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# Harmonizing Arbitration & Competition Law Disputes

URVASHI BADOLIYA[1]

## ABSTRACT

*Numerous national courts have examined the possibility of arbitrating disputes pertaining to competition law. Even though case law from the United States, the United Kingdom, and the European Union (E.U.) generally favors a positive outcome, this subject is still being contested in India to get around arbitration provisions. There is a consensus in India that rules that are necessary, like competition laws, are meant to safeguard important society interests, and therefore arbitration provisions should be avoided. The premise of the argument is that the implementation of such laws should not be left to uncontrolled national or international arbitral bodies.*

*Considering this, this researcher examines the coherence between arbitration procedures and competition law issues in India and offers viable ways to reconcile the two fields while preserving the public interest. Considering that,*

*Part I illustrates India's distinct method of dealing with issues arising under competition law, emphasizing the Competition Act's precedent and the civil courts' restrictions in handling these cases.*

*Part II analyses the "four-fold test" for arbitrability that was presented in the Vidya Drolia case, evaluating its standards and consequences for Indian competition disputes.*

*Part III investigates the potential for using the "second-look doctrine" and cooperative knowledge to protect public policy in India's arbitrability of competition disputes.*

*Part IV compares the minimalist and maximalist viewpoints to examine the various standards of review and the degree of respect accorded to arbitrator rulings in competition law issues.*

*Finally, Part V suggests a random de novo review of arbitration rulings as the best course of action, arguing that courts must strike a compromise between upholding required standards and maintaining the benefits of international arbitration.*

***Keywords**: Competition law, Arbitration law, Booz Allen.*

## I. INTRODUCTION

In recent years, the intersection of competition law and arbitration has become a focal point for legal discourse globally, including in India. The dynamic nature of competition law, coupled

[1] Author is an Advocate at DHC, India.

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with the complexities of arbitration proceedings, has led to significant challenges in harmonizing these two areas of law. India, with its burgeoning economy and evolving legal landscape, stands at the forefront of this debate.

The need to reconcile the objectives of competition law enforcement with the principles of arbitration, such as party autonomy and confidentiality, presents both opportunities and dilemmas for policymakers, legal practitioners, and businesses alike. As arbitration emerges as a preferred method for resolving commercial disputes, including those involving competition law issues, there arises a pressing need to develop a coherent framework that ensures effective enforcement of competition law while respecting the principles of arbitration.

Arbitration appears as a possible rival to state courts' long-standing protection of competition law. Although welcomed by nations such as the US and the UK, India poses a distinct conflict. This study delves into this conflict by examining the legal system in India as well as the implications of foreign judicial viewpoints.

## II. Addressing competition law conflicts: India's arbitrability paradigm

India's jurisprudence has diverged significantly from the strategies employed by countries possessing strong antitrust laws. Competition Act[2], which is now in effect in India, supersedes all other laws, making it impossible for civil courts to investigate cases that fall under the jurisdiction of the Competition Commission of India (CCI). Consequently, the statute offers no other means of resolving matters pertaining to competition law.

Considering this, the 2012 case Union of India v. Competition Commission of India[3] raised the issue of the arbitrability of antitrust issues in India for the first time. The Ministry of Railways claimed that the case could not stand because the parties had a legally binding arbitration agreement that prohibited the CCI from getting involved. Nevertheless, the Delhi High Court rejected this argument, stating that the Competition Act supersedes other laws and that CCI disputes are distinct from contractual obligations heard by arbitral tribunals. The court further stressed that arbitration panels might not have the authority, responsibility, or capacity to carry out the necessary inquiries to address concerns pertaining to abuse of dominance.

Further elaborating on this idea, the Bombay High Court emphasized that other laws should not supersede the terms of the Arbitration Act, which could lead to some issues being excluded

[2] Section 61 of Competition Act, 2002.
[3] Union of India v. Competition Commission of India, (2012) AIR 66.

from arbitration. Furthermore, the Court observed that, unlike commercial disputes resolved through arbitration procedures, competition disputes generally aim to penalize anti-competitive behaviour rather than provide damages or compensation.

Furthermore, in Samir Aggarwal v. Competition Commission of India[4], the Indian Supreme Court upheld the idea that, in contrast to arbitration proceedings, which are in personam in nature, the CCI's inquiries are in rem in nature, concentrating on the overall issue at hand rather than individual rights. Notably, recently, the CCI issued an order against Tata Motors[5] that reaffirmed the agency's inquisitorial role and emphasized its commitment to the public interest. Analogously, the National Company Law Appellate Tribunal (NCLAT) employs an inquisitorial and in rem methodology in its proceedings.

Although the examples give clarity by defining an express exclusion, the interpretations made by the individual courts completely preclude the arbitration of problems pertaining to competition law. The flexibility provided by the Vidya Drolia[6] and Booz Allen[7] tests of arbitrability is eliminated by this method. The potential for claims of competition law violations—specifically, breaches of contracts—was not acknowledged by the court. While abusive conduct by dominant enterprises regarding distribution agreements may involve rights in personam, allowing arbitral tribunals to resolve such disputes privately, cartels and other anti-competitive agreements covered under Section 3 of the Act[8] have significant implications for the public. Consequently, courts may decline to forward arbitration petitions with competition law issues if such instances establish a precedent.

