ARBITRABILITY OF COMPETITION LAW DISPUTES IN INDIA – WHERE ARE WE NOW AND WHERE DO WE GO FROM HERE?

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I. Introduction

In the contemporary era of ever increasing global trade and commercial disputes, the role of arbitration as an alternative method of dispute resolution is steadily growing.[1] By agreeing to arbitrate, private parties waive their right to approach the national courts in order to avail the benefits of a flexible, neutral and impartial forum of adjudication. However, the private nature of arbitration and the confidentiality of the decision making process often give rise to debates on whether certain 'public law' issues involving public interest can be settled by way of arbitration.[2]

Competition law is one such matter through which the State checks unacceptable economic activities by using punitive damages as a means of deterrence.[3] Since competition law exists to prevent market distortions, enhance overall efficiency of the market and safeguard consumer welfare,[4] there is a substantial public interest element involved in punishing violations of competition law, raising doubts about the 'arbitrability' of competition law disputes.

Simply put, 'arbitrability' refers to the ability of a dispute to constitute the subject

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[1] Marna Lourens, *The Issue of 'Arbitrability' in the Context of International Commercial Arbitration (Part I)*, 11 S. AFR. MERCANTILE L.J. 363, 363 (1999).

[2] Assimakis P. Komninos, *Arbitration and EU Competition Law* 7 (Univ. Coll. London, Dep't of Law, Working Paper, 2009) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1520105 ["Komninos"]. *E.g.,* Robert Gorman*The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 4 U. ILL. L. REV. 635 (1995); Robert B. von Mehren, *From Vynior's Case to Mitsubishi: The Future of Arbitration and Public Law*, 12 BROOK. J. INT'L L. 583 (1986).

[3] Maria Valmana Ochaita, *Civil Liability for Infringing Competition Rules: Grounds, Standing and Scope of Damages*, *in* PRIVATE ENFORCEMENT OF COMPETITION LAW 572 (2011); Patricia Hanh Rosochowicz, *Deterrence and the Relationship Between Public and Private Enforcement of Competition Law,* 25 EUR. COMPETITION L. REV. (2005).

[4] See, *e.g.*, Indian Competition Act, No. 12 of 2003, Preamble, INDIA CODE (2002); Treaty on European Union 1992, art. 3(1); Namibia Competition Act (2003), Cap. (1); South Africa Competition Act 89 of 1998 art. 2 (S. Afr.); Competition & Consumer Act 2010 s 2 (Austl.); Commerce Act, 1986, 1A (N.Z.).

matter of arbitration.[5] The concept encapsulates three aspects, (i) whether the disputes, having regard to their nature, could be resolved by a private arbitral forum or whether they are exclusively reserved for public fora (courts); (ii) whether the disputes are covered by the arbitration agreement and (iii) whether the parties have referred the disputes to arbitration.[6] Since the answer to the last two questions do not raise public policy concerns and are specific to the facts of each case, this article is intended to deal only with the first question of subject-matter arbitrability.

The arbitrability of competition law disputes becomes a critical question when a dispute arises between parties who have a pre-existing contractual relationship (a franchise agreement, joint venture, technology licenses, distribution agreements etc.) and the agreement contains a clause to refer all disputes to arbitration.[7] In a contractual dispute, competition law could be invoked either as a *shield* (say, where Party A claims for breach of contract and party B defends himself by claiming nullity of the contract because it is anti-competitive) or as a *sword* (for instance, where one party is claiming damages for loss suffered due to other party's anti-competitive behaviour).[8] Can competition law disputes be referred to arbitration leading to a binding award enforceable by courts?

This issue has been the subject of intense debate throughout the world,[9] while

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[5] Alexis Mourre, *Arbitrability of Antitrust Law from the Europe and US Perspectives, in* 1 EU AND US ANTITRUST ARBITRATION: A HANDBOOK OF PRACTITIONERS 1, 3 (Gordon Blanke & Philip Landolt eds., 2011).

[6] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 S.C.C. 532 ¶ 21 (India) ["Booz Allen"].

[7] John R. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C.L. REV. 219 (1986).

[8] Organization of Economic Co-operation and Development [OECD], *Arbitration and Competition*, OECD DAF/COMP (2010) 40 ["OECD"]; Komninos, *supra* note 2.

[9] Fiona Trust & Holding Corp. v. Privalov [2006] EWHC (Comm) 2583 (Eng.); Cour d'appel [CA] [regional court of appeal] Bologna, July 18, 1987; *accord.* Coveme v. Compagnie Francaise des Isolants, (Fr.); Premium Nafta Products Ltd v. Fili Shipping Company Ltd., [2007] UKHL 40 (appeal taken from Eng.); Ludwig Von Zumbusch, *Arbitrability of Antitrust Claims under US, German and EEC Law: The International Transaction Criterion and Public Policy*, 22 TEX. INT'L LJ 291 (1987); John Beechey, *Arbitrability of Anti-Trust/ Competition Law Issues – Common Law,* 12 ARB. INT'L (1996); Frank-Bernd. Weigand, *Evading EC Competition Law by Resorting to Arbitration?*, 9 ARB. INT'L 249 (1993); JH Dalhuisen, *The Arbitrability of Competition Law*, 11 ARB. INT'L 151,151 (1995); Hamid Gharavi, *The Proper Scope of Arbitration in European Community Competition Law*, 11 TUL. EUR. & CIV. 185 (1996); J Bridgman, *The Arbitrability of Competition Law Disputes*, 1

the matter continues to remain relatively unexplored in the Indian context. The present article attempts to fill this lacuna by analysing this seemingly uneasy interface between arbitration and competition law regimes in the Indian setting.

