. Soler Chrysler Plymouth.
[29] Scherk v. Alberto-Culver Co.

the Courts shall ascertain if the tribunal has taken cognisance of the antitrust claims and addressed them accurately. Presently, the arbitrability of competition disputes is an established practice in the U.S. judicial policy.[30]

3.2 THE EUROPEAN UNION APPROACH

Historically, in E.C.J., the material review of arbitral awards has been limited to public policy considerations.[31] The Regulation 1/2003 lead to the decentralisation of competition law adjudication and the national courts of member states were allowed to hear competition law matters.[32] The modernisation regulation in 2004 further laid down the track of private enforcement of competition disputes.[33] It was in *Eco Swiss v. Benetton* that the European Court of Justice ruled in favour of arbitrability of competition issues.[34] The Court stated that the arbitral tribunal must apply the E.U. competition laws while adjudicating the disputes. Since the Eco Swiss judgment, it has been well-established that European Union competition law pertains to public policy in all Member States and that, accordingly, arbitrators must apply E.U. competition law ex officio whenever it is applicable.[35] Similar principle was used in *E.T. Plus S.A. v. Welter*, wherein claims alleging a breach Articles 82, i.e. in relation to

[30] GKG Caribe, Inc. v. Nokia-Mobira, Inc., 725 F.Supp. 109, 110-13 (D.P.R. 1989); Gemco Latino-America, Inc. v. Seiko Time Corp., 671 F.Supp. 972, 979 (S.D.N.Y. 1987).
[31] Nevin Alija, *To Arbitrate or not to Arbitrate Competition Law Disputes*, 5 MEDITER. J. SOC. SCI. 643 (2014).
[32] Council Regulation (E.C.) No. 1/2003 (Dec. 16, 2002); *see also* Carl Baudenbacher & Imelda Higgins, *Decentralization of EC Competition Law Enforcement and Arbitration*, 8 COLUM. J. EUR. L. 1 (2002)
[33] Council Regulation No.1/2003 on the implementation of the rules on competition laid down in arts. 81 and 82 of the Treaty [2003] OJ L1/1.
[34] Eco Swiss v. Benetton, C-126/97 (June, 1999).
[35] Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA (E.C.J, 200.6).

abuse by an undertaking of a dominant position, are arbitrable if they are covered by the arbitration agreement.[36]

3.3 THE POSITION IN OTHER COMMON LAW NATIONS: NEW ZEALAND, AUSTRALIA AND ENGLAND

After the positive paradigm shift in the United States towards the arbitrability of competition disputes, several other common law nations have inherited the same. The High Court of New Zealand extensively extended the same to New Zealand in its ruling in *Attorney General of New Zealand v. Mobil Oil New Zealand Ltd*.[37] The claim dealt with an agreement being in violation of the Commerce Act, 1986 as it lead to substantially lessening competition in the relevant market. As the agreement contained an arbitration clause, the argument against it was that the High Court must stay it given the public policy objective of the Commerce Act, i.e. to promote competition in the markets of New Zealand. In order to lay down an extensive jurisprudence for the future, the High Court formulated a team of experts in the field of commerce, business, economics, law and accountancy. Thereafter, the court upheld the principles of international arbitration provisions as highlighted by the U.S. judicial policy in the *Mitsubishi* case. The principle upholding arbitrability of competition disputes was that the applicability of the Commerce Act at the time of execution of the agreement with an arbitration clause would be different then its application in a court proceeding.

Australia moved towards this idea two years later in 1991, when the question arose whether claims under the consumer protection provisions of the

[36] E.T. Plus S.A. v. Welter [2005] E.W.H.C. 2115 (Comm.).
[37] Attorney General, New Zealand v. Mobil Oil New Zealand Ltd. [1989] 2 N.Z.L.R. 64d.

Trade Practices Act, 1974 fell under the ambit of the arbitration clause.[38] Justice Handley opined that there was no basis for excluding claims arising under the statutes which grant remedies enforceable in or confer powers on courts of general jurisdiction. He further stated that arbitrator must be authorised to exercise the powers which are conferred on the courts of general jurisdiction by the Act and that the arbitrator must exercise the powers appropriately. As the jurisdiction of competition disputes vest exclusively with the Federal Court of Australia, the use of the word 'appropriate' by Justice Handley point towards the responsibility that the arbitrators would carry while adjudicating upon competition disputes.

