ARBITRABILITY OF COMPETITION LAW IN INDIA – A CRITICAL ANALYSIS

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ABSTRACT

In the wake of globalization, private enforcement of competition law is gaining significant importance. However, with the notion of public policy attached to matters of competition law, the feasibility of private enforcement of competition law is in question in various jurisdictions across the world. This paper aims to analyze the feasibility of arbitration, one of the methods of private enforcement, of competition law in India and further, enumerates the significance, importance and jurisprudence of the mechanism of private enforcement of competition law in India. Additionally, the paper analyses the concept of arbitration of competition law in India, by drawing an analogy to the international framework, specifically the United States of America and the European Union. Finally, the paper explores and relies on various leading judicial pronouncements to understand the existing legal scenario in India with respect to arbitrability of competition law in India.

Keywords - Private Enforcement, Competition Law, Arbitration, Public policy

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INTRODUCTION

In a multifaceted country like India, markets play a momentous role in the progress of the economy. The efficiency of these markets is forthrightly connected to the regulation and competitiveness of these markets.[i] To ensure optimal allocation of resources, the government relies on several policy tools to ensure the contestability and competitiveness of the markets.[ii] Thus, the government enacted the Competition Act, 2002 (hereinafter referred to as 'the Act'), by repealing the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as 'the MRTP Act')[iii]. The Act was enacted with a dual object of promoting and sustaining the competition in markets, and protecting the interests of the consumers.[iv] However, the Act fails to define the term 'competition'. Nevertheless, the term can be construed as the struggle for superiority and the strive for customers and businesses in the marketplace.[v] Ultimately, it can be unequivocally understood that the purpose of competition law is to not only create deterrence in the society, but also to protect the interests of the consumers. However, the diverse competition laws across various jurisdictions predominantly focus on investigating and punishing infringements given under the laws in order to create deterrence of such behavior in future, rather than directly compensating the parties affected by the infringement.[vi]

PRIVATE ENFORCEMENT OF COMPETITION LAW

The primary means of enforcement of competition law is sought to be achieved through the establishment of quasi- judicial authorities, namely, the Competition Commission of India[vii] (hereinafter referred to as "CCI") and the Competition Appellate Tribunal (hereinafter referred to as "COMPAT"). However, after the Act was amended in the year 2017[viii], the current powers of the COMPAT stand transferred to National Company Law Appellate Tribunal (hereinafter referred to as "NCLAT")[ix]. Hence, the NCLAT can hear all disputes arising out of contravention of Sections 3, 4, 5 and 6 of the Act. The authorities are bestowed with the duty to prohibit anti- competitive agreements and abuse of dominant positions by market players and to regulate combinations. Additionally, they have the power to punish and prescribe penalties for any such infringements. The foremost effort of the competition laws in the country is to ensure effective enforcement of the Act with the main intention to promote public interest. However, with the advent and rise of parties entering into various anti-competitive and

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exclusive agreements, private enforcement and compensating the aggrieved party has acquired noteworthy importance.[x]

The concept of the aggrieved party claiming compensation dates back to the MRTP Act. Section 12B of the MRTP Act[xi] empowered the Monopolies and Trade Restrictive Trade Practices Commission to award compensation, after conducting an inquiry, to the aggrieved party who suffered a loss or damage due to the monopolistic or restrictive, or unfair trade practices, carried on by any undertaking or any person. This Section was inserted based upon the recommendations of the Sachar Committee, wherein the Committee referred to several competition laws across the world, that recognizes the concept of compensating the actual party who suffered a loss or damage due to competition[xii]. Few of them being – Section 7 of the Sherman Act and Section 4 of the Clayton Act, within the jurisdiction of USA, Section 6 of the Federal Act of Switzerland, Section 6 of the Act against Restraint of Competition of Spain and Section 25 of the Prohibition of Private Monopoly and Maintenance of Fair-Trade Act of Japan.

