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EVOLUTION FOR ALTERNATE DISPUTE RESOLUTION IN COMPETITION DISPUTE

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ABSTRACT

Since the year 1190s and the early 2000 in the Indian Context, ADR (alternative dispute resolution) developments are no longer given the significance of the supplementing mechanisms. Arbitration, reconciliation, etc. are older than even litigation. Over time the zest with the increasing procedure and recognition of the adversarial replaced it. When the difficulties of the adversarial system were recognized globally, it was the time when arbitration remained the renaissance of the ADR. Litigation continues to have very little propensity, and arbitration continues to be highly preferred. Domestic courts show a strong preference for arbitral awards compared to foreign court judgments, establishing arbitration as the primary method of dispute resolution. Many nations have adopted the 1958 New York Convention, ensuring the universal recognition of the arbitration process and the enforcement of the arbitral awards. In simple words, Arbitration encompasses negotiation, conciliation, mediation, and other traditional arbitration, which are often colloquially referred to as out-of-court settlements. These methods are non–judicial approaches to resolving disputes. The term disputes denotes contentious or questioned issues. It is essential to understand that a dispute can also encompass situations where parties simply have a disagreement and seek amicable solutions. However not all disputes can be solved by this method, and the choice of remedy is critical.

Keywords: Alternative Dispute Resolution (ADR), Adversarial System, Renaissance of ADR, Litigation vs. Arbitration, 1958 New York Convention, Universal Recognition, Dispute Resolution Methods, Dispute Resolution in India.

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THE RENAISSANCE OF ADR: ARBITRATION TAKES CENTER STAGE

Alternative Dispute resolution as the name glares is an alternative to the conventional dispute resolution mechanism which is primarily litigation-centric. With time, arbitration has evolved as the instrument that assists the parties in settling their disputes in a very short period [2]Arbitration is a method whereby parties resolve their dispute using an arbitrator instead of national courts, and more or less, people have found arbitration more approachable than courts due to many benefits like less time consumption, a flexible, neutral and impartial forum of adjudication. Arbitration has developed into a favored private, amicable method of resolving disputes over time. Courts and arbitral tribunals have been handling intricate contracts, and the law governing arbitrations is changing quickly. An issue commonly faced by arbitration tribunals is whether the dispute referred to is arbitrable in the first place. These questions commonly arise when allegations of fraud are made before a tribunal or a reference is made to decided issues relating to competition law.

The Arbitration Conciliation Act 1996[3] does not explicitly enumerate all arbitrable disputes, but certain sections, such as 2(3), 34(2)(b), and 48(2), indirectly address the issue of nonavailability. In essence, the prevailing notion is that the disputes affecting rights in personam can be addressed through arbitration, while matters involving rights in rem cannot. In this article, we have discussed and analyzed whether the disputes arising from competition are arbitrable or not.

Certain elements within the framework of the Competition Act are associated with the public interest, such as activities like cartels and other agreements that hinder competition, falling under Section 3 of the Competition Act[4]. Conversely, when a dominant enterprise engages in abusive behavior concerning a distributorship agreement, it pertains to personal rights. Consequently, an

[2] Ethiopian Airlines v. Stic Travels(P) Ltd., (2001) 7 SCC 474.
[3] The Arbitration Conciliation Act, 1996, No.26, Acts Of Parliament,1996 (India).
[4] The Arbitration Conciliation Act, 1996, § 3, No.26, Acts Of Parliament,1996 (India).

arbitration tribunal could potentially have the authority to resolve a dispute as long as it concerns the determination of the rights of the parties involved.

LEGAL PRECEDENTS: COURTS AND THE ARBITRATION – COMPETITION NEXUS

The question of arbitrating competition law issues has not come up before a court in India. However, the courts have determined that proceedings under the Competition Act, 2002 (Competition Act) will not be stayed due to the presence of an arbitration clause between the parties. In *Union of India v. Commission in India*[5], parties to a Concession Agreement with the Ministry of Railways had filed a complaint alleging had the Railway Board was abusing its dominant position by the increased charges. The Railway Board challenged the Competition Commission of India's (CCI) jurisdiction based on the arbitration clause between the parties. The Delhi High Court ruled that the CCI's inquiry would have a far different scope and focus than that of arbitral tribunals, and so rejected this as a legitimate reason to halt the proceedings at the CCI. In a similar context relating to the Monopolies and the Restrictive Trade Practices Act 1969 (MRTP)[6], the Act was in addition to the remedies available under contract and arbitration laws. The question that arises herewith is whether the arbitration of the competition law disputes is also an additional remedy to those provided under the Competition Act and if an Arbitral tribunal should decide antitrust issues.