The present article has both positive and normative aspects. The article first explores whether there are any restrictions on the arbitrator's power to decide competition law issues under the existing legal regime of India and then discusses the normative justifications and advantages of allowing arbitration in competition law. To situate the debate in its proper context, Part I of the article discusses the international experience of arbitrability of competition law disputes and the remaining article then critically analyses the legal position in India. Part II provides a synoptic perspective of the arbitration regime in India and attempts to formulate a working definition of arbitrability by an analysis of existing case laws. Part III undertakes a critical evaluation of the Competition Act, 2002 to assess whether a dispute involving competition law could satisfy the test of arbitrability, highlighting in particular, the legal impediments in arbitrating such a dispute. Finally, Part IV is a normative evaluation of the pros and cons of entrusting arbitrators with competition law disputes.

A. *Genesis of the Debate: A glance at the International Position*

At first glance, the two branches of law – arbitration and competition law - seem to be diametrically opposite. *Competition law* is dominated by public order, requiring the state to promote competitive markets and protect public interest while in contrast, *arbitration law* is a private consensual method of dispute resolution centred around party autonomy.[10] In such a case, whether or not competition law disputes can be subjected to arbitration has been the subject of considerable discussion throughout the world, particularly in the United States ["US"] and the European Union ["EU"].[11]

Historically, private resolution of disputes through arbitration was considered ill-suited for competition law issues because fear prevailed that competition law issues are

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E.B.L.R. 147 (2008); Nevin Alija, *To Arbitrate or Not to Arbitrate…Competition Law Disputes*, 5 MEDITERRANEAN J. SOCIAL SCIENCES 641 (2014).

[10] Ioan Lazar & Laura Lazar, *Considerations on International Commercial Arbitration in Competition Matters in the European Union*, 15 CURENTUL JURIDIC 103, 107 (2012).

[11] James R. Atwood, *The Arbitration of International Anti-trust Disputes: A Status Report and Suggestions,* INT'L ANTITRUST L. & POL'Y (1994); H. Paul Lugard, *EC Competition Law and Arbitration: Opposing Principles?,* 19 E.C.L.R. 295 (1998); Assimakis P. Komninos, *Arbitration and the Modernisation of European Competition Law Enforcement*, 24 WORLD COMPETITION 211 (2001).

fact-intensive and therefore, too complicated for arbitrators; or that the private nature of arbitration means that the competition law would not be applied openly or consistently; or that arbitrators have a pro-business bent of mind which might lead to under-enforcement of laws.[12] Since there is no appeal from an arbitral award, arbitration was often seen as a 'black hole to which rights are sent and never heard from again.'[13]

Besides these public policy concerns, the problem stood further compounded in the European Union where the European Commission initially enjoyed exclusive jurisdiction over competition law disputes. Since the national courts in EU did not have the power to hear competition law disputes,[14] arbitral tribunal which are considered to be a substitute of courts, were also denied the jurisdiction to hear disputes involving competition law.[15]

This judicial hostility towards arbitration underwent a change in the 1980s and early 1990s, beginning with the US judgment of *Mitsubishi Motors Corp v. Soler Chrysler Plymouth,*[16] where the court held that an arbitration clause in an international contract should be given full effect even if that means submission of antitrust issues to arbitration. The Courts acknowledged that arbitrators in this time and era, deal with complex problems and when faced with the adjudication of competition law disputes, it is always possible to select an arbitrator who is an expert in the field of competition law.

A similar change was witnessed in the European Union where Regulation 1/2003 decentralized competition law and allowed the national courts of member states to hear competition law matters.[17] In the landmark judgment of *EcoSwiss China Time Ltd. v. Benetton*

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[12] American Safety Equipment Corp. v. J.P. Maguire, 391 F.2d 821 (2d Cir.,1968); *accord.* 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); Emanuela LecchI & Michael Cover, *Arbitrating Competition Law Cases* (March 2008) www.charlesrussell.co.uk.

[13] William W. Park, *National Law and Commercial Justice, Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647 (1988-89).

[14] Council Regulation No. 17/62 (Feb. 6 1962).

[15] Komninos, *supra* note 2.

[16] Mitsubishi Motors Corp v. Soler Chrysler Plymouth, 473 U.S. 614 (1985).

[17] Council Regulation (EC) 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); Julian Lew, *Competition Laws: Limits to Arbitrators' Authority, in* ARBITRABILITY – INTERNATIONAL AND COMPARATIVE PERSPECTIVES (Loukas Mistelis & Stavros Brekouslakis eds., 2011).

International NV,[18] the European Court of Justice affirmed arbitral tribunal's power to hear competition law disputes. As a result, arbitration of competition law is now a *fait accompli* in US[19] and European countries.[20]

Against the backdrop of this international experience, let us now analyse whether arbitration can play a role in resolving competition law disputes under the existing legal regime in India.