The arbitration law of England is completely derived from the UNCITRAL model law and it doesn't limit the arbitrability of any dispute.[39] Section 6(1) Arbitration Act of 1996 a very general definition of the permissible scope of arbitration agreement stipulates that parties may submit to arbitration any "present or future disputes irrespective of whether they are contractual or not".[40] The triggering point of arbitrating anti-trust matters in England took place in *E.T. Plus S.A. v. Welter*.[41] The Court opined that the anti-trust disputes are themselves not non-arbitrable but the arbitration clause must specify that the case is the kind of case covered by it. However, in subsequent case laws, the Court has moved towards a broader interpretation of the arbitration agreements, wherein they have stated that the phrase 'any dispute' in a clause would

[38] BM Australia Ltd. v. Nat'l Distribution Services PTY [1991] 100 A.L.R. 361.
[39] MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 172 (2d ed. 2001).
[40] TIBOR VARADY ET. AL., DOCUMENT SUPPLEMENT TO INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 122 (2009).
[41] E.T. Plus S.A. v. Welter [2005] E.W.H.C. 2115 (Comm.).

encompass competition disputes unless it is explicitly excluded.[42] Therefore, post the *E.T. Plus S.A.* case, England has fixed its position and no doubt about the arbitrability of competition disputes.

3.4 FRANCE AND SCANDINAVIAN NATIONS

Article 2060 of the Civil Code restricted the arbitrability of all matter in which there was a public policy consideration. Therefore, prior to the 1981 amendment to the arbitration laws in France, arbitrability had been elucidated in a very restrictive manner, denying arbitration whenever the dispute would touch the aspect of public policy.[43] However, in the later years, the French arbitration regulations moved towards a peculiar continental legal system which favoured a more logical outlook to public policy considerations. The Court established in the *Labinal* case that the mere presence of a public policy consideration did not limit the arbitrability of the matter.[44] The Court of Appeal further strengthened the arbitrability of competition disputes in France by holding that the arbitrators may apply E.C. competition law provisions and, where appropriate, draw the consequences of a wrongful conduct.[45] Moreover, in *Coveme* and *S.N.F. v. Cytec* the arbitrability of competition disputes was finally upheld by the French courts, and it was ruled that the arbitral award on competition dispute would be enforced unless there is a "flagrant" violation of E.U. competition law.[46] The court aimed to create a distinction on the arbitration of competition dispute based upon the

[42] Fiona Trust & Holding Corp. v Privalov [2006] APP.L.R. 10/20; Premium Nafta Products v. Fili Shipping Co. [2007] U.K.H.L. 40.
[43] *supra* note 35.
[44] Labinal v. Mors, 645 Rev. Arb. (1993) (Fr.).
[45] Societe Aplix v. Societe Velcro, 165 Rev. Arb. (1994) (Fr.).
[46] Coveme v. Compagnie Francaise des Isolants, Court of First Instance, Bologna (July 18, 1987); SNF v. Cytec, Cour de Cassation, Chamber Civil 1, No. 06-15320 (June 4, 2008).

degree of violation. Therefore, in France, Arbitration can be resorted by the parties unless there is a blatant or overt violation of competition law such as abuse of dominant position or cartelisation.

Among the Scandinavian countries, both Sweden and Denmark have a strong arbitration culture and provide for arbitration of competition disputes. However, presently arbitration doesn't play a major role in Denmark, in the enforcement of E.C. competition law and national competition law as most claims for damages have been "follow-on" claims based on decisions from the competition authorities.[47] Two recent cases of the Danish Supreme Court and the Swedish Supreme Court have adopted a minimalistic standard as a pro-arbitration measure. The Swedish Supreme Court highlighted an 'area of tolerance' by stating that an award cannot be rendered invalid merely because it violates competition law provisions, if it does not render the award clearly incompatible with the basic principles of the Swedish legal system.[48] The Danish Supreme Court took a similar view wherein it stated that only an extraordinarily grave error, either blatant misapplications of well-defined rules or the failure to apply clear precedent, will lead to a review.[49] Therefore, the Scandinavian countries applied the 'second look doctrine' as developed in the *Mitsubishi* case in a more liberal and pro-arbitration manner.

[47] *IBA Private Enforcement*, INT'L BAR ASS'N (July 23, 2018), https://www.ibanet.org/Document/Default.aspx?DocumentUid=BC705151-ED8A.
[48] Jakob Sorenson & Kristian Torp, *The Second Look in European Union Competition Law: A Scandinavian Perspective*, 34 J. INT. ARB. 1, 35–54 (2017).
[49] *Id.* at 51.

4. ARBITRABILITY OF COMPETITION DISPUTES IN INDIA: SECOND LOOK DOCTRINE AS AN ALTERNATIVE TO NON-ARBITRABILITY

As there is no conclusive determination on the arbitrability of competition disputes in India, there is still scope to bring anti-trust matters within the ambit of the Arbitration Act, 1996. Most countries have seen arbitrating competition matters as a viable option. There are two policy objectives that form the basis of this discussion. Firstly, the need to ensure public interest in competition matters and secondly, to promote arbitration as a preferred medium of dispute resolution. Therefore, there is a need to create a balance between the public interest involved in competition law disputes and creating a strong arbitration culture in the country.

