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Global Perspectives on Antitrust laws and their Arbitrability

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Abstract

With globalisation emerging more profoundly there will be a sharp increase in the number of antitrust claims. As a result, arbitration can be promising to resolve such disputes. Both arbitration and competition law belong to different spheres of private and public laws of enforcement. Though, there still exists a potential scope of interaction between competition and arbitration. There has been different perspective prevailing all over the globe over the arbitrability of such claims. Competition law objectives stems from public interest where else arbitration as a mechanism values the private interest of the parties.

This essay attempts to examine the efficiency of arbitration to resolve antitrust claims. It provides an analysis of the Mitsubishi and Eco Swiss, the groundbreaking judgments of the USA and EU which brough arbitrability of antitrust disputes in the picture. It further examines that the emerging economies of the Asia-Pacific and their rulings with respect to arbitrability of antitrust claims. There exists a growing divergence in Asian Pacific laws of the countries globally. They seem to be either at cross-roads with the decisions of the USA and EU or they still have not dealt with the private law enforcement of antitrust disputes. By means of settlement through arbitration in their legislations or decisions of their national courts so far.

Introduction

A survey by Queen Mary University of London in the year 2018 revealed that International Arbitration is the most preferred Dispute Resolution mechanism.[1]It is most preferred in international contracts and has witnessed tremendous growth since the 1980's.[2] Mostly, all commercial disputes are arbitrable.[3] Competition law claims

[1] *2018 International Arbitration Survey: The Evolution of International Arbitration,* Queen Mary University of London (2018),<www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-(2).PDF>

[2] Jean-Claude Najar, 'Chapter 4: Arbitrating Competition Law: The User's Perspective', in Gordon Blanke and Phillip Landolt (eds), EU and US Antitrust Arbitration: A Handbook for Practitioners, (Kluwer Law International 2011)

[3] UNCITRAL Model Law on International Commercial Arbitration, Art 1 (1), 2006.

are a part and parcel of the business transactions and thereby are commercial in nature. Competition law disputes satisfies the 'commercial' test and hence, are arbitrable.[4]

Arbitration and Antitrust disputes at first instance seem to be poles apart in their objectives to contradict rather than complement each other. Competition law objective is to promote economic efficiency in competitive markets and maximize public interest. Arbitration, on the other hand, is a private settlement of disputes which involves the appointment of Arbitrators. However, there is an evolving jurisprudence which states that antitrust disputes are arbitrable.

Internationally, competition law has been dominated by developed countries such as the USA and the European Union. Now, most of the developing countries have competition law jurisdictions. As evident from the fact, more than 130 jurisdictions[5] have competition laws in place. The BRICS[6] countries are the growing economic powers.[7] Also, David Gerber states, 'the future of global competition law depends on decisions to be made in countries outside Europe and the US [and these] decisions will be shaped by factors that differ significantly from those created by the US and European experience'.[8]

This essay explores the dynamics of arbitrability of antitrust disputes. It presents how a paradigm shift is observed in EU and USA stance from non-arbitrability of antitrust disputes to their arbitrability. And how jurisdictions worldwide continuously involved in surging competition law claims are now opting for Arbitration. Learnings from the USA and EU antitrust experience can also enable most Asian Pacific countries to adopt a robust Arbitration regime for redressal of their antitrust claims.

Effectiveness of Arbitration to resolve Antitrust disputes.

With rising number of anti-competitive activities, competition authorities may be burdened and not in a position to enforce competition law effectively due to lack of financial and human resources. To address such anti-competitive activities more efficiently. More than 50 countries have introduced leniency programmes in their competition law regimes to detect illegal cartel activities.[9] A leniency programme is a kind of whistleblower protection mechanism in which a member of cartel exposes about the illegal activities to the Commission. The commission provides for immunity or lenient treatment by either reducing the penalties or fines involved before it could discover such illegal activities. Leniency programs inclusion in competition law is an attempt to ameliorate the enforcement of competition authorities. To satisfy goals of competition law and policy.[10]

[4] Kazuaki Nishioka, *The enforcement of crossborder competition law claims in Asia-pacific and choice of forum agreements: Private litigation or arbitration?*,in Ariel Ezrachi and WilliamE. Kovacic (eds), 10 Journal of Antitrust Enforcement 279 – 302 (2022)
[5] Wendy Ng, *Changing Global Dynamics and International Competition Law: Considering China's Potential Impact*, 30 EJIL 1409, 1410 (2019)
[6] Brazil, Russia, India, China and South Africa
[7] Supra note 5.
[8] Supra note 5.
[9] UNCTAD MENA Programme, 'Competition Guidelines: Leniency Programmes' <UNCTAD/DITC/CLP/2016/3<https://unctad.org/en/PublicationsLibrary/ditcclp2016d3_en.pdf> accessed 18 February 2024.
[10] Kazuaki Nishioka, *The enforcement of crossborder competition law claims in Asia-pacific and choice of forum agreements: Private litigation or arbitration?*,in Ariel Ezrachi and WilliamE. Kovacic (eds), 10 Journal of Antitrust Enforcement 279 – 302 (2022)

Globally, it is being observed that there is a significant reduction in the leniency applications from 2015 to 2020.[11] Now the competition commission opting for Arbitration for redressal of antitrust disputes would bring a significant reduction in backlog of cases and increase manifold, the judicial capacity of the competition authorities.