B. *A Look at the Arbitration Regime in India and the Question of Arbitrability*

Since there is no universal definition of the concept of 'arbitrability,'[21] the source of restrictions on arbitrability (arbitrators power to hear certain disputes) lies within the national laws - *either* in the rules normally found in the arbitration laws *or* in other statutes that reserve certain disputes to be adjudicated by the national courts only.[22]

In India, both international and domestic arbitration are governed by the Arbitration and Conciliation Act of 1996 ["the Act"] which is based on the UNCITRAL Model Law on International Commercial Arbitration.[23] The Act does not enumerate any category of disputes as being non-arbitrable. Instead, it allows arbitration of all disputes arising out of a legal relationship, whether contractual or not,[24] thus, giving the impression that all disputes are arbitrable regardless of their nature. However, this notion is dispelled by Section 2(3) of the Act which declares that the Act would not affect any

[18] Case C-126/97, Eco Swiss China Time Ltd. v. Benetton Int'l N.V., 1999 E.C.R. I-3055.

[19] GKG Caribe Inc. v. Nokia-Mobira Inc., 725 F.Supp. 109, 110-113 (D.P.R. 1989) ["GKG Caribe Inc."]; *accord.* Gemco Latino-America Inc v. Seiko Time Corp., 671 F.Supp. 972, 979 (S.D.N.Y. 1987); Gilmer v. Interstate Johnson Lane Corp., 500 U.S. 20 (1991).

[20] Cass., sez. un., 21 augosto 1996, n. 47, I-137 (It.) ["Cass., sez. un."]; *accord.* Dirland Telecom SA v. Viking Telecom AB, [2005] E.C.L.R. 432, 438 (Swed.); Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA et al. (2006) ECR 1-6619 Joined Cases C-295/04 anc C-298/04.; ET Plus SA v. Welter, [2005] EWHC (Comm.) 2115 (Eng.); Cour d'appel [CA] [regional court of appeal] Paris, 1991, Ganz v. Nationale des Chemins de Fer Tunisiens (SNCFT), 478 (Fr.); Cour d'appel [CA] [regional court of appeal] Paris, 1993, Labinal SA v. Mors and Westland Aerospace Ltd., 645 (Fr.).

[21] U.N. *Comm'n on Int'll Trade L., Rep. on its32d Sess., U.N. Doc. A/54/17; Supp. No.17* (*June 1999).*

[22] JEAN-FRANCOIS POUDRET ET AL., COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 101 (2d ed. 2007) ["POUDRET"].

[23] The Arbitration & Conciliation Act, No. 26 of 1996, Preamble, INDIA CODE (1996) ["Arbitration & Conciliation Act"].

[24] Section 7 of the Arbitration and Conciliation Act 1996 defines the term 'Arbitration agreement.'

law by virtue of which certain disputes may not be submitted to arbitration. That there are restrictions on arbitrability is further confirmed in Sections 34(2)(b) and 48(2) of the Act which empower the Courts 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."

Since these statutory restrictions are couched in vague terms and offer little guidance, the concept of 'arbitrability' has crystallized over time with case laws setting forth limitations on parties' freedom to arbitrate. In the seminal case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited*,[25] the Supreme Court of India held that all disputes relating to *rights in personam* are amenable to arbitration (right *in personam* is an interest protected solely against specific individuals); and all disputes relating to *rights in rem* (right exercisable against the world at large) are required to be adjudicated by courts and public tribunals only. Some examples of such non-arbitrable disputes are disputes pertaining to the rights and liabilities arising out of criminal offences,[26] matrimonial disputes, insolvency and winding up,[27] testamentary issues like grant of probate,[28] succession certificate, admiralty suits,[29] foreclosure of mortgage,[30] and eviction or tenancy matters governed by special statutes.[31]At the same time, this rule allows flexibility to the extent that even disputes relating to sub-ordinate rights *in personam* arising from rights *in rem* are considered to be arbitrable.[32] For instance, where a criminal matter such as physical injury gives the injured the right to claim damages, the dispute can be referred to arbitration.[33] Similarly, while an arbitral tribunal cannot grant a judicial separation, a husband and wife may refer to arbitration the terms on which they shall separate.[34]

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[25] Booz Allen, *supra* note 6.
[26] State of Orissa v. Ujjal Kumar Burdhan,(2012) 4 S.C.C. 547 (India).
[27] Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd., (1999) 5 S.C.C. 688 (India).
[28] Chiranjilal Shrilal Goenka v. Jasjit Singh, (1993) 2 S.C.C.507 (India).
[29] Osprey Underwriting Agencies v. ONGC Ltd., A.I.R. 1999 Bom 173 (India).
[30] Booz Allen, *supra* note 7.
[31] Fingertips Solutions Pvt. Ltd. v. Dhanashree Electronics Ltd.,2011 Indlaw CAL 805 (India).
[32] Booz Allen, *supra* note 7.
[33] Keir v. Leeman, (1846) 9 Q.B. 371 (Eng.), *See* Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan, (1999) 5 S.C.C. 651 (India); Booz Allen, *supra* note 7.
[34] *Id.*; Soilleux v. Herbst, (1801) 2 Bos, Wilson v Wilson (1848) 1 HL Cas 538; Cahill v. Cahill, [1883] 8 A.C. 420 (Eng.).