However, the new Competition Act, 2002 recognized the concept of compensating the aggrieved party only after five years of the enactment of the Act, in the year 2007. With the objective of actually compensating and restoring the position of the aggrieved party, the legislature added Section 53N to the Competition Act, 2002, by passing the Competition (Amendment) Act, 2007[xiii]. The Section states that any aggrieved party shall have the right to claim compensation for the actual loss suffered by him. However, no cause of action for the adjudication of such compensation claims would arise if there is no finding of actual loss or damage caused to the party claiming such loss by the CCI or COMPAT. Hence, passing of an order by the CCI or COMPAT is a pre-requisite for filing an application to claim compensation. Such an application can be made only by the Central Government, the State Government, any local authority, an enterprise or a person. Furthermore, if any enterprise contravenes the orders of the CCI or COMPAT, the aggrieved party can file an application under Sections 42A and 53Q (2) of the Act claiming for compensation.

Although twelve years have elapsed since the insertion of Section 53N, only five cases have utilized this provision of law to file an application for recovery of compensation.[xiv] However, no ruling has been pronounced in all these cases till date. The first case to invoke Section 53N is the *MCX Stock Exchange (MCX-SE) Ltd. v. National Stock Exchange of India Ltd. (NSE)*[xv],

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wherein, a compensation claim was filed by MCX-SE, based on the orders passed by the CCI[xvi] and COMPAT[xvii] holding NSE responsible under Section 27 of the Act[xviii] for abuse of dominance, as given under Section 4[xix] of the Act and imposed a penalty of INR 856 crore. However, NSE has preferred an appeal against the orders of the CCI and COMPAT, which is currently *sub judice* before the Supreme Court. MCX-SE initially claimed a monetary sum of INR 588.65 crores, but later, revised their compensation amount to a monetary sum of INR 856 crores. This clearly indicates that there is no clear mechanism provided under the Act to determine the compensation amount. Moreover, the Act does not address what will happen to the application of compensation claim if the aggrieved party has passed off its losses to its consumers.

ARBITRABILITY OF COMPETITION LAW

As a result of the complicated and time-consuming process involved in filing an application by the aggrieved party to recover the losses incurred by him, arbitrability of the competition law is gaining substantial importance. However, along with comes with it comes the question of feasibility of the resolution of issues by private arbitral tribunal that involves question of public policy.

International Perspective

Historically, the courts in international jurisdictions were of the view that competition law cannot be resolved through arbitration, owing to the fact that competition law encompasses the element of public policy and the issues prevailing in this field are immensely fact – intensive and are thus, too complicated for the arbitrators to adjudge upon.[xx] Moreover, it was feared that the pro-business perspective of the arbitrators might lead to under enforcement of laws.[xxi]

In the United States, in accordance to the *American Safety* doctrine, it was considered inappropriate to resolve competition law disputes through arbitration. In light of the same, the American Courts in the cases of *Applied Digital Technology Inc. v. Continental Casualty Co.*[xxii] held that claims arising out of antitrust issues are not arbitrable and thereafter in *Cobb v. Lewis*[xxiii] upheld that “antitrust issues non-arbitrable unless arbitration agreement negotiated after dispute arises”. However, around late 1980s to early 1990s, there was a change in this

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judicial trend. The first case that held that the competition law is arbitrable in the United States was that of *Mitsubishi Motor Corp. v. Soler Chrysler Plymouth*. The U.S. Supreme Court in this case held that an arbitration clause in an international contract should be given full effect, which includes submission of antitrust issues to arbitration. The court also held that the arbitrators deal with complex situations and issues, and therefore, any expert in the field of antitrust law can be selected for adjudication of competition law disputes[xxiv]. The same trend was continued by Courts in *GKG Caribe Inc. v. Nokia Mobira, Inc*.[xxv] and *Gemco Latino-america, Inc. v. Seiko Time Corp*.[xxvi] wherein the *American Safety* doctrine was rejected and arbitration of domestic antitrust issues was allowed.

Similar shift to trend was witnessed in the European Union jurisdiction, wherein Regulation 1/2003 decentralized and allowed the national courts of member states to hear the matters regarding competition law.[xxvii] In the case of *Eco Swiss China Time Ltd. v. Benetton International NV, the European Court of Justice held that the arbitral tribunal has the power to hear the matters relating to competition law.*[xxviii]

Indian Scenario

Against the backdrop of the international regime, it is pertinent to analyse the possibility of arbitration of competition law in India. Currently, there is no substantive decision regarding the arbitrability of competition law in India.