In Arbitration parties have more control over the issues and how it must be resolved. It has flexibility to reach settlement of their dispute, whether promoted by the arbitral tribunal or by their own initiative.[12]

Arbitrability of competition law disputes suffers setbacks such from such claims that competition authorities are in a better position to adjudicate competition law claims than arbitral tribunal. Competition authorities deals with investigation, evidence finding and imposes sanctions for infringements. Whereas a tribunal is ill-equipped to deal with such claims. Hence, competition law disputes are inarbitrable. This criticism to deny arbitrability of competition law disputes on the above grounds seems irrational.

Firstly, the arbitral tribunal addresses only '*inter partes matters of private law remedy*'[13] and does not address claims such as administrative and penalties which fall in the exclusive jurisdiction of the commission. Allowing arbitrability of competition disputes does not oust the jurisdiction of the commission. The commission's public enforcement is still reserved. Dealing with competition law matters requires technical knowledge.[14] Secondly, an arbitral tribunal which has competition law and economics experts on the bench can adjudicate antitrust issues more quickly than a single non-specialist judge.[15]

Arbitrability of antitrust disputes by the states implies that arbitral tribunal will take into consideration the competition law of the state in course of the arbitration proceedings. Also, the duty stems from the arbitration clauses in the contract.[16] Thirdly, the tribunal is also empowered to request for *documents, exhibits or other evidence*[17] from the parties to be produced within time as specified. Expert witnesses can be appointed by the tribunal with the prior consent of the parties. [18]

Arbitral tribunals have the power to hear the expert witnesses and determine cases by using the experts' reports submitted to them by the parties and exchange those reports between the parties.[19] Though, an arbitral tribunal remains unaffected by the decisions of the competition authorities. Still tribunals are careful while passing an award so that it does not run against the decisions rendered by the competition authorities.[20] As it poses a risk of being declared null and void in the future and remaining unenforceable by the competition authorities.

[11] OECD (2022), OECD Competition Trends 2022 <http://www.oecd.org/competition/oecd-competition-trends.htm> accessed 18 February 2024
[12] Supra note 2.
[13] Supra note 7.
[14] Supra note 7.
[15] James Segan, 'Arbitration Clauses and Competition Law', in Gianni de Stefano and Pablo Ibáñez Colomo (eds), 9 Journal of European Competition Law & Practice 423 – 430 (2018)
[16] Horacio Vedia Jerez, Private Enforcement of Competition Law, in Competition Law Enforcement and Compliance across the World: A Comparative Review, International Competition Law Series, 61 Kluwer Law International 235- 350 (2015)
[17] Art. 27 UNCITRAL
[18] Supra note 14.
[19] Article 25(3) ICC Arbitration Rules
[20] Supra note 14.

Moreover, the arbitral tribunals can ask the competition authorities to render their opinions on specific matters to be determined to aid/assist in their dispute redressal.[21] Also, they can request for information from the competition authorities '*in the course of an investigation for the infringement of competition law*'[22] which can be useful for the issues of competition law raised before them in the arbitral proceedings.

Lastly, opting for arbitration to settle disputes does not grant the parties to avoid the relevant competition laws. The arbitral tribunal while passing the competition law takes into consideration the competition law and policy. Violation of public policy can be avoided by the State at the stage of recognition and enforcement of the arbitral awards. A state retains the powers to amend the competition laws in place to regulate business activities based on it's public policy.[23] Looking through the lens of judicial policy, a state should acknowledge the arbitrability of competition law claims. There exists no good reason to deny competition law claims from being resolved through arbitration.[24]

Learnings from the USA and EU: Saying Yes to Arbitrability of Antitrust Disputes

The groundbreaking judgment of the USA Supreme Court in *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth*[25] paved way for arbitrability of antitrust disputes in the USA's jurisdiction and a shift from it's earlier reasoning that antitrust claims are *inappropriate for arbitration.*[26]

This case involved an agreement between Mitsubishi Motors Corporation and Soler Chrysler-Plymouth, regarding the distribution of automobiles in Puerto Rico. The applicable law as per the agreement was the Swiss law. And the guidelines of the Japan Commercial Arbitration Association had to be followed for dispute resolution. Later, Mitsubishi filed a lawsuit in the District Court of Puerto Rico, seeking that Soler be forced to appear for arbitration in Japan in as per the terms of the contract. The American corporation claimed that because the contract prohibited the distributor from selling the cars outside of Puerto Rico, it violated the Sherman Antitrust Act's provisions governing U.S. competition.