Developing on the ruling in *Booz Allen (supra)*, the case of *Kingfisher Airlines Limited v. Prithvi Malhotra Instructor*[35]placed a further restriction on arbitrability. It was held that even an action *in personam* would not be non-arbitrable if it has been reserved for resolution by a public forum as a matter of public policy. This is not to suggest that creation of special tribunal with respect to certain subject matter *per se* precludes arbitration in that subject matter. Instead, disputes would be considered non-arbitrable only where a particular enactment creates special rights and obligations and gives special powers to the Tribunals that are not enjoyed by civil courts.[36]

HDFC Bank v. Satpal Singh Bakshi[37] serves as a perfect example for the point being made. The issue involved in the case was whether a matter falling within the jurisdiction of the Debt Recovery Tribunal (established by the *Recovery* of Debts Due to Banks & Financial Institutions Act, 1993) could be submitted to arbitration. The Delhi High Court observed that the tribunal was not created to adjudicate on special rights created under the said statute but for expeditious disposal of cases arising under the general law of the land such as contract law.[38] In such a case, the Court concluded that the matter falling within the jurisdiction of the Debt Recovery Tribunal can be heard by an arbitral tribunal as well.[39] On the other hand, in the context of the Industrial Disputes Act 1947, the Court in *Kingfisher* observed that the Act confers certain special rights on workmen which are not available under the general laws and provides industrial tribunals for the adjudication of disputes involving these rights. An industrial dispute is not seen as a private dispute between the employer and employee but seen as affecting the industry as a whole. This implies that industrial disputes have been reserved by the legislature for adjudication by the public forum as a matter of public policy and arbitration of such disputes is not permissible. Similar is the case with the state Rent Control Act, where the provisions of the Act are required to take precedence over the contract between the parties so as to protect the interests of the tenants. In *Natraj Studios Pvt. Ltd. v. Navrang Studios*,[40] the Supreme Court held that the arbitral tribunals, which are a substitute to civil courts cannot hear a dispute under the Rent Control Act because the statute provides

[35] Kingfisher Airlines Limited v. Prithvi Malhotra Instructor, 2013(7) Bom C.R. 738 (India).
[36] *Id.*
[37] HDFC Bank v. Satpal Singh Bakshi, (2013) 134 D.R.J. 556 (India).
[38] *Id.* at ¶ 14.
[39] *Id.*
[40] Natraj Studios Pvt. Ltd. v. Navrang Studios, A.I.R. 1981 S.C. 537 (India).

these rights to be adjudicate in the specialized tribunals only. This suggests that the decision in such cases cannot be heard by an arbitral tribunal despite the fact that the decision involves a right *in personam*, and not a right *in rem*.

These cases make it amply clear that the determination of arbitrability in the Indian context would require a two-fold enquiry. At the first stage, it needs to be determined whether the subject matter of the dispute is a *right in rem*, in which case, the dispute would not be amenable to arbitration. If, however, the dispute involves a *right in personam*, then the next question to be answered is whether the adjudication of such a dispute is reserved by the legislature exclusively for public fora as a matter of public policy. An affirmative answer to the second question would imply that arbitration in the subject matter is not permissible. The following section seeks to apply this working formula of arbitrability to competition law matters.

C. *The Competition Law regime in India and the Legal constraints to Arbitrability of Competition Matters*

After the economic reforms of 1991 in the form of market liberalization, India enacted the Competition Act to usher in a competitive market and to prevent potential market distortions.[41] In furtherance of this aim, the Competition Act prohibits anti-competitive behaviour between market players (cartels, price fixing etc.) having an adverse impact on competition,[42] prevents a dominant enterprise in the market from abusing its dominant position[43] and regulates mergers between enterprises that would result in a substantial reduction of competition in the market.[44]The Competition Act is primarily enforced through the Competition Commission of India ["CCI"] which is vested with both regulatory and quasi-judicial powers[45]and the Competition Appellate Tribunal ["COMPAT"], established to sit in appeal from orders of the CCI;[46] with the Supreme Court serving as the ultimate appellate authority.[47]

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[41] Dept. of Company Affairs, *Report of the High Level Committee on Competition Policy and Law* (2000).
[42] The Competition Act, No.12 of 2003, § 3, INDIA CODE (2002).
[43] *Id.* at §4.
[44] *Id.* at §5.
[45] *Id.* at §7.
[46] *Id.* at § 53A.
[47] *Id.* at § 53T.

Interestingly, the Competition Act does not provide for an alternate method of dispute resolution and the CCI or COMPAT do not have statutory powers to direct parties to use such methods. The only time that the Court was confronted with the issue of arbitration of matters covered under the Competition Act was in *Union of India v. Competition Commission of India*.[48] In this case, parties who had entered into a Concession Agreement with the Ministry of Railways for operating container trains, filed a complaint before the CCI alleging that the Railway Board was abusing its dominant position by imposing increased charges and restricting access to infrastructure. The Railways challenged the CCI's jurisdiction to hear the dispute in view of the extant arbitration agreement between the parties. However, the Delhi High Court allowed the CCI to hear the matter notwithstanding a valid arbitration clause, on the ground that the scope and focus of CCI's investigation is very different from the scope of an enquiry before an Arbitral Tribunal. It was observed that 'the Arbitral Tribunal would neither have the mandate, nor the expertise, nor the wherewithal'[49] to prepare an investigation report which is necessary to decide the dispute in question.

