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ARBITRABILITY OF THE ANTI-COMPETITIVE DISPUTES IN INDIA – A COMPARATIVE TRAVERSAL THROUGH THE LEGAL FRAMEWORKS IN THE US AND EU.

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Abstract: The interaction between the public-spirited Anti-trust laws and the party-centred Arbitration laws has fomented a great deal of discourse on the congruence and degree of harmony between these two islands of law. A prima facie outlook on the aforesaid interplay might suggest an apparent incongruence and incompatibility, for the former caters to the larger public interests and the latter, to the personal commercial interests. However, one cannot overlook the silver lining that a convergence offers. This Research Paper attempts to traverse through the judicial exegesis and jurisprudential interplay of these laws in the EU, under the Treaty on the Functioning of the European Union (TFEU) and the Anti-trust laws in the US to juxtapose the interpretational underpinnings of the convergence with the bedrock of the public and private law divide vis-à-vis the arbitrability of the anti-trust disputes in India. In the light of the foregoing observations, the Researcher prudently assumes legal conundrum as regards the scope and limitations of arbitration. In furtherance of the above, the Researcher attempts to examine the nitty-gritties of this interplay against the backdrop of the relevant provisions of the laws of contracts. Although, there are volumes transcribed on the aforesaid interplay, there is a larger area uncovered as regards the congruence of these two apparently contradictory laws in India, in the light of which, the researcher, hereby sets out to collate and excavate the nuts and bolts of this legal juxtaposition, to foreground their viewpoints and perspectives thereof.

Index Terms - Anti-trust, Arbitration, Interplay, Competition, Market.

I. INTRODUCTION:

Alternative Dispute Resolution mechanism has taken the legal fraternity by storm with an expansive inclusion of most of the civil, commercial and a class of criminal disputes. Arbitration, being the most preferred method of dispute resolution in the commercial milieu has proven to be an apparently cost-effective and mutually convenient procedure for resolution of disputes. The significance of ADR is rather understated and implies greater role in dispute resolution. ADR, by definition, seems to replace the conventional litigious adjudication of disputes. However, the Hon'ble Supreme Court in *Afcon Infrastructure Limited and Another v. Cherian Varkey Construction Company Pvt. Ltd., and Others*[1] has emphatically penned on the arbitrability of disputes, the perusal of which may draw one's attention to paragraph 27, which factors out a category of cases involving the interests of the public. Arbitration, although, is a less formal adjudication of disputes, the observation of the Hon'ble Supreme Court in the case cited above reveals that the primary modicum of these methods of disputes resolution is the private nature. A plain reading of the objectives of the Competition Act, 2002, suggests its proclivity for protection of the interests of the consumers and the competing commercial enterprises in the market. In the light of the judicial observation, the researcher is constrained to draw parallels between the category of cases that involve public interest and the nature of Competition law. The idiosyncratic bedrock of the Anti-trust laws is the protection of the interests of a class of people in the market such as the consumers and the competitors, the violation of which may invoke penalty. However, to fixate on the foregoing observations as suggestive of incongruence, is to turn a blind eye to the silver lining that its harmony offers. The historical perception of this incongruence has taken a turn for the better, which may be evidenced in the jurisdictions like the US and EU, where the Courts in the US and the European Commission have emphasized on a harmonious interpretation of the width and extent of arbitrability of the anti-trust disputes. The researcher attempts to present a comparative analysis of the arbitrability of anti-trust disputes in the EU and the US on one hand in India on the other. The researcher further intends to catalogue the aforesaid juxtaposition, with the legislative history, judicial exegesis and the personal analysis of the plausibility of the impugned proposition.

[1] (2010) 8 SCC 24.

II. JUDICIAL OUTLOOK ON ARBITRATION – JUXTAPOSITION OF STANDPOINTS IN THE US, THE EU AND INDIA.

Arbitration has gained ground as the most convenient method of commercial dispute resolution, across the globe. With a view to protecting the economic interests of commercial enterprises, jurisdictions across the globe have underscored the need for an expeditious disposal of commercial disputes. The scope of arbitration has evolved and expanded over time with judicial recognition of its contemporary relevance. However, arbitration is perceived as an alternative method of resolving contractual disputes. The researcher in this chapter sets out to explore and compare the judicial outlook on scope of arbitration, its limits and constraints, in the US, EU and India.

CHAPTER II.I - IN THE US.