## III. Breaking the puzzle: interpreting Vidya Drolia's four-fold arbitrability test for Indian competition conflicts

To that end, a closer look at the "four-fold test" established by the Supreme Court in Vidya Drolia is essential in evaluating the possible arbitrability of competition conflicts in India, building upon the analysis of India's competition law framework and the challenges it provides.

### *(A) The Four-Fold Test*

To resolve the arbitrability of disputes, the Supreme Court of India established the "four-fold

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[4] Samir Aggarwal v. Competition Commission of India, 2020 SCC OnLine SC 1024.
[5] CCI orders probe against Tata Motors for alleged unfair biz practices, Economic Times *(last visited on Feb 07, 2024) https://economictimes.indiatimes.com/industry/auto/auto-news/cci-orders-probe-against-tata-motors-for-alleged-unfair-biz-practices/articleshow/82410018.cms?from=mdr*
[6] Vidya Drolia & Ors. Vs. Durga Trading Corporation, (2021) 2 SCC 1.
[7] Booz Allen & Hamilton v. SBI Home Finance Ltd. AIR 2011 SC 2507
[8] Competition Act, 2002.

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test" in Vidya Drolia[9] in December 2020. The purpose of this test is to establish whether a dispute is outside the purview of arbitration and to offer a simplified procedure. Therefore, the following factors are included in the "four-fold test" described in Vidya Drolia:

- when the dispute's cause of action and subject matter are related to actions in rem that do not concern subordinate rights in personam that result from rights in rem;
- when the origin and subject matter of the disagreement have an erga omnes effect; when the issue's cause and subject matter affect third parties' rights;
- when the dispute's cause and subject matter are related to the State's inalienable sovereign and public interest functions; and
- when the dispute's subject matter is expressly or necessary impliedly non-arbitrable under mandatory statute(s).

*(B) Examining the Standards:*

Antitrust conflicts usually require adjudicating actions and rights "in rem" and are of a public nature. Several provisions, including Section 19(1)[10], enable anybody to report violations of the Act to the Competition Commission of India (CCI), whether they have suffered losses or not. This illustrates how antitrust conflicts are inherently public. However, under Section 53N[11], which calls for the determination of each affected party's individual rights, aggrieved parties may also seek compensation based on the CCI's conclusions. In a similar vein, deciding individual rights is a component of antitrust lawsuits resulting from current business arrangements like distribution, joint venture, or franchise agreements. Since the disagreement would include the parties' own rights, the usual requirements of the "four-fold test" for arbitrability might not be met in these situations.

In the Canadian case of Murphy v. Amway[12], it was decided that private damages claim under Section 36 of the Canadian Competition Act may be subject to arbitration. This decision serves as an example of the possibilities for arbitration in antitrust disputes. In Seidel v. Telus Communications Inc.[13], the Supreme Court of Canada distinguished between several provisions of the Business Practices and Consumer Protection Act. Based on this distinction, the court determined that claims falling under specific sections may be subject to arbitration. Like this, it is important to remember that claims originating from pre-existing contractual agreements and

[9] Vidya Drolia & Ors. Vs. Durga Trading Corporation, (2021) 2 SCC 1.
[10] The Competition Act, 2002
[11] The Competition Act, 2002
[12] Murphy v. Amway Canada et al., (2013) 443 N.R. 356 (FCA)
[13] Seidel *v.* TELUS Communications Inc., 2011 SCC 15, [2011] 1 S.C.R. 531

private antitrust claims covered by Section 53N of the Indian Competition Act should both be regarded as arbitrable in the context of India.

Furthermore, the sovereign and inalienable powers of the State are typically not at issue in private antitrust lawsuits. The Indian Competition Act itself does not apply to the State's inherent and sovereign functions. Businesses performing such tasks may be excused from the Act's rules if it serves the public interest, according to Section 54 of the Act[14]. Consequently, private antitrust claims do not meet the requirements of the "four-fold test," which includes safeguarding the State's sovereign and inalienable functions.

Nevertheless, the arbitrability of these cases is hampered by the CCI's exclusive jurisdiction over antitrust matters, which is required by Section 61 of the Act[15]. This implies that not even the Act's subordinate individual rights are subject to arbitration. The non-arbitrability of antitrust issues is supported by the Supreme Court of India's emphasis in the Vidya Drolia[16] case on the significance of a specialized venue such as the CCI for assessing antitrust rights and liabilities.

It is questionable, though, whether this criterion is helpful in proving arbitrability. Some contend that arbitrators can protect the rights and obligations set forth by the applicable laws by applying these rules to conflicts in an effective manner. The Supreme Court of India recognized in the Vidya Drolia case[17] that arbitration should not be impeded by circumstances like the need to comply with necessary laws, the legislative goals of public policy, or the intricacy of the cases. To ensure effective resolution of their rights, parties to competition-related issues may be able to choose arbitrators who are well-versed in antitrust law.