In India, the laws relating to arbitration is governed by the Arbitration and Conciliation Act, 1996. Section 7 of the Arbitration and Conciliation Act[xxix] clearly permits all disputes arising out of a legal relationship, whether contractual or not, to be submitted to arbitration. Inference can hence be drawn from this Section that all disputes, irrespective of its nature can be submitted for arbitration. However, Section 7 has to be read along with Section 2(3) of the Arbitration and Conciliation Act[xxx] which states that nothing in Part I of the Act shall affect any other law in force, by virtue of which certain matters cannot be submitted to arbitration. Additionally, perusal of Section 34(2)(b) and Section 48(2) of the Act clearly specifies that any Arbitral Award that violates a fundamental public policy of India, can be set aside. Competition law, undoubtedly aims at preventing market distortions, enhancing overall efficiency of the market and safeguarding consumer welfare, which are few important elements of public policy.

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Although, arbitration is not defined anywhere in the Act and there is no internationally accepted definition of what is arbitrable, the concept of arbitration can be understood to encapsulate three important aspects – *(a) whether the dispute can be resolved by a private arbitral tribunal or is it reserved exclusively for a public forum; (b) whether the dispute is covered by the Arbitration Agreement; and (c) whether the parties have referred the dispute to arbitration.*[xxxi] The last two elements make it clear that all legal relationships arising out of a contract can be settled through arbitration, if the contract provides for an option or clause for arbitration in case of any disputes. The only problem that arises is the fulfillment of the first element, namely, if the dispute can be resolved by a private arbitral tribunal, especially if the matter is of public policy and is of public importance.

At this juncture, reliance can be placed on the case of *HDFC Bank v. Satpal Singh Bakshi,*[xxxii] wherein the Delhi High Court concluded that the matters falling within the jurisdiction of the Debt Recovery Tribunal can be heard by an arbitral tribunal, on the principle that the Debt Recovery Tribunal was set up for expeditious disposal of cases and not to adjudge upon the special rights created under a statute. Drawing an analogy to the competition law, the CCI is established for expeditious disposal of cases and hence, the arbitral tribunal cannot be stopped to adjudge on the special rights of the parties arising out of a contract.

The Supreme Court of India, in the case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*,[xxxiii] held that all actions arising out of right *in rem* have to be adjudicated by the courts and public tribunals only, however, all actions arising out of right *in personam* can be resolved through arbitration. However, in the case of *Kingfisher Airlines Limited v. Prithvi Malhotra Instructor*[xxxiv], the court further placed a restriction on arbitrability of competition law, by stating that an action *in personam* will not be arbitrable if it has been reserved for resolution by a public forum, owing for it to be a matter concerning public policy. These two cases clearly indicate a two-fold inquiry to test if a matter is arbitrable in India or not.

The first case in India that came close to questioning the possibility of arbitration of competition law is the *Union of India v. Competition Commission of India.*[xxxv] *In this case, a complaint was filed before the CCI by the parties who had entered into a concession agreement with the Ministry of Railways, alleging that the Railway Board was abusing its dominant position by imposing increased charges. The Railway Board challenged the CCI's jurisdiction*

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in view of the pre - existing arbitration contract between the parties. However, the court held that the CCI has the jurisdiction to hear the matter on the ground the Arbitral Tribunal does not have the expertise to prepare an investigation report which is explicitly required to adjudge the dispute in question.

CONCLUSION

There is not much jurisprudence in India regarding the arbitrability of competition law in India. However, creating a balance between safeguarding public interest and promotion of alternative means of enforcement of competition law is the need of the hour. The number of cases being resolved by arbitration is increasing at a fast pace in India. Hence, the fear of letting matters of public policy to be resolved by arbitration has to be surmounted. Public enforcement of competition law has its own downfalls which can be resolved through private enforcement of competition law. At this juncture, it is important to define the term public policy and thereafter, narrow down cases that do not fall under this definition. The cases that do not fall under this definition have to be further narrowed down into whether it involves adjudication of problems of only two parties or affects any third party as well. Moreover, if it affects any third party, the approach of resolving the issue has to be identified as in such cases, the third party may take the case to the NCLAT again, which would again defeat the purpose of private enforcement and might require the involvement of adjudicatory authorities. Additionally, the law must be clear on how the damages would be determined if the losses have been passed down to the consumers. Even though a clear procedure is required for the feasibility of arbitrability of competition law, a mix of both the enforcements must be adopted, in order to promote easier and efficient remedies to the aggrieved parties. In wake of the attempts made by India to make a significant impact in the international arbitration scenario, allowing arbitration to resolve competition law disputes, would be a step towards aligning the Indian legal scenario with that of the international framework.