The court rejected the earlier position in the case of *American Safety case* and held that,

"*There is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism. To be sure, the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate its statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim*"

[21] Supra note 14.
[22] Supra note 15.
[23] Supra note 5.
[24] Supra note 4.
[25] 473 US 614 (1985)
[26] *American Safety Equip. Corp. v. J.P. Maguire*, 391 F.2d 821 (2d Cir. 1968)

The second look doctrine propounded in this judgment opened the gates for arbitrability of antitrust claims, which states that,

"Convention reserves the right to refuse enforcement of an award where the recognition or enforcement of the award would be contrary to the public policy of that country".

This second look doctrine is similar to judicial review. It is also in consonance with UNCITRAL's model law which states that an award can be set aside if the subject matter of dispute is not capable of settlement through arbitration.[27] And award enforcement can also be denied on the grounds of violation of public policy.[28] This judicial review ensures that the arbitral award rendered by the arbitral tribunal would not be contrary to the public policy.

The Mitsubishi case also established the effective Vindication doctrine, which states that the arbitration agreement will be void if the contractual forum proceedings are so onerous and challenging for the party that they practically prohibit them from accessing the courts. Competition claims are arbitrable, provided that the party may preserve its statutory rights in arbitration, as per the decision's pronouncement.[29]

The EU also shares similar approach that antitrust disputes are arbitrable. It held the same in it's landmark case, *Eco Swiss v Benetton*.[30] The lawsuit concerned a license agreement that Eco Swiss China Time Ltd. and Benetton International NV had signed for the production and subsequent selling of watches. It also stipulated that disputes would be settled in accordance with the guidelines established by the Netherlands Arbitration Institution and that Dutch law would be applied. Since Eco Swiss was no longer allowed to sell watches in Italy and Bulova was not allowed to sell them in other EU member states at the time, the deal established a market-sharing agreement between the parties.

The European Court of Justice held that if the national court's domestic procedural rules allowed for the annulment of arbitral decisions that contained public policy violations, it would be compelled to revoke an award that breached European Competition Law. From the ECJ's response, one may deduce that the EU's antitrust laws and its public policy standards were equal. The ruling in Eco Swiss also confirms the arbitrability of competition disputes and the national courts' authority to examine antitrust cases. The judiciary will carry out this review if an action is filed seeking the annulment or recognition of the arbitral award.

These two landmark judgments indicate that international case law has generally followed the trend of confirming the arbitrability of competition claims and ensuring that national courts have the authority to review arbitral awards running against their public policy.

There are two approaches for scrutiny of awards, maximalist and minimalist approach. Under the maximalist approach, arbitral awards are thoroughly examined by national courts upon challenge or request for

[27] Art. 34
[28] Art. 5(2)(a)
[29] Carlos Ragazzo and Mariana Binder, Antitrust and International Arbitration, 15 UC Davis Business Law Journal 174-178 (2017)
[30] Int. Case No C-126/97 [1999] ECR I-3055 (ECJ)

enforcement. This entails a thorough examination and fresh evaluation of all the case's evidence. Wherelse, under the minimalist approach, national courts merely need to confirm that arbitrators have considered matters pertaining to competition law and have not arrived at a decision that is "manifestly" at odds with public policy.[31] This approach predominates in EU. As observed in a recent judgment[32] where it stressed that public policy violations should be exercised in 'exceptional circumstances' and that an 'alleged' violation of most fundamental provisions of EU law would not amount as such.

Also, to achieve a balance between public policy and the effectiveness of arbitration, the breach or violation of competition law entailing annulment or a refusal to enforce an award must be 'serious, effective, and concrete'. The incorrect application of competition law by tribunal would not constitute a breach of public policy as such.[33]

Different Perspectives on Arbitrability of Antitrust Disputes in Asia Pacific

Although in some jurisdiction, arbitrability of competition claims has been strictly denied through statutes in force and by decisions of the court. For example, in mainland China, Supreme People's Court in the case, Huili v Shell[34] has held that antitrust disputes remain inarbitrable.[35] The Court clarified that the subject matter in Shell v. Huili is not within the purview of arbitrable concerns since it transcends the rights and obligations of the contract between private counter parties.[36]

The general test for arbitrability is outlined in Articles 2 and 3 of the Chinese Arbitration Law, the Anti-Monopoly Act specifically states that the goal of competition legislation is to safeguard the interests of the general public and third parties. In this way, even in situations where a private law remedy may be in doubt, mainland China prioritizes the public interest.[37]

Similary, India has not faced any such case which addressed the antitrust dispute and their arbitrability. Although, in the year 2012, Delhi High Court was closest to assess this issue was in the case, *Union of India v. Competition Commission of India.*[38] The Court maintained the CCI's jurisdiction and expressed the opinion that the arbitral tribunal's area of inquiry would differ from the CCI's investigation. The Court further held that the arbitral tribunal's authority was restricted to the terms of the contracts and that it lacked both the authority and the knowledge to look into matters of antitrust between the parties.[39] Although, there is no legislation in place that bars competition law claims arbitrability in India.

