International Journal of Advanced Research and Development
ISSN: 2455-4030; Impact Factor: RJIF 5.24
Received: 15-06-2019; Accepted: 18-07-2019
www.advancedjournal.com
Volume 4; Issue 5; September 2019; Page No. 125-128

Competition Dispute Resolution under Arbitration Mechanism: A Comparative Study of European Union and Indian

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Abstract
With the increasing international trade and commerce, the transnational commercial disputes have also increased at a phenomenal rate. Likewise, with the increase in transnational competition disputes, the role of arbitration as an alternative to competition dispute resolution has also become popular. In application of competition laws, arbitration can play a vital role in resolving competition disputes. Arbitration has been well recognised by the States as one of the dispute resolution mechanisms alternative to litigation. The paper examines the international experience of arbitrability of competition disputes and its application in European Union (EU) Competition Law *vis-à-vis* competition disputes in India. It concludes with the appraisal of the prospects and possibilities of arbitration in resolving international competition disputes. As India is becoming hub for international trade and commerce, it is hoped that arbitration will help in resolving competition disputes among the most developed competition law jurisdictions.

Keywords: competition disputes, arbitration & arbitrability, EU competition law, Indian competition law, connecting link, second look doctrine

1. Introduction
With the increasing international trade and commerce, the transnational commercial disputes have also increased at a phenomenal rate. This has given rise to transnational competition disputes and inter-play of arbitration as an alternative to competition dispute resolution mechanism (Komninos, 2019) [1]. In arbitration, the parties enter into an agreement through a contract, providing autonomy to themselves to resolve their future disputes through arbitration. Arbitrators are appointed by the parties to resolve the disputes (Baudenbacher, 2002) [2]. The arbitrators resolve the disputes, submitted to them by applying the law that is applicable to the parties on merits of the disputes. The arbitration contracts between the parties exclude the courts' jurisdiction to adjudicate on the disputes between them (Carbonneau, 2003) [3]. The arbitration awards given by the arbitrators are enforceable in the same way like judgments of the courts. Across all the jurisdictions, arbitration is recognised as a dispute resolution mechanism. However, in certain exceptional grounds, the courts may review the arbitral wards in their substance (*revision au fond*) and set aside or refuse their recognition and enforcement (Werner, 1995) [4]. Arbitration and competition law are two distinct branches of law and often seem contradictory, but, their practical working and applicability has complimentary and compatible (Dempegiotis, 2008) [5]. Although, arbitration was not recognised in resolving competition disputes in the past, the position started to change after 1980s or early 1990s. Now, arbitration in competition law disputes has been accepted by almost all the developed competition law jurisdictions. With the passage of time, arbitration has become one of the important principles to be considered in resolving transnational competition disputes (Flere, 2006) [6]. The paper first tries to examine the international experience of arbitrability of competition disputes, second, the application of arbitration in EU Competition Law, third, the scope for arbitration in competition disputes in India and fourth the final discussion the prospects and possibilities of arbitration in resolving international competition disputes.

2. Material and Methods
The present study of competition dispute resolution under arbitration mechanism adopts to study analytical method of legal research by undertaking the historical development as well as the present status of application of arbitration in competition disputes. The investigation of the provisions concerning 'arbitration' under the EU Competition Law as well as under Indian Competition Law is studied under comparative law methods. The international convention on arbitration, viz; *United Nation's New York Convention*, 1958, *European Economic Community* (EEC Treaty), 1957; the *Treaty on European Union* (TEU), 1992; the *Treaty on Functioning of the European Union* (TFEU), 2007 and the *Council Regulation* (EC) No. 1/2003 has been critically analyzed under statutory interpretation methods. Indian legislations dealing with competition under the *Monopolies and Restrictive Trade Practices Act* (MRTP ACT), 1969 and the *Competition Act*, 2002 is appraised in harmonious construction of legislations on arbitration, namely, *Arbitration and Conciliation Act*, 1996. The arbitration of competition disputes under the *UNCITRAL Model Law on International Commercial Arbitration* has been examined in monistic legal framework. Thus the primary sources like statutes, regulations, conventions and treaties provided by secondary sources books, articles found in journals in website, commentaries and glossaries.