In another case *Man Roland v. Multicolour Offset,*[50]involving a similar factual matrix, under the Monopolies and Restrictive Trade Practices Act, 1969 ["the MRTP Act"] (the predecessor of the Competition Act), the Supreme Court held that the remedies available under the MRTP Act are in addition to the remedies that may be available under contract law. The courts would, therefore, continue to have jurisdiction despite the arbitration agreement between the contractual parties.

In both these cases, the Court's conclusion that the right to file a suit before the CCI/ Court is an unwaivable right was grounded on the perception that the scope of proceedings in CCI/ MRTP Commission is different from the scope of proceedings before an arbitral tribunal whose mandate is circumscribed by the terms of the contract. Though these judgments provide useful insight into the judicial mind-set, they cannot be seen as a blanket denial of arbitration for competition matters.[51] This is because in both the cases, the courts have held that the arbitration clause does not take away the jurisdiction of the MRTP Commission/ CCI but there is no precedent to suggest that

[48] Union of India v. Competition Commission of India, A.I.R. 2012 Del 66 (India).
[49] *Id.* at ¶ 16.
[50] Man Roland v. Multicolour Offset, (2004) 7 S.C.C. 447 (India).
[51] Anubha Dhulia, *Arbitrability of Competition Matter: With Special Reference to India*, COMPETITION LAW REPORTS (2012).

competition law disputes cannot be adjudicated in an arbitral tribunal where both the parties wilfully submit the dispute to arbitration. In such a scenario, whether the Courts would enforce the arbitration agreement continues to remain inconclusive. Similarly, what would be position when the arbitrator gives an award on a matter involving competition law and the award is subsequently challenged before the Court? Would the court then refuse to enforce the award on public policy considerations?

Since there is no authoritative judgment which considers these issues from a public policy perspective, arbitrability of competition law disputes still remains an open question in India.[52] The following section attempts to determine the arbitrability of competition law disputes by undertaking a two-fold enquiry based on general principles of arbitrability discussed previously.

i. Whether a Claim Arising under the Competition Law is a right in rem?

It is interesting to note that disputes that can arise under competition law have both 'private' and 'public' elements.

Section 19(1) of the Competition Act empowers *any person*, *consumer or association* to file information with the CCI with respect to any (alleged) contravention of the Competition Act. This is followed by an investigation (by CCI's specialized investigation wing called the Director General) and once the fact of infringement is established, the CCI is empowered to punish the violation by imposing a penalty, issuing a 'cease and desist' order etc.[53] Based on this finding of infringement, Section 53N additionally allows *third parties affected by anti-competitive conduct* to approach the COMPAT and claim compensation for the loss suffered by them due to the anti-competitive conduct. Compensation can also be claimed for losses suffered due to the failure of the other party to comply with the orders of CCI/COMPAT.[54]

It is argued that the fact that 'any person' can bring a claim under Section 19 without any personal injury/interest in the matter highlights the public interest nature of the remedy. Any order made under Section 19 determining the validity of an agreement or imposing liability on the defaulter would therefore, be an order *in rem* because an anti-competitive behaviour not only harms the interests of the rival businesses that directly

[52] *Id.*
[53] The Competition Act, No.12 of 2003, § 27, INDIA CODE (2002).
[54] *Id.* at § 42, 53.

sustain losses but also has an impact on all the consumers, retailers who are forced to pay higher price for the goods. Since the remedy for a complaint under Section 19 would affect public interest at large i.e. persons other than the parties to the arbitration agreement, such an order can only be granted by CCI in exercise of the power conferred upon them by the statute.

Section 53, on the other hand, provides statutory rights and remedies only to an 'aggrieved party' and such a claim would involve determining the rights and interests of only the individual party in the subject-matter of the case. Even if the right to recover damages requires the arbitral tribunal to make a finding of liability, it would not involve penal consequences but would merely be a step towards establishing a civil monetary claim or any other contractual remedy. This indicates that such an application involves a right *in rem* which is purely *inter partes* and does not affect the rights of third party who are strangers to the arbitral proceedings.

Therefore, the suggestion is that to the extent the Competition Act allows a private remedy, the test of *Booz Allen* stands satisfied and competition law does involve a *right in personam* capable of being arbitrated. When faced with an analogous question under the Business Practices and Consumer Protection Act 2004 ["BPCA"], the Supreme Court of Canada contrasted the wording of section 171 of the BPCA Act with that of section 172 and found that while under section 171, damages can be sought only by 'the person who suffered damage,' a section 172 claim may be initiated by 'virtually anyone' regardless of whether he was affected by a consumer transaction.[55] The court observed that the fact that such persons do not necessarily act in their personal interest highlights the *public* nature of the remedy under section 172. The difference in language led the Court to conclude that while claims under Section 172 was not arbitrable, section 171 claims could nonetheless be arbitrated.[56] Using the same rationale, the Federal Court of Appeal in a subsequent judgment held that Section 36 of the Canadian Competition Act 1985 is a private claim and arbitration is possible for this civil law aspect of competition law i.e. where parties claim damages for violation of competition law or allegation regarding the voidability of anti-competitive agreements.[57]

[55] Seidel v. Telus Communications Inc., ¶ 32 [2011] 1 S.C.R. 531 (Can.).
[56] *Id.* at ¶ 36.
[57] Murphy v. Amway Canada Corporation, ¶ 60-66 [2013] F.C.R. 38 (Can.).

ii. Whether Adjudication of Competition Disputes is Reserved for the Exclusive Jurisdiction of public fora?