The first significant corollary observations made regarding the concern that antitrust cases are too complex to be left in the hands of the arbitrators and the fact that the US recognized arbitrability of competition disputes stems from the Mitsubishi Motors Case[2]. The Supreme Court in Mitsubishi began by noting the "healthy regard for the federal policy favouring arbitration" as well as, in respect to international matters, the growth of American business and trade will not be encouraged if "we insist on a parochial concept that all disputes must be resolved under our laws and in our courts,"[3]. In holding antitrust claims arbitrable (that is, claims "encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction"), Justice Blackmun observed with remarkable prescience in 1985 that "the controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested,"[4]. Thus, the Supreme Court was inclined to envelop this "experiment" and require courts to "shake off" any hostilities to arbitration and essentially get with broad-minded international approach of progress in trade and commerce. The court in the Mitsubishi Case was further of the altitude that since the essence of contract is the free will and consent of the parties, the same policy shall be followed in amicably resolving disputes arising out of such contracts and agreements between the parties. The Mitsubishi case is still influencing with vigour. As is apparent, that unparalleled decision continues to be of great significance in the handling of complex arbitrations, including and especially those dealing with antitrust or competition issues.

In addition to the Mitsubishi case, strides were made in the area of arbitrability of competition cases in the most recent issue of Novelis and Aleris[5] when the combination of the aluminium producers Novelis and Aleris was the subject of a market definition under arbitration, which the US Department of Justice Antitrust Division declared a success. The Antitrust Division has used arbitration to settle a dispute for the first time in this case, but it won't be the last.

Furthermore, to encapsulate the US Supreme Court has been very emphatic that it has been the flexibility of arbitration that is the important factor opening the arbitrability issues regarding antitrust and competition claims for the Court.

CHAPTER II.II - IN THE EU.

In the context of the European Union, there is a growing unanimity that any disagreements relating to competition law arising out of Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") should be completely arbitrated. The arbitrability of all competition law disputes is subject to court review, nonetheless. There is disagreement over the issues resulting from other provisions, such as Articles 106-108 and a subject arising under secondary legislation, despite the fact that the arbitrability of disputes arising from these articles may not need much consideration (For instance, the EU Merger Control Regulation)[6].

The claim regarding the arbitrability of Competition cases is impliedly supported by the Court of Justice's Eco Swiss[7] decision from 1999. The Court implicitly ruled on the arbitrability of those rules when it made decisions regarding the obligations of national courts to protect the effectiveness of EU competition law and to refuse to recognise or annul arbitral awards that are in violation of the public policy (ordre public) of the forum. However, the CJEU in *Eco Swiss*[8] also left open a number of questions – including whether arbitrators should always be obliged to assess competition law arguments even if not explicitly raised by the parties to the arbitration; and whether the mere rejection of competition law arguments in the oral hearing without a reflection of such assessment in the final award should be sufficient to avoid the EU public policy exception.

Although it can be said that the arbitrability of competition law is now widely acknowledged in both the EU and the US, recent CJEU rulings, such as in the CDC Hydrogen v. Evonik Degussa[9] case, have sparked a discussion about how arbitration agreements must be drafted to cover competition law claims for damages based on a violation of European competition law rules, i.e., article 101 or 102 TFEU. While collusion between two or more businesses is generally prohibited under article 101, article 102 specifies that even one business abusing a dominating market position through unilateral measures is illegal as being incompatible with the internal market. Despite the fact that the CJEU has not yet made an arbitration-specific ruling, instead focusing on jurisdiction

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[2] Mitsubishi Motors v. Soler 473 US 614 (1985).
[3] 473 US at 629
[4] 473 US at 638
[5] United States of America v. Novelis Inc. & Aleris Corporation (1:19-cv-02033-CAB).
[6] Damien Geradin & Emilio Villano, *Arbitrability of EU Competition Law-based Claims: Where Do We Stand After the CDC Hydrogen Peroxide Case?*, 40(1) World Competition 2017.
[7] Case C-126/97, Eco Swiss China Time Ltd. v. Benetton International NV.
[8] Supra Note 20
[9] ECLI:EU:C:2015:335

agreements, the justification can be used equally to comprehend the substantive parameters of both jurisdictional and arbitral agreements.

CHAPTER II.III - IN INDIA.

The Indian judicial standpoint as regards the arbitrability of anti-trust disputes is rather clear. It may be felicitous at this juncture to underscore the judicial observations in the Afcons case,[10] as regards the categories of cases suitable for resolution by ADR methods. The noteworthy portion of the aforementioned judgement proposes a standpoint in stark contrast to the arbitrability of anti-trust disputes.

Further, in Union of India v. Competition Commission of India[11], the Hon'ble High Court of Delhi traversed through the objectives of the Competition Act, the role of an anti-trust watchdog i.e., the Competition Commission of India and the nature of mischief sought to be steered clear by the Act, juxtaposed with the nature of redressal mechanism i.e., arbitration. It may be necessitous to wade through paragraphs 11-17 of the judgement, where a clear negation of the impugned arbitrability can be noticed.

As regards the Indian judicial standpoint, it can be noticed that there is an unequivocal disapprobation of the plausibility of arbitration of the anti-trust disputes. This position proposes a view contrary to the judicial trajectory in the US and the EU, which is suggestive of an expansive approach. The Researcher intends concur with the judicial opinion of the Indian judiciary and drift away from the position maintained by the US and the EU.

III. ARBITRATION OF ANTI-TRUST DISPUTES – ANALYSIS OF THE LEGAL CONUNDRUM.

Arbitrability of anti-trust disputes have fomented a great deal of conundrum in the legal and judicial circles. For, the nature of each of two impugned fields are poles apart. The inclusion of anti-trust disputes within the jurisdictional ambit of an arbitral tribunal, gives birth to a question i.e., whether an arbitral tribunal wields power to decide on issues concerning public policy?

It is pertinent at this juncture to note that arbitration is by definition a private forum that is born out of an agreement inter vivos. The differing judicial opinions across the globe, however displays a streak of similarity at cross-roads concerning the competence and enforceability. This cross-wise similarity proves an important legal issue i.e., an arbitral tribunal does not wield the same power as a public forum. However, as regards the competition rules, the EU and the US seem to have adopted a liberal view as to the jurisdictional expanse of an arbitral tribunal.

The researcher desires to posit a view, although conventional, that an extension of the jurisdictional ambit of an arbitral tribunal essentially sidelines the representation of the interests of nascent start-ups in the market. The reason for the foregoing observation is twofold viz., the privity of contract and contractual limitations on an arbitral tribunal.

As regards the privity of contract, the researcher is of the considered view that a member of a relevant market, who is neither a part of a collusion nor a party to the impugned agreement, barely gets an opportunity to represent his grievances. Another limb of this argument surrounds the interests of consumers which remain underrepresented. There are volumes of literature that suggest a suo moto consideration of anti-trust issues of an agreement, however, the principle of party autonomy and the private nature of the forum stand at loggerheads with such suggestion. Further, it is necessitous to be mindful of the fact that covert anti-trust disputes remain brushed under a carpet unless divulged by an aggrieved class.

As regards the contractual limitations on an arbitral tribunal, it goes without saying that an arbitral tribunal is born out of a contract and shall be bound by such arbitration agreement. The terms of an arbitration agreement define and delimit the powers of an arbitral tribunal. Any territorial rules to extend the jurisdiction of an arbitral tribunal may obfuscate and defeat the objectives and relevance of an arbitration agreement. This incongruence proves that a harmonious bestowal of jurisdiction on an arbitral tribunal on issues concerning public interest is far removed from reality.

IV. CONCLUSION:

Anti-trust behaviour poses a threat to the socio-economic wellbeing of a society and may leave a perennial scar on the economy. The nature of effect of an anti-competitive activity is rather public, the redressal of which, through arbitration may not bring to fore the secretive collusive behaviour of cartels or any sly anti-competitive agreements.[12] Further, the jurisdiction of an arbitral tribunal is limited to the terms of an arbitration agreement. This entails limitations on the arbitral tribunal to hear the grievances of consumers and the other nascent players in the market or to investigate the nuances of a relevant market. The private nature of the forum, further impedes the ability to deliberate on issues concerning public interests. Although, the US and the EU have adopted a noticeable change in the outlook on such ambiguous crossroads, India has maintained the stringency of divide between the two islands of law. However, in the light of the study carried out, the researcher posits and advances an argument in concurrence with the judicial standpoint in India.

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[10] Supra Note 1.

[11] 2012 SCC OnLine Del 1114 : (2012) 128 DRJ 301 : (2012) 187 DLT 697. Also see Thirumurugan Co-operative Agricultural Credit Society v. M. Lalitha (Dead) through LRs, (2004) 1 SCC 305.

[12] RRTA v. W H Smith & Sons Ltd., and Ors., [1969] 1 W.L.R. 1460. Note – This case discusses the secretive nature of the anti-comeptitive agreements.