3. Results
With the increase in business disputes, the parties to the

disputes tend to prefer arbitration over litigation to resolve their issues. Many factors responsible for the preference of arbitration over litigation are independence, neutrality, impartiality, flexibility, confidentiality, technical expertise of the arbitrators appointed, time and cost efficiency etc. (Lugard, 1998) [7]. Likewise, in case of global business disputes, it is always easier to resolve the issues through arbitration than involving in transnational litigation with conflicting jurisdictional issues.

3.1 Arbitration and Competition

The *United Nation*'s *New York Convention* of 1958 recognises the enforcement of foreign arbitral awards (Lazer, 2012) [8]. It rather makes enforcement of the arbitral awards easier than the judgments of the courts in another jurisdiction. Arbitration and competition law seems incompatible from the fact that in arbitration, the parties try to resolve their disputes by appointing private individuals, *i.e.*, arbitrators, which ultimately exclude them from the courts' jurisdiction over them. On the other hand, in competition law, the State tries to regulate the anti-competitive agreements between the private parties (Nomani, 2013) [9]. Since competition law tries to check market distortions and tries to safeguard consumer welfare by promoting fair competition in the market, it involves public interest. So, the question arises as to how arbitration can be way to resolve the competition disputes which are subject to control by the State (Atwood, 1994) [10].

3.2 Application of Arbitration in Competition Disputes

The Courts lack the expertise necessary to understand and adjudicate over the complex economic issues involved in the competition disputes. On the other hand, the arbitrators are appointed by the parties are having necessary knowledge and expertise in the concerned field as compared to the judges of the courts. The process of arbitration, because of its distinct character as dispute resolution mechanism creates so many questions for its application in the field of competition law. In arbitration, private individuals are appointed as arbitrators by the parties to a dispute and they, acting as judges will adjudicate the matter submitted to them and will decide accordingly (Nomani,2015) [11]. The judges so appointed are neither state functionary, nor they are responsible for safeguarding public policy or public interest as such. Thus, unlike courts, the arbitrators are not bound by either public international law or any mandatory norms. Thus the arbitration and competition law are found complimentary and perfectly compatible with each other. As for example, arbitration is an institution that necessarily flourishes in a free market economy system with free market economy system with freedom of commerce and competition. The more the competitive commerce of goods and services the stronger the presence of arbitration (Nomani, 2012) [12].

3.3 Arbitration and EU Competition Law

There are two mechanisms under which the EU Competition Law can be applied under international arbitration. They are, firstly, if the parties to a transnational dispute have not opted any particular law to be applicable over them, Articles 101 and 102 *Treaty on Functioning of the European Union* (TFEU), 2007 will be over them under the *indirect unilateral conflicts rule* making them fall under EU Competition Law. Under this rule, the EU Competition Law becomes applicable if there is a sufficiently close connection with the territory of the EU. The rule is 'indirect' as the provisions do not expressly provide for application of the same; rather the application is deduced through interpretation of the specific provisions. The condition necessary for the application of EU competition rules is whether certain agreement, practice or behaviour prevents, restricts or distorts competition within the internal market in a causal, foreseeable and substantial way (Alison, 1986) [13]. The position is now clear that although the competition disputes involving public rules on protection of free competition are not arbitrable, the general application of arbitration under EU Competition Law is accepted no more questioned. In *Eco Swiss China Time Ltd.* v. *Benetton International* NV [14] the Court of Justice approved the application of arbitration under EU Competition Law. The Court while deciding on the duties of national courts to safeguard the effectiveness of EU Competition Law, refused to set aside the arbitral award.