Having established that competition law, to the extent that it allows claims and remedies under the private law, is amenable to arbitration, the next logical question is whether adjudication of such civil disputes is reserved for the exclusive jurisdiction of public forum under the Competition Act.

As mentioned earlier, the CCI is an overarching body to sustain and promote competition within the Indian markets. The Preamble and Section 18 of the Competition Act entrusts the CCI with an obligation to eliminate anti-competitive practices, protect the interests of consumers and ensure freedom of trade of all market participants. Section 61 of the Competition Act bars the jurisdiction of civil courts to entertain any competition law matter.

Applying the logic of *HDFC Bank case*, it is amply clear that the CCI was created to adjudicate on special rights created under the Competition Act and the dispute does not arise under the general law of the land (contract law, common law etc.). This leads us to conclude that the provision setting an exclusive jurisdiction of CCI could perhaps be construed as excluding arbitrability of competition law disputes.

One might argue that Section 61 of the Competition Act cannot preclude arbitration since Section 5 of the Arbitration Act begins with a *non-obstante* clause and provides that *notwithstanding anything in any other law*, the jurisdiction of the Court is excluded where there is an arbitration agreement.[58] However, this contention was shot down by the Court in *Central Warehousing Corporation v. Fortpoint Automotive Pvt. Ltd.*,[59] where it was observed that Section 5 cannot be read in isolation. It has to be necessarily juxtaposed with Section 2(3) of the Arbitration Act which states that the provisions of the Arbitration Act will not affect any other law by virtue of which certain disputes cannot be submitted to arbitration. In light of this judicial interpretation, there is little doubt that the exclusive jurisdiction of CCI restricts the arbitrability of competition law issues in India.

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[58] Arbitration & Conciliation Act, *supra* note 23 at § 5 - Extent of judicial intervention: Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

[59] Warehouse Corporation v. Fortpoint Automotive Pvt. Ltd., 2010 (1) Bom C. R. 560 (India).

On the strength of this analysis, it can be reasonably concluded that given the extant competition and arbitration jurisprudence in India, it is highly unlikely that the Courts would allow arbitration of competition law disputes. Competition law disputes involve two facets - one is the administrative law aspect of competition law which includes imposition of public sanctions such as fines for infringement.[60]A claim under such provisions involves a *right in rem* and fails to satisfy the first prong of the 'arbitrability test' and is therefore wholly unsuitable for arbitration. In fact, administrative aspects of competition law are not considered arbitrable in any jurisdiction in the world due to the public interest involved.[61] At the same time, violation of competition law also entails civil law consequences whereby an aggrieved person is entitled to make an individual, private claim for compensation for loss suffered due to anti-competitive behaviour or any other contractual remedy. Such civil law disputes satisfy the first prong of the arbitrability test since they involve *right in personam*. Despite this, these disputes would not be amenable to arbitration because Indian laws assign the CCI/ COMPAT with the sole mandate to address competition disputes, to the exclusion of any other body.

D. *Utility of resolving Competition Law matters using arbitration – Is There a Need for Change?*

Determining whether or not competition law disputes should be arbitrable has to be based on the consideration of two policy objectives. On one hand, there is a need to safeguard public interest by reserving sensitive matters for resolution only by national courts and on the other hand, arbitration needs to be promoted as a vibrant system of dispute resolution for imparting certainty and convenience to business transactions. In India, judicial hostility towards arbitration arguably stems from the concern that public interest would be injured if competition law disputes are allowed to be resolved by arbitration. However, as discussed earlier, there is now an overwhelming international judicial consensus[62] that these are 'archaic misconceptions' and with the proliferation of arbitration, the relevance of public policy is diminishing on the international front,

[60] Sotiris Dempegiotis, *EC Competition Law and International Commercial Arbitration: A new era in the interplay of these legal orders and a new challenge for the European Commission*, 1 GLOBAL ANTITRUST REV. 135, 139 (2008).
[61] *Id.;* Organization of Economic Co-operation and Development [OECD], *Arbitration and Competition*, OECD DAF/COMP (2010) 11.
[62] GKG Caribe Inc., *supra* note 19; Cass., sez. un., *supra* note 20.

opening up the gateway to arbitration in hitherto foreclosed areas.[63]Though 'arbitrability' of a dispute is governed by the municipal law of each jurisdiction, arbitrability of competition law has emerged as a transnational principle.[64]

It is also worth mentioning that precluding arbitration in competition law disputes is not the only way to protect public policy. One alternative is that the CCI can allow parties to go for arbitration and at the same time play the dual role of *parens patriae* and *amicus curiae* in the arbitral proceedings.[65]In the *Mitsubishi* case that allowed arbitration of antitrust disputes in the US, the Court balanced its strong stance in favour of arbitrability with an obligation for the arbitrator to apply the antitrust law. This means that while the arbitrators can determine questions involving competition law, the courts are empowered to take a 'second-look' at the contents of the arbitral award at the enforcement stage to verify that questions of competition law have been properly addressed (popularly known as the 'second-look' doctrine).[66] In case of non-application/ incorrect application of the Competition Act (say, where enforcing the arbitral award would mean giving effect to an anti-competitive agreement) the Court can refuse to enforce the award on the ground that it runs counter to the public policy of the state. This 'second-look doctrine'[67] which originated in US and was subsequently mirrored in EU judgements,[68] adequately ensures that arbitration would not provide private parties a chance to circumvent the mandatory competition law.