The process of arbitration is highly flexible and is based upon the principle of party autonomy. Therefore, as the Competition Act, 2002 is a public welfare Act and seeks to ensure competition in the market, the primary gap that is needed to be filled is the compliance with the Competition provisions in the arbitral process. The same issue was faced by the Supreme Court of United States and was comprehensively discussed in the *Mitsubishi* case. The Court created a balance between the two laws and allowed anti-trust issues to be arbitrated on the condition that the tribunal applies the anti-trust laws of U.S. Moreover, as discussed earlier, to further ensure its enforcement, the Court brought forward the 'Second Look Doctrine'. This would mean that the tribunal shall decide the matter on the basis of competition laws and the Courts shall verify that the

questions of competition law have been properly addressed.[50] In case of any contravention with the competition laws of the country, the courts shall refuse to enforce the arbitral award. This doctrine has thereafter been applied in several different jurisdictions and is now an accepted practice globally. The Second look shall only come into operation in cases wherein there is an evident need of review by the commission. Such an approach would ensure that the purpose of arbitration i.e. to reduce the burden on the court is not rendered futile. Therefore, the same doctrine can be used in India as a substitute to the non-arbitrability of competition law disputes.

Another problem, in arbitrating competition matters as highlighted by the Delhi High Court in *Competition Commission of India v. Union of India*,[51] is that the tribunals do not have the expertise to decide technical and fact intensive disputes. However, experienced arbitrators all over the world have taken over technical matters and are deciding competition disputes without any problems. The recent positive attitude to the Courts in India in regard to the arbitration of disputes dealing with fraud is an example of the same. Similar to anti-trust issues, fraud allegations also carry both '*right in rem*' and '*right in personam*' as it is a criminal wrong under the Indian Penal Code. Moreover, allegations of fraud are very technical and fact intensive, still the Court in *A. Ayyaswamy v. A. Paramasivam* ruled in favour of the arbitrability of fraud disputes.[52] However, the Court made a distinction between 'Serious fraud' and 'Fraud *Simplicitor*' and stated that cases that are of very serious nature must be adjudicated by the Court. Similar categorisation can also be made in anti-trust matters if the C.C.I. is

[50] Patrick Baron & Stefan Liniger, *A Second Look at Arbitrability – Approaches to Arbitration in the United States, Switzerland and Germany*, 27 ARB. INT'L 19 (2003).
[51] Competition Comm'n of India v. Union of India, A.I.R. 2012 Del. 66.
[52] A. Ayyaswamy v. A. Paramasivam.

sceptical of leaving the entire enforcement of competition law in private hands. An approach that can be adopted by the Commission in disputes of serious nature is to refer the parties to arbitration with regard to the compensation claims based upon the in rem orders by itself.

Moreover, the Commission can play the role of an *amicus curie* or *parens patriae* in the arbitral proceedings and aid the tribunal with any assistance or investigation it needs, to determine any aspect of the competition enforcement.[53] Similar practice is undertaken in the E.C.J. to ensure proper enforcement of E.U. laws. Section 21 of the Competition Act, 2002 allows the Commission to give its reference to statutory bodies in case of any decision that needs to be taken in regard to anti-competitive issues. Also, Section 6 and 27 of the Arbitration Act enables the arbitral tribunal to seek assistance for administrative and evidentiary purposes. Similar help can be sought by the arbitral tribunal while dealing with questions related to Section 27 and 48 of the Competition Act, 2002. Therefore, if the arbitrator feels that any assistance is required, for instance to determine the market share or the relevant market in a dispute, the assistance of the Commission can be taken. Mediation or conciliation, as a practice can also be adopted in the Pre-hearing conferences of the Commission under Regulation 17 of the Competition Commission of India (General) Regulations, 2009. The pre-hearing conference is undertaken by the Commission prior to the hearing to establish whether there is any prima facie case of violation. Therefore, as a practice to resolve issues at a stage prior to the proceedings, conciliation or mediation can be adopted as an effective practice.

[53] Rahul Satyan, *Policing Mergers, Remedies & Procedure*, COMPETITION COMM'N OF INDIA (Oct. 31, 2011) http://cci.gov.in/images/media/ResearchReports/Policing%20Mergers_%20Remedies%20&%20Procedure.pdf.

The assignment member of the tribunal may act as the conciliator or mediator between the parties.

Disallowing arbitration of competition disputes can also lead to parties making frivolous defences of anti-competitive practices, thereby hampering the process and practice of arbitration. Due to the specific jurisdiction of competition Commission in India, the following changes can help promote arbitration as a forum to resolve competition disputes.