To delve deeper into this principle, the Bombay High Court as illustrated in the *Central Warehousing Corporation v. Frontprint Automotive Pvt. Ltd* Case[7] highlighted the importance of considering section 5 of the Arbitration and Conciliation Act[8] in conjunction with section 2(3) of the Arbitration Act 1996[9]. The clarification stressed the provisions of the Arbitration Act should not supersede other legal statutes, potentially leading to certain disputes being ineligible for

[5] Union of India v. Commission in India, (1999) 6 SCC 667.
[6] The Monopolies and the Restrictive Trade Practices Act 1969, No. 54, Acts of Parliament, 1969 (India).
[7] Worlds Window Infrastructure And … v. Central Warehousing Corporation, 2018 Latest Caselaw 1168 ALL.
[8] The Arbitration Conciliation Act, 1996, § 5, No.26, Acts Of Parliament,1996 (India).
[9] The Arbitration Conciliation Act, 1996, § 2(3), No.26, Acts Of Parliament,1996 (India).

arbitration. Furthermore, the court pointed out that disputes are usually resolved through arbitration, which resolved through arbitration, which revolves around compensation or damages.

Furthermore, the Indian Supreme Court, in the case of *Samir Aggarwal v. Competition Commission of India*[10], affirmed the idea that the investigations carried out by the CCI have an "in rem" nature, concentrating on the general issue at hand rather than individual rights. This stands in contrast to the arbitration proceedings, which have an: "in personam" nature, focusing on the rights of the parties involved. Importantly, a recent order by the CCI against Tata Motors in May 2021 reiterated the fact that the CCI functions as an inquisitorial body dedicated to upholding the public interest. It is similarly, proceeding before the NCLAT adopts an inquisitorial and in rem approach.

PRESERVING PUBLIC POLICY: BALANCING ENFORCEMENT AND BENEFITS

The non-arbitrability of the competition law disputes is not the sole means of protecting public policy. An alternative approach involves allowing the parties to opt for arbitration while granting the CCI a dual role as patren patriae and the amicus quaire in the arbitration proceedings. Drawing inspiration from the *Mitubhasi Case*[11], where antitrust disputes were deemed arbitrable in the US courts, the courts balanced their support for the arbitrability by obliging arbitrators to apply antitrust law. As a result, the "second look doctrine" was established, wherein the courts examine the arbitral judgment during the enforcement phase to make sure that provisions of competition law are properly taken into account. This approach forbids private parties from using arbitration to get around mandatory competition law.

When domestic courts automatically enforce arbitration awards without reviewing them, arbitrators may overlook local mandatory rules. On the other hand, if the courts consistently subject arbitration awards to de novo review to ensure compliance with these mandatory rules, it determines the advantages of arbitration, including predictability, impartiality, and cost efficiency. Therefore, it's challenging for courts to both enforce mandatory rules and uphold the benefits of the international arbitration system.

[10] Samir Aggarwal v. Competition Commission of India, Case No. 37 of 2018.
[11] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

A more effective approach for courts is to selectively conduct de novo reviews of arbitration decisions, rather than reviewing each one systematically. This approach encourages arbitrators to be mindful of mandatory rules while sparing courts from the task of reviewing every arbitration award.

It would be undesirable if courts in more developed countries started implementing special review rules for specific areas of arbitration awards is arguably only warranted in the cases where there may be significant anti-competitive impacts in the particular jurisdiction. In other words, should only occur when arbitrators blatantly disregard competition law to those who evade rules or where there is apparent illegality or conflict with those rules. If arbitrators genuinely apply competition laws, taking into account the party's arguments and providing substantial reasoning for their award. The focus should be on the consequences of recognizing the award in the jurisdiction where enforcement is sought, rather than just the existence of the problematic award in the jurisdiction where enforcement is sought, rather than just the existence of the problematic award. Only when those consequences are intolerable and fundamentally contrary to the principles of law and morality in that jurisdiction should they violate public policy.