Another safeguard could be the use of Section 27 of the Arbitration Act that allows an arbitral tribunal to seek assistance from the Court in taking evidence. This

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[63] Pavle Flere, *Impact on EC Competition Law on Arbitration Proceedings*, 3 SLOVN. L. REV. 155 (2006).

[64] Komninos, *supra* note 2.

[65] Rahul Satyan, *Policing Mergers, Remedies & Procedure* (Oct. 31, 2011), http://cci.gov.in/images/media/ResearchReports/Policing%20Mergers_%20Remedies%20&%20Procedure.pdf.

[66] *See, e.g.*, Radieati di Brozolo, *Anti-trust: A Paradigm of the Relations Between Mandatory Rules and Arbitration – A Fresh Look at the "Second Look*", 1 INT'L A.L.R. 23 (2004); Patrick Baron & Stefan Liniger, *A Second Look at Arbitrability – Approaches to Arbitration in the United States, Switzerland and Germany*, 19 ARB. INT'L 27 (2003); S.I. Strong, CLASS, MASS AND COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW 255 (2013)

[67] POUDRET, *supra* note 22, at 301.

[68] Cour d'appel [CA] [regional court of appeal] Milan, 15 juillet 2006, Terrarmata v. Tensacciai, Riv. dell'arbitrato 2006, 744 (It.); Cour d'appel [CA] [regional court of appeal] Florence, 21 marzo 2006, Nuovo Pignone SpA v. Schlumberger, Riv. dell'arbitrato 2006, 741 (It.); Dom av 24 mars 2005, Gerechtshof Haag, Marketing Displays International Inc. mot VR Van Raalte Reclame B.V. Gjengitt i van den Berg (2006) (Neth.).

provision can be used by the arbitral tribunals to consult the CCI when confronted with questions of competition law. This is an established practice in EU where the European Commission routinely acts as *amicus curiae* in arbitral proceedings involving competition law to protect the public's interest in the correct and uniform application of European Competition law.[69]

Furthermore, the arbitration of competition law disputes can offer an array of advantages. The protection of competition in India is heavily dependent on prosecution of anti-competitive behaviour by the CCI and the paucity of private actions is one of the greatest shortcomings of the Indian Competition law regime.[70]In case of an infringement, howsoever huge the penalty imposed by the CCI maybe, the aggrieved party does not receive any restitution for the losses suffered due to anti-competitive practices. A report published in 2014 indicates that in the past five years of CCI's establishment, almost all the cases decided by the CCI are pending in appeal before the COMPAT or further before the Supreme Court.[71] Consequently, no private claim has reached its conclusion and the aggrieved parties are still awaiting a remedy.[72]Enforcement of competition law by private parties is the backbone of the US competition law regime and even countries like UK are now encouraging private enforcement.[73] By allowing compensation, India can effectively involve private players in the enforcement of competition law and the fear of paying high compensation would prove as an additional deterrent for violation of competition law.[74]

Arbitration offers a greater degree of flexibility, privacy and confidentiality of information than court proceedings which would make it easier for private parties to

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[69] *E.g.,* A.E.S. Summit Generation Limited and A.E.S.-Tisza Erdma Kft. v. Republic of Hung., ICSID Case No. ARB/07/22 (Sept. 23, 2010).

[70] Payel Chatterjee & Simone Reis, *Private enforcement of competition issues, Competition Commission of India vis-à-vis- Alternate Forums – Is it actually an option?* (July 10, 2014), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Article/Private%20Enforcement%20of%20Competition%20Law%20Issues.pdf.

[71] Rahul Goel & Anu Monga, *Private Antitrust Litigation 2014*, GLOBAL COMPETITION REV. 74, 77 (2014); *See also* Amit Kapur et al., *India*, www.jsalaw.com; Farhad Sorajee, *India Cartels*, www.gloallegalinsights.com; Aman Malik, *Complaints Dwindle as CCI Faces Awareness Deficit,* LIVE MINT (Jan. 25, 2016), http://www.livemint.com/Politics/p3uUm7UvYnBZTbbgljwU7K/Complaintsdwindle-asCCI-faces-awareness-deficit.html.

[72] *Getting the Deal Through: Private Antitrust Litigation*, 1 GLOBAL COMP. REV., 7, 2014, at 78.

[73] Barry Rodger, *Competition Law Litigation in the UK Courts: A study of all cases 2009-2012,* 6 G.C.L.R. 55 (2013).

[74] Darragh Killeen, *Following in "Uncle Sam's" footsteps? The evolution of private antitrust enforcement in the European Union*, 34 E.C.L.R. 480 (2013).

vindicate their claims under competition law.[75]Viewed from this angle, arbitration of competition disputes is compatible with the aims of Indian competition policy in terms of promoting competition and consumer welfare and it would not threaten the edifice of competition law[76] since public enforcement (imposition of fines etc.) would still be the prerogative of the competition authorities. Arbitration should therefore, not be viewed as a substitute to CCI but rather as an accompanying vehicle to further the effective enforcement of competition law.

It is also important to consider that precluding arbitration of competition matters impairs the effectiveness of arbitration as an adjudication vehicle because it would mean that a reluctant party can make frivolous allegations of competition law infringement only to stonewall arbitration, thus defeating the whole purpose of the arbitration agreement.[77]

Therefore, it is evident that allowing arbitrators to deal with competition disputes is conducive to the development of both the arbitration and competition law regimes in India. To achieve this end, the current problem of non-arbitrability of competition law disputes can be resolved in two ways. The problem can be resolved legislatively, following the EU model, through decentralization of Competition law i.e. an amendment to the Competition Act removing the bar on civil courts' jurisdiction in handling competition law disputes. However, the other solution would be a judicial change in the criteria for determining the 'arbitrability' of disputes. The Indian judiciary has received sharp criticism for its existing trend of categorizing certain disputes as non-arbitrable for the sole reason that a special court has been given exclusive jurisdiction over it by special statute.[78]It is argued that to determine the arbitrability of a particular category of disputes, the only relevant question to be answered should be whether the nature of dispute is such that its resolution would significantly affect the public interest or interest of individuals who have not agreed to have the dispute resolved by arbitration (i.e.

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[75] Carl W. Hittinger & Terry Smith, *Arbitrating Antitrust: Are Things Getting More Complicated?*, (Feb. 6,2012),http://www.thelegalintelligencer.com/id=1202541387095?keywords=Arbitrating+Antitrust:+Are+Things+Getting+More+Complicated&publication=The+Legal+Intelligencer.

[76] OECD, *supra* note 8.

[77] JAN PAULSSON, THE IDEA OF ARBITRATION 119 (Oxford Univ. Press, 1st ed. 2013).

[78] Pankhuri Agarwal, *Arbitrability of Disputes in India: Still Grappling in the Dark*, 5 THE ARBITRATOR 2, 5 (2013).

determination as to whether the dispute constitutes a *right in rem/in personam*).[79]In case this test is satisfied and in the absence of an express prohibition on arbitration, the Courts should not oust the private parties' right to submit the dispute to arbitration.

II. Conclusion

Recent times have witnessed significant developments in the field of arbitration in India. Between 2008 to 2011, India saw a 200 percent growth in the number of disputes that have been referred for arbitration[80] and recent surveys suggest that more than 90 percent of Indian companies who have a dispute resolution policy, would prefer arbitration, rather than litigation, for resolution of future disputes.[81] This growth coincides with, and is propelled by a sincere effort on the part of the Indian judiciary to minimize intervention in arbitral proceedings.[82]

In a series of progressive judgments over the past few years, Courts have consistently reinforced India's pro-arbitration approach. Consider for instance, the case of *BALCO v. Kaiser Aluminium*[83]where the judiciary declared that Indian courts have no power to intervene in a foreign seated arbitration; or *Shri Lal Mahal Ltd. v. Progetto Grano Spa*[84] where the Court significantly narrowed down the 'public policy' exception as a ground for review of a foreign arbitral award. As recently as in 2014, the case of *Enercon (India) Ltd. v. Enercon Gmbh*[85] saw Indian Courts infusing life into a nearly unworkable arbitration clause; while in *HSBC Pl Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd.*[86]

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[79] *Id.*

[80] Arpinder Singh, *Emerging Trends in Arbitration in India: A study by Fraud Investigation & Dispute Services,* ERNST & YOUNG (2013), http://www.ey.com/Publication/vwLUAssets/EY-FIDS-Emerging-trends-in-arbitration-in-India/$FILE/EY-Emerging-trends-in-arbitration-in-India.pdf.

[81] *Corporate Attitudes & Practices Towards Arbitration in India*, PWC NETWORK (May 2013), http://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf.

[82] Arpinder Singh & Yogen Vaidya, *Taking a Pro-arbitration Turn*, THE FIN. EXPRESS, May 15, 2014, http://m.financialexpress.com/news/column-taking-a-proarbitration-turn/1250892.

[83] BALCO v. Kaiser Aluminium, (2012) 9 S.C.C. 552 (India).

[84] Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 S.C.C. 433 (India).

[85] Enercon (India) Ltd. v. Enercon Gmbh, (2014) 5 S.C.C. 1 (India).

[86] HSBC Pl Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd., Appeal No. 196 of 2014 in Arbitration Petition No. 1062 of 2012*, High Court of Bombay (India).*

and *World Sports Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte Ltd.,*[87] the courts established a break from the past by allowing arbitration to proceed even when the dispute involved allegations of fraud.

As India is attempting to reclaim its position on the stage of international arbitration, allowing arbitration to resolve competition law disputes, albeit with some safeguards, would be a step in the right direction to align India's arbitration regime with international standards. A predictable arbitration regime would prove immensely useful in reducing risks in trans-border commerce, thus making the Indian markets more accessible to commercial parties.

[87] World Sports Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte Ltd., A.I.R. 2014 S.C. 968 (India).