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ENDNOTES

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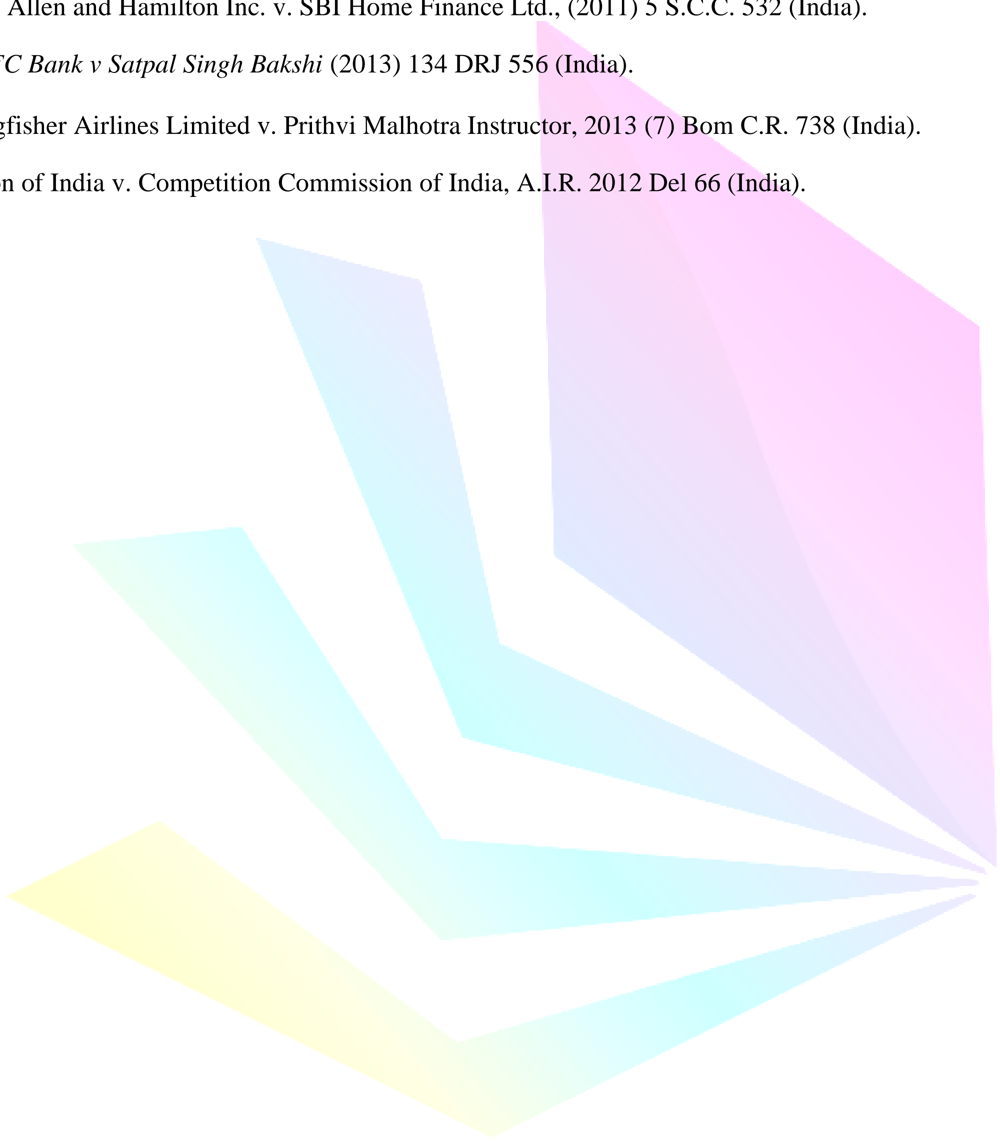

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