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[31] Lucian Ilie and Amy Seow, *International Arbitration and EU Competition Law Complement Rather than Contradict One Another*, in Maxi Scherer (ed), Journal of International Arbitration, 34 Kluwer Law International 1007-1038 (2017)

[32] Régie nationale des usines Renault S.A. v. Maxicar S.p.A. & Orazio Formento, Case C-38/98, CJEU, Judgment of 11 May 2000, paras 26–32.

[33] Supra note 31.

[34] Supreme People's Court, No 47, 29 August 2019

[35] Qingxiu Bu, The arbitrability of antitrust disputes: a Chinese perspective, *Journal of Antitrust Enforcement*, Volume 10, Issue 2, July 2022, Pages 303–325, https://doi.org/10.1093/jaenfo/jnab020

[36] See Id

[37] Kai-chieh Chan, *China's Top Court Says No to Arbitrability of Private Antitrust Actions*, Kluwer Arbitration Blog (Feb. 15, 2024)https://arbitrationblog.kluwerarbitration.com/2020/01/23/chinas-top-court-says-no-to-arbitrability-of-private-antitrust-actions/

[38] *A.I.R. 2012 Del 66 (India)*

[39] Abhisar Vidyarthi, *Applying Vidya Drolia's "Four-Fold Arbitrability Test" to Antitrust Disputes in India*, Kluwer Arbitration Blog(Feb. 16, 2024)https://arbitrationblog.kluwerarbitration.com/2021/02/10/applying-vidya-drolias-four-fold-arbitrability-test-to-antitrust-disputes-in-india/

Looking at Australia, competition law disputes are traditionally not arbitrable in Australia.[40] Although in a case[41], it has upheld that antitrust disputes are better decided by the courts than the arbitral tribunals.[42]

Most jurisdictions in Asia have not contested the arbitrability of antitrust disputes by statutes and rulings of the court. Example: South Korea, Japan, Taiwan, Singapore and Hong Kong. In facts some of the commentators of these jurisdiction have favour Arbitration for antitrust disputes.[43] The commentators agree that public policy is not in question in competition law disputes arbitrability and are concerned with the remedies of private law.[44] Although the arbitrability of competition law claims is broadly acknowledged in the United States and Europe, it appears to remain ambiguous in many Asian jurisdictions.

Conclusion

With arbitration emerging as the most preferred disputes resolution mechanism in largely all developed countries. There is no doubt that antitrust claims are arbitrable in nature especially in the developed countries however, for developing countries there is still a long road to traverse. Arbitrability of antitrust claims have not been well received in major developing economies. The reasons remain to have not deal the arbitrability of antitrust issues yet and also no legislature has enacted any act to clearly demarcate the position of either arbitrable or not. Though some have expressed through their judicial decisions that these antitrust claims are not so private in nature to be dealt by tribunals as the courts would be in a better position to adjudicate. This shows reluctance as the arbitrability of such disputes may lead to losing over the competition market claims that affects the public at large. Reconciling the competition and arbitration law is required. An understanding needs to be developed that arbitral tribunals do not become immune from the stage of review of their awards as propounded in the second look doctrine. They are accountable for the awards passed in contravention to public policies of the respective states. Hence, private claims arising from antitrust disputes would be more suitable for arbitration which would considerably reduce the burden of courts as well.

[40] Gitanjali Bajaj, Kabir Barat and Michael Robbins, *In brief: arbitration agreements in Australia*, DLA Piper (Feb. 16, 2024)https://www.lexology.com/library/detail.aspx?g=11e43f5a-73ab-4a30-9c24-3b89900f90ef
[41] Freedom Foods Pty Ltd v Blue Diamond Growers [2021] FCA 172
[42] Vicky Priskich, *Mandatory Laws Applicable to an Arbitration: A View from Australia,* Kluwer Arbitration Blog (Feb. 16, 2024) https://arbitrationblog.kluwerarbitration.com/2021/07/24/mandatory-laws-applicable-to-an-arbitration-a-view-from-australia/
[43] Supra note 10.
[44] See Id.