1. A judicial pronouncement stating that the jurisdiction of the Competition Commission under Section 61 doesn't not bar the arbitration of competition disputes.
2. An amendment to the Section 61 of Competition Act, 2002 stating that the same does not bar arbitration or removing the exclusivity clause and decentralising the process as seen in E.U..

The advantages of arbitrating competition disputes are the same as the advantages of arbitrating any other dispute. In most case, the orders of C.C.I. are pending before the appellate body or the Supreme Court.[54] Parties are required to wait for long for their private claims to come to a conclusion.[55] Arbitration of disputes would lead to higher compensation for the affecting parties and thereby act as a high deterrent for the anti-competitive practices. Certain adjustments to the confidentiality clauses and the arbitration agreements will also lead to a more business friendly outlook. The arbitration agreements can be made to specify that they shall cover competition disputes as well.

[54] *Most of CCI's penalties are stuck in court*, LIVEMINT (Dec. 14, 2015), https://www.livemint.com/Politics/0lDEKk4J2v5Jah9q2cPYwJ/Most-of-CCIs-penalties-are-stuck-in-court.html.

[55] *Getting the Deal Through: Private Antitrust Litigation*, 1 GLO. COMP. REV. 7, 78 (2014).

For instance, in 2001, in the *DLF* case,[56] C.C.I. had ordered the real estate giants to modify their agreement that consisted of unfair provisions.[57] C.C.I. had ruled that DLF had abused its dominant position to get the members of informant association to sign a highly abusive apartment buyer's agreement. The parties were given the freedom to modify the unjust provisions by the commission. In such a scenario, the arbitration of the dispute could have proven to be a more viable option for the parties. Since arbitration brings with itself flexibility, speed and confidentially for the parties which make the entire process smoother.

5. CONCLUSION

Liberalisation of the economy has brought with itself several new issues relating to the competitive capabilities of the market players. The idea of Consumer welfare is at the forefront of promotion competition law. Free and Fair Competition in the market is essential to ensure technical advancements and innovations. The Competition Act, 2002 replaced the M.R.T.P. Act to cover for the existing gaps and to cater to the new challenges in the open and free market. With the increase in investments and transnational transactions, arbitration has also become as a highly favoured mode of dispute resolution. Following the international trend, India has also seen a drastic increase in the number of disputes that have been referred for arbitration.[58]

[56] Belaire Owners Ass'n v. DLF Ltd., C.C.I. Case no. 19/2010.

[57] Aakanksha Kumar, *The question of CCI's jurisdiction to "modify" apartment buyers agreements – A Review of COMPAT's DLF order*, LIVELAW (June 28, 2014), http://www.livelaw.in/question-ccis-jurisdiction-modify-apartment-buyers-agreements-review-compats-dlf-order/.

[58] Arpinder Singh, *Emerging Trends in Arbitration in India: A study by Fraud Investigation & Dispute Services*, ERNST & YOUNG (July 24, 2018),

The global pro-arbitration attitude has seen the initial hostility of Competition Law and Arbitration Law towards each other is fade in most jurisdictions. The recent study of O.E.C.D. on the arbitrability of competition disputes highlighted the advantages and disadvantages of arbitration and addressed the enforceability of awards that determine competition law claims holistically. Competition law disputes often involve transnational claims and arbitration agreements forms a part of the ease of doing business for the parties. However, having said that it is also important to enforce competition law efficiently to ensure that the public interest is not sacrificed. Therefore, arbitration must not be seen as an alternative to C.C.I. but as a supplement to the objective that C.C.I. aims to achieve. Arbitral tribunal formed by the consent of the parties must work in tandem and seek assistance from the C.C.I. to ensure proper compliance with the Competition law. The 'Second look Doctrine' that oversees the optimum application of competition law shall act as a system of checks and balances for the tribunals.

Creating a balance between the public policy considerations, a distinction similar to fraud cases can be made in competition law. Serious violations and fact intensive disputes such as abuse of power and cartelisation can be restricted from the scope of arbitration clauses. Thus, arbitration of competition claims does not downplay the enforcement of competition law but provides a particularly useful method in resolving competition law claims. It will be interesting to see if India follows the footsteps of other countries by allowing arbitration of anti-trust matters. Ensuring 'jurisprudence *constante*' wherein there is uniformity among arbitral tribunal while dealing with similar subject

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http://www.ey.com/Publication/vwLUAssets/EY-FIDS-Emerging-trends-in-arbitration-in-India/$FILE/EY -Emerging-trends-in-arbitration-in-India.pdf.

matters will be critical. The same is likely because the tribunals shall apply the existing anti-trust laws for the adjudication of the dispute. Similar practice is seen is fact intensive disputes in Investment Arbitration cases between investors and Host States. In any event, we are likely to see an escalation in the use of arbitration, and other alternative dispute resolution mechanisms, to determine competition law matters globally.