4. Discussion

The competition authorities in public interest may intervene the civil proceedings as *amicus curie* if required. Moreover, the parties are not at liberty to settle their disputes through settlement against the competition rules. This rule has been followed both domestically as well as internationally. The importance of arbitration in resolving disputes can be understood from the Article 293 of the *TEU*, 1957. The Article induces the member States to enter into negotiations with each other agreements for reciprocal recognition and enforcement of arbitration awards.

4.1 Nature and Trends of EU Arbitration and Competition Law

The EU competition rules sought to function in single market perspective. According to the Court of Justice, competition-restrictive agreements would tend to restore the national divisions in trade between member States, namely to reconstruct trade barriers already abolished by the original *Treaty of Rome*, 1957. It reads as under:

The Treaty, whose preamble and content aim at abolishing the barriers between States... could not allow undertakings to reconstruct such barriers.

Article 101 (3) of the *TFEU Guidelines*, 2010 enunciates:

The objective of Article (101) is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the (Union) for the benefit of consumers [15].

Under Article 101 of *TFEU*, the nullity of anti-competitive agreements is absolute and must be raised by courts ex-officio, notwithstanding the will of the litigants.

4.2 Enforcement of Arbitration Awards under EU Competition Law

An arbitration award, against the public policy of the member States, the will not be enforceable and can be set aside by the European Court of Justice. The competition laws in international context, pertain to the public policy forum and fall under the category of mandatory norms and thus they are applicable over the parties irrespective of whether they have chosen any particular law or not. The

goal behind this mandatory norm is to protect the general, political, social, economic or cultural interests of the States.

4.2.1 The Council Regulation 1/2003

The *Council Regulation* 1/2003 provides for the enforcement of competition law as well as Treaty Competition Rules by the National Competition authorities and courts. However, the same has not provided the process of arbitration for the reason, the arbitration enjoys private autonomy. Neither Article 4 (3) of the *Treaty on European Union* (TEU) nor Article 15 (1) of *Regulation 1/2003* provides any legal sanction to the process of arbitration. Likewise, the arbitrators are not duty bound to send the copies of "written judgment" to the *Commission*. The arbitration process cannot be a vehicle of illegality. The arbitrators are like any other business undertaking only. So, if they violate the rules of competition, they will be liable for the breach of Article 101 of *TFEU*.

4.2.2 Enforcement of Arbitration Award under Article 101 of *TFEU*

In *Gencor Ltd* v. Commission [16] the General Court defined the concept of "effect on competition within the Union" and laid down three cumulative criteria to make the assessment is laid as under:

Application of a [merger] regulation is justified under the public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the [Union…]. It is therefore necessary to verify whether the three criteria of immediate, substantial and foreseeable effect are satisfied in this case.

Almost all the competition law jurisdictions use this connecting link (*facteur de rattachement*) the effect of the anti-competitive conducts on their markets to justify the application of their competition laws. However, in this rule, there are chances of conflicts between the jurisdictions due to the conflicts of interests where any anti-competitive conduct is affecting more than one jurisdiction (Hittinger, 2019) [17]. So, such rules cannot be bilateral as well as universal. There is another second mechanism where the Treaty Competition Rules are applicable on the international competition disputes.

4.3 Arbitration under Indian Competition Law

The *Arbitration and Conciliation Act*, 1996 of deals with domestic as well as international arbitration in India. The *Arbitration and Conciliation Act*, 1996 is based on the *UNCITRAL Model Law of International Commercial Arbitration*. Indian *Competition Act*, 2002 empowers the *Competition Commission of India* (CCI) with regulatory powers and the *National Company Law Appellate Tribunal* (NCLAT) with the quasi-judicial powers over matters relating to competition disputes in India (Nomani, 2018) [18].

4.3.1 The Arbitration and Conciliation Act, 1996

The *Arbitration and Conciliation Act*, 1996 provides for arbitration of all disputes arising out of any legal relationship whether contractual or not. From this the natural inference which can be drawn is that all legal disputes are arbitrable under the *Act* (Dhulia, 2012) [19]. Moreover, the *Act* does not expressly exclude any kind of disputes as non-arbitrable. However, Section 2(3) of the Act provides that the Act would not affect any law by virtue of which certain disputes may not be submitted to arbitration. Further, Sections 34(2) (b) and 48(2) of the *Act* adds restrictions on arbitrability over certain disputes by empowering 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" (Choudhary, 2016) [20].

4.3.2 Application and Enforcement of Arbitration

Since none of the above provisions have specifically excludes any certain kind of disputes from arbitration the Supreme Court has come out to define the rights of the parties in dispute to go for the same. In *Booz Allen and Hamilton Inc*. v. *SBI Home Finance Limited* [21] it 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 (Chatterjee, 2014) [22]. The Supreme Court, in another case, *Kingfisher Airlines Limited* v. *Prithvi Malhotra Instructor* [23] has put further restriction on arbitrability of disputes involving action for right in *personam*. Thus, from the decisions of the Supreme Court, we can deduce that there is a two-fold mechanism to see whether a dispute can be adjudicated by arbitration or not. Firstly, it is to be determined whether a dispute involves a right in *rem* or a right in *personam*. If the matter in dispute involves a right in *rem*, it cannot be adjudicated under arbitration. Secondly, it is to be determined that even if any matter in dispute involves a right in *personam*, whether the same has been reserved by any legislation for courts or any specific tribunal as a matter of public policy (Nomani, 2019) [24]. If the matter in dispute is reserved for courts or any specific tribunal, the same cannot be decided through arbitration.

4.3.3 Arbitration under Indian Competition Act, 2002

The competition dispute in India can be referred to arbitration or not was raised for the first time in *Union of India* v. *Competition Commission of India* [25]. In this case, a Concession Agreement was entered by the parties with the Ministry of Railways for the operation of container trains. A complaint was filed by the parties later before the *CCI* alleging that the Railway Board position that it imposed increased charges and restricting access to infrastructure and thus is abusing of its dominant position. The CCI's jurisdiction over the dispute was challenged by the Railways in view of the arbitration agreement between the parties. But, the Delhi High Court allowed the *CCI* to hear the matter notwithstanding a valid arbitration clause. The High Court was of the view that the scope and focus of *CCI*'s investigation is very different from the scope of an enquiry before an Arbitral Tribunal. Since, there is no authoritative judgment on as to whether both the parties can wilfully refer their competition disputes to arbitration in India, the question of arbitrability of competition disputes still remains open.

5. Conclusion

Arbitration is the result of a private agreement between the parties. On the other hand, competition disputes come under the domain of the State and pertain to public interest. Here, the question comes as to how arbitration can be employed to resolve public law disputes. The possibility of arbitration in

resolving international commercial disputes can provide great incentive for the development of transnational business and trans-border mobility of resources. Although there is a fear of breach of international law or competition rules by the arbitrators, so far as now, it's a hypothetical scenario only (Lew, 2011) [26]. There are no instances of breach of fundamental competition rules by the arbitrators. Rather, the arbitrators have been found very conscious about the application of competition rules. Thus, arbitration has been found more satisfactory in resolving competition disputes than courts. The arbitration has been approved and allowed as an alternative to resolve competition disputes, in India as well in abroad (Nomani, 2016) [27]. There has been a growing need for allowing arbitration to resolve competition disputes. The competition authorities in India to take cognizance of the 'second look doctrine' originated in US and later also adopted by the EU prevents the misuse of arbitration by the private parties (Mourre, 2011) [28]. As India is growing and becoming the hub for international trade and commerce, allowing arbitration in resolving competition disputes with certain restrictions on the same, will help India to align with the most developed competition law jurisdictions (Nomani, 2016) [29]. Thus an arbitration regime would be immensely helpful in resolving transnational competition disputes.

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