The U.S. Supreme Court's ruling in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.[18], which upholds the validity of arbitrators' authority to uphold substantive antitrust rules and grant parties in wronged parties suitable remedies, lends credence to this strategy. Thus, arbitration should not be excluded from matters pertaining to competition based only on the fact that a specialized venue such as the CCI exists.

[14] The Competition Act, 2002

[15] The Competition Act, 2002

[16] Vidya Drolia & Ors. Vs. Durga Trading Corporation, (2021) 2 SCC 1.

[17] Vidya Drolia & Ors. Vs. Durga Trading Corporation, (2021) 2 SCC 1.

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

## IV. Creating a new paradigm: Protecting public policy in arbitrability of competition disputes in India by using the second look doctrine and collaborative experience

After looking at how competition disputes can meet the criteria of the Vidya Drolia test, it is critical to discuss how we can protect public policy goals in the arbitrability of these conflicts while also doing so concurrently and successfully.

There are more ways to safeguard public policy besides competition law conflicts being non-arbitrable. A different strategy would be to let the parties choose arbitration and give the CCI two roles in the arbitration: parens patriae and amicus curiae. By requiring arbitrators to apply antitrust law, the courts moderated their support for arbitrability, taking a cue from the Mitsubishi case, in which antitrust issues were declared arbitrable in the United States. This led to the creation of the "second look doctrine," a process wherein the courts examine the arbitral judgment at the enforcement stage to make sure that features of competition law are properly considered. This approach forbids private parties from using arbitration to get around mandatory competition law.

Additionally, Section 27 of the A&C Act provides an additional layer of protection by enabling arbitral tribunals to request evidence support from the court, which in turn enables tribunals to communicate with the CCI regarding matters pertaining to competition. This procedure is in line with the EU's strategy, whereby the European Commission frequently participates in arbitration cases concerning competition laws as an amicus curiae to ensure accurate and uniform.

## V. Balancing acts: Interpreting the standard of review conundrum in competition law arbitration cases

India possesses the capacity to transform the arbitrability of competition disputes through its adoption of the "second look doctrine" and encouragement of cooperative expertise. By using this strategy, the goals of public policy might be safeguarded while still enjoying the benefits of arbitration. It is still difficult, though, to come to an agreement on the standard of scrutiny and degree of deference national courts need to provide arbitrator rulings. As a result, several courts have taken rather differing stances on this matter.

### *(A) The Minimalist Approach*

According to the minimalist approach, arbitral rulings should only be rejected or revoked in the most extreme circumstances. For instance, if arbitrators apply tight horizontal limitations or

reject competition legislation altogether even when the parties have brought it up. Even if the arbitrators decided incorrectly about competition law, there should not be a breach of public policy in the remaining circumstances. Using this method would need a detailed analysis of the case merits (révision au fond), which is typically prohibited by current arbitration legislation, to check arbitral rulings for errors.

*(B) The Maximalist Approach*

The maximalist approach, on the other hand, places more emphasis on the efficacy principle and contends that the majority of infractions of competition laws need to be seen as breaches of public policy. According to this perspective, the main objective of competition law is to safeguard the public interest. When it comes to competition law, arbitrators should proceed with caution and only accept small errors as justification. When evaluating awards that are related to Indian competition law, courts that use this method exercise substantive authority. The Swiss Tribunal Fédéral has stressed[19] that judges must look at both the decision's operational portion and its underlying premises.

## VI. Conclusion

Arbitrators may ignore local required restrictions if domestic courts immediately enforce arbitration rulings without reviewing them. Nonetheless, the advantages of arbitration, such as its predictability, neutrality, and potential to save costs, are compromised if courts often examine arbitration rulings from scratch to make sure they comply with necessary regulations. Therefore, courts are unable to uphold the benefits of the international arbitration system while still enforcing necessary regulations.

Rather, the best course of action for courts would be to arbitrarily review arbitration rulings de novo. By removing the need for courts to review each arbitration ruling, this method encourages arbitrators to regularly adhere to necessary rules. This tactic was mistakenly carried out by the Mitsubishi ruling, which was criticized for being overly ambiguous and for raising questions about how American courts would handle arbitration awards that deviate from mandatory regulations.

Because of the possible ramifications, it would be regrettable if courts in more sophisticated nations implemented special review guidelines for particular types of arbitration. One could argue that it is only important to review the substance of arbitration rulings in situations where there could be significant anti-competitive repercussions in a certain jurisdiction. To put it

[19] Eco Swiss v. Benetton, [1999] E.C.R. I-03055.

another way, it ought to happen only in cases when arbitrators blatantly disregard competition law to skirt the law or in situations where there is obvious illegality or disagreement with the norms. Even if the arbitrators made mistakes in their application, the award should normally not be susceptible to review if they fairly applied the competition laws, took into account the parties' arguments, and included meaningful rationale in their decision. Rather than only focusing on the issue award's existence, attention should be directed onto the consequences of acknowledging it in the jurisdiction where enforcement is sought. Public policy should only be violated if those consequences are unbearable and fundamentally at odds with the moral and legal standards of that jurisdiction.

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