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# HARMONISING ARBITRATION AND COMPETITION LAW

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## ABSTRACT

*Although arbitration is a more favoured mechanism for dispute resolution in commercial disputes, its nexus with competition law evokes tensions specially relating to public policy. In India, the arbitrability of competition law disputes is still unresolved, with the Competition Act, 2002 potentially in conflict with the pro-arbitration approach of the Arbitration and Conciliation Act, 1996. In contrast, the United States takes a more pro-arbitration stance, making antitrust disputes arbitrable under federal law. The European Union, however, strikes a conservative middle ground, maintaining intense judicial oversight to insure that awards are not detrimental to the market or public policy objectives of competition law. This article advocates for an Indian framework of harmonisation that is balanced, under which arbitral tribunals can rule on competition-related civil cases, subject to review by the courts. Learning from the US approach to arbitrability and the EU orientation towards post-award review, the article suggests institutional and legal reforms to promote harmony between private adjudication and public enforcement of competition principles in India.*

## KEYWORDS

Arbitration; Competition Law; Public Policy

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# INTRODUCTION

## A. DEFINING ARBITRATION AND COMPETITION LAW

Arbitration is a formal and consensual procedure of dispute resolution, wherein parties agree to refer their disputes or conflicts to an Arbitral Tribunal. This tribunal is typically comprised of one or three arbitrators appointed by the disputing parties through various methods that have usually been decided upon in the arbitration agreement. This agreement will typically also contain the nature of the dispute and rules governing the eventual arbitration.[2] This procedural adaptability affirms the principle of party autonomy in arbitration. Essentially, having a consensual, tailored method ensures an efficient and impartial process for the parties. The parties are given a final and binding decision to their dispute by the tribunal, which is enforceable in law.[3]

Competition law, also known as antitrust law in certain jurisdictions, is a collection of legal principles intended to preserve and foster healthy competition in markets. Its main goal is to provide a level playing field on which businesses compete fairly and consumers enjoy a range of options, fair prices, and innovation. Through the regulation of market conduct, competition law seeks to prevent practices that can distort the competitive process and damage the general market environment. It aims to create an open and dynamic system of markets where companies compete on merit, not manipulation. It safeguards not only competing firms against unfair means but also consumers who have the most to lose from a distorted market.

The introduction of competition law stemmed from a need of the state to monitor business activities that placed distorted markets in a free economy. The objective of competition law is to prohibit practices and agreements that impede competition and particularly affect consumers and citizens in accessing goods and services.[4]

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[2] E. Gaillard and J. Savage, *Fouchard, Gaillard, Goldman On International Commercial Arbitration* (Kluwer Law International, 1999) 241.

[3] Hong Kong International Arbitration Centre, *What is Arbitration?*, HKIAC, *https://www.hkiac.org/arbitration/what-is-arbitration* (last visited 25 April 2025).

[4] Competition Commission of India, *Introduction to Competition Law: Part I – Basic Introduction*, CCI https://www.cci.gov.in/public/images/publications_booklet/en/introduction-to-competition-law-part-1-basic-introduction1652182155.pdf (last visited 25 April 2025).

### B. A CLASH BETWEEN THE TWO

Arbitration is thus a private mode of enforcement between parties, while the state acts as the competition law regulator – necessarily involving aspects of public enforcement.[5] This particular aspect remains a point of contention in harmonizing arbitration with competition law. This has then led to a conflict between the sphere of private enforcement in arbitration vis-à-vis the public enforcement of competition law. A fear stems from the possibility of allowing the parties to settle disputes, without the involvement of regulators. Owing to the fact that arbitration is a private process, competition regulators might not be able to investigate or intervene in the process, which may prevent the companies/ businesses from being scrutinized and kept in check by regulators.

In other words, there is a pervasive fear that arbitration can become a means of avoiding enforcement of competition law. Although arbitrators can settle disputes between parties, they are not able to order corrective measures like curbing anti-competitive behavior or changing market conditions that would be in the interest of the public. While arbitration does provide flexibility and efficiency in dealing with disputes, in cases of anti-competitive conduct, it is oft believed that it must not be used to undermine the enforcement of laws which protect the consumer and the market. However, scholars have increasingly noted that although the two fields seem incompatible, they are also complementary. Arbitration thrives in a *laissez-faire* or free economy, where competition and trade are ideally unrestricted. This, in turn, increases the movement and exchange of competitive goods and services.[6]

This paper analyses Indian jurisprudence to emphasize a harmonization of arbitration and competition law, through a comparative understanding of the jurisdictions of the United States of America and the European Union. These jurisdictions have been preferred for two reasons – the pioneering approach taken by the US in harmonizing arbitration and competition law; and the influence of EU law on Indian Competition Law.[7]

Through an examination of the manner in which the US and EU reconcile the objectives of efficient competition law enforcement and the canons of arbitration, the paper attempts to

[5] GORDON BLANKE AND RENATO NAZZINI, INTERNATIONAL COMPETITION LITIGATION: A MULTI-JURISDICTIONAL HANDBOOK (2013).
[6] Assimakis Komninos, *Arbitration and EU Competition Law*, SSRN (2009) http://ssrn.com/abstract=1520105.
[7] Kashish Makkar, *Will CCI repeat the European Union's mistakes?*, FINANCIAL EXPRESS, https://www.financialexpress.com/opinion/will-cci-repeat-the-european-unions-mistakes/3251001/ (last visited May 5, 2025).

identify lessons that could be used in the formulation of a more harmonious and balanced approach in India.

## MATERIALS AND TERMINOLOGY

This paper uses the terms *competition law* and *antitrust law* interchangeably, acknowledging that *antitrust law* refers to the United States of America [henceforth, US] legal framework and *competition law* to the European Union [henceforth, EU] and Indian legal landscape. However, the two are treated synonymously for the purposes of this paper, unless the context itself necessitates a jurisdictional distinction. It is recognized that both words have their origins in different legal traditions, with 'antitrust law' more readily used in the US legal system, and 'competition law' with the European Union and India. However, what they stand for in terms of its objectives and legal principles is in consonance. This terminological flexibility will allow for a uniform and homogeneous comprehension of the shared themes in this paper.

The primary sources underpinning this paper are legislation, case law, scholarly work and literature. For the Indian analytical work – the Competition Act, 2002 and the Arbitration and Conciliation Act, 2016 ("A&C Act") will be relied upon. From the US perspective – reference will be made to the two federal agencies bearing the responsibility of enforcing antitrust laws, the Antitrust Division of the US Department of Justice and Federal Trade Commission. Instruments such as the Sherman Act, 1890 to deal with anti-competitive agreements and monopoly, and the Clayton Act, 1914 deals with specific activities of businesses and companies such as mergers, tying and other restrictive practices.

In the context of EU competition law, this paper draws on the Treaty on the Functioning of the European Union (TFEU). From the perspective of arbitration, particular attention is paid to relevant legal instruments such as the New York Convention and the UNCITRAL Model Law as legislative sources for both EU and India.

This paper also places considerable emphasis on case law. Judicial and quasi-judicial decisions, especially in the context of antitrust arbitration, have been instrumental in shaping and clarifying the legal landscape. In addition, legal scholarship is drawn upon to support the theoretical framework and argumentation.

## I. Comparative Analysis of US and EU

### A. Position in the United States of America

In the US, there are 2 primary legislations governing antitrust laws – firstly, the Sherman Antitrust Act, 1890, seeks to regulate the criminal violations of agreements to fix prices or wages, rig bids, or allocate customers, workers, or markets.[8] Further, it regulates exclusive contracts, subject to civil enforcement. Secondly, the Clayton Act aims to promote fair competition and prevent unfair business practices that could harm consumers such as tying agreements, predatory pricing and mergers.[9]

**a. Earlier Position :** American Safety v. McGuire

i. Facts of the Case

In the case of *American Safety v. McGuire,*[10] the question of arbitrability of antitrust disputes was discussed in the context of an exclusive license to use trademarks. The parties, American Safety Equipment Corporation ("ASE") and Hickok Manufacturing Co., Inc ("Hickok") entered into a License Agreement. One of the clauses of the Agreement was that the disputes would be settled by arbitration. Over time, there were increased tensions between the parties, and a complaint was filed by ASE against Hickok in the district court. However, Hickok invoked the arbitration clause. ASE argued that considering the antitrust violations in grounds of restrictive business activities concerning the exclusive license, the district court had exclusive jurisdiction to determine that illegality.

ii. Questions before the Court

The court was asked to consider two closely related but distinct issues. First, whether the language of the arbitration clause was sufficiently broad to include disputes involving antitrust law. Second, whether antitrust claims brought under the Sherman Act are the kind of disputes

[8] The Sherman Antitrust Act of 1890; Antitrust Division, U.S. Department of Justice, *The Antitrust Laws*, https://www.justice.gov/atr/antitrust-laws-and-you (last visited February 14, 2025).
[9] The Clayton Antitrust Act of 1914; Antitrust Division, U.S. Department of Justice, *The Antitrust Laws*, https://www.justice.gov/atr/antitrust-laws-and-you (last visited February 14, 2025).
[10] American Safety Equipment Corporation v. J.P. Maguire & Co., 391 F.2d 821.

that can properly be resolved through arbitration – raising the question of whether the matter is arbitrable.

iii. Decision: Negating Arbitration

The bench compromised of Chief Judge Lumbard, Circuit Judges Kaufman and Feinberg. Justice Feinberg delivered the opinion on behalf of the bench. The Court noted that, "a claim under the antitrust laws is not merely a private matter".[11] Notably, the Court noted that antitrust violations can have an impact on a large number of people and inflict staggering economic damage. However, the Court acknowledged that all such matters do not attain such proportions.

This raises a key element – that the Court recognized that all antitrust matters are not of such scale that they are capable of having an impact on public policy. Yet, the Court was hesitant in creating exceptions, as the potential effect was still uncertain.

The Court held that where there is a "pervasive public interest" and on consideration of the "nature of the claims", antitrust disputes must remain in the purview of the Courts.[12] The Court concluded that the district court must decide all issues relating to antitrust claims in the License Agreement and then, arbitration can be opted for. What can then be implicitly seen is that arbitration is perceived as a last resort – which is not the intent of the process.

Through this judgment, a tussle between promoting arbitration and public interest is prevalent. On the one hand, the Court does not wish to create any exemptions to the rule of non-arbitrability but on the other, it recognizes decisions which note the "obligation to shake off the old judicial hostility to arbitration".[13]

**b. MITSUBISHI CASE: PAVING THE WAY**

i. Facts of the Case

With the advent of the *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth*, the position taken by the Federal Court above underwent an overhaul.[14] A Distributor Agreement was entered into by the parties, with a further Sales Procedure Agreement that included an

[11] *Id,*
[12] American Safety Equipment Corporation, *supra* n.10.
[13] American Safety Equipment Corporation, *supra* n.10.
[14] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

arbitration clause. The question that arose was whether antitrust claims are non-arbitrable, even when parties consented to arbitrate them.

ii. Decision

Justice Blackmun, Justice Burger, Justice White, Justice Rehnquist and Justice O'Connor delivered the majority opinion of the Court. Justice Stevens and Brennan formed the dissent.

1. Merits of Arbitration

Justice Blackmun, speaking for the majority, acknowledged that *"The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts…. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."*[15]

Here, the Court noted the evolving stance of arbitration, particularly in a globalising context. This represented a fortification of the Court's fleeting opinion in *American Safety*. Justice Stevens – representing the dissenting opinion - was cautious to protect the costs that a citizen bears to seek remedy in arbitration, having to move to a neutral location and was not confident in the fairness of arbitration.

However, the realm of arbitration has emphasised its procedure to guarantee fairness. Internationally, the United Nations released the UNCITRAL Arbitration Rules, which offers comprehensive rules on arbitration, with checks and balances as to procedure and termination.[16] For example, Article 17 states that,

"*Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the*

[15] *Id.*
[16] United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, 2010.

*proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."*[17]

In other words, it imposes a duty on the tribunal to treat parties with equality and offer reasonable opportunities to both parties to be heard – reflecting universal principles of natural justice. The tribunal must ensure a fair and efficient process in conducting the resolution.

2. Variable types of disputes

Notably, the Court had doubts with relation to the *American Safety* case. The Supreme Court felt that the mere appearance of an antitrust dispute does not alone warrant invalidation of the select forum, on the assumption that the clause is invalid. Further, Justice Blackmun noted that all anti-trust claims, such as vertical restraints, do not require "monstrous proceedings"[18]. In fact, the Court missed that this was raised in *American Safety* yet hesitates in creating exceptions. Here, the Court clearly laid down that a blanket ban on arbitrating competition law disputes is not warranted or in line with global trends regarding arbitration.

3. Intent and Complexity

Focusing on the intent of arbitration, Justice Blackmun noted that the desire to arbitrate stems from the desire to streamline proceedings and receive expeditious results that will serve the needs of the parties and keep lower effort and costs. The Court affirmed that arbitrators are often drawn from the legal and business community, and assistance can be sought in antitrust matters.

A significant approach by the Court here was to dispense of the criticism that tribunals are not competent to understand the complexity of such forms of disputes. Justice Blackmun noted that "adaptability and access to expertise"[19] are hallmarks of arbitration. It was further noted that the "*subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal."*[20]

[17] *Id.* at Article 17.
[18] Mitsubishi Motors Corp., *supra* n. 15.
[19] *Id.*
[20] Mitsubishi Motors Corp., *supra* n. 15.

The Court recognized that tribunals are preferred owing to their expert panel and expeditious results. In case of competition law disputes, it often involves economics and economic theory. For example, the IBA Rules on Taking of Evidence in International Arbitration allows use of expert testimony to aid in resolution and specialized knowledge.[21] Arbitration continues to be used, even in complex trade disputes, where sovereign states have signed agreements to resolve disputes involving international trade.[22]

4. Review

The Court addressed a key public policy concern about arbitrating antitrust disputes by introducing the "second look" doctrine – visiting the conflict between private and public enforcement discussed earlier. The Court acknowledged that at the stage of enforcement, the court will have an opportunity to ensure that the "legitimate interest" in the enforcement of antitrust laws has been addressed.

In other words, courts will have the chance to review the outcome, ensuring that the objectives of antitrust law are upheld – not subverting the public policy aspect. It recognizes the need to protect the enforcement of antitrust laws and reassures that courts will play a vital role in this process. This balance between the efficiency of arbitration and the protection of antitrust interests is central to the court's approach.

### B. Position In EU: Balancing Arbitration and Competition

i. Decision

In the case of *Eco Swiss China Ltd. v Benetton International N.V.,* the Court of Justice of the European Union ("CJEU") initiated proceedings for stay of enforcement of an award rendered relating to breach of a licensing agreement, claiming it was violative of public policy.[23]

> The Court, comprising of the judges C. Gulmann, J.L. Murray, D.A.O. Edward, H. Ragnemalm, L. Sevón and M. Wathelet decided that national courts must be vigilant and can annul an award if it is contrary to Articled 81 of the EC Treaty – that is,

[21] International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration,* 2020.
[22] *See Multi-Party Interim Appeal Arbitration Arrangement (MPIA),* GENEVA TRADE PLATFORM, https://wtoplurilaterals.info/plural_initiative/the-mpia/ (last visited May 3, 2025).
[23] Judgment C-126/1997 by the European Court of Justice delivered 1 June 1999.

> "*1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:*
>
> *(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
>
> *(b) limit or control production, markets, technical development, or investment;*
>
> *€ share markets or sources of supply;*
>
> *(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
>
> *€ make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*
>
> *2. Any agreements or decisions prohibited pursuant to this article shall be automatically void*." [24]

In other words, any anti-competitive agreement is deemed void and contrary to public policy. Thus, the Court decided an award which has such anti-competitive effects can be annulled on grounds of public policy. This case is particularly important in highlighting how national courts must handle enforcement and annulment of arbitral awards that might conflict with EU law, which prohibits anti-competitive agreements.

ii. Implications

This decision affirmed the *Mitsubishi* approach – that matters of competition law are arbitrable. Even if not argued before the Tribunal or not considered therein, in case competition law issues are raised to challenge the award, it is subject to annulment. In other words, the CJEU's ruling

[24] Treaty establishing the European Community - Part Three: Community policies - Title VI: Common rules on competition, taxation and approximation of laws - Chapter 1: Rules on competition - Section 1: Rules applying to undertakings - Article 81 - Article 85 - EC Treaty (Maastricht consolidated version) - Article 85 - EEC Treaty

emphasized that national courts in EU Member States must assess whether an arbitral award violates EU law when considering the recognition or enforcement of that award.

If an arbitral award breaches Article 101 of the TFEU, national courts are obligated to annul or refuse to enforce that award, even if the arbitration was conducted outside the EU, as such violations are seen as undermining the broader principles of EU law.

In essence, the *Eco Swiss* case highlighted the balance that must be struck between respecting arbitral autonomy and upholding EU competition rules, ensuring that international arbitration does not facilitate anti-competitive practices within the EU. Even though it is supposed to be an alternative to traditional court proceedings, arbitration cannot be used to get around important laws, such as competition law.

## II. Indian Position and Way Forward: Borrowing from US and EU

### C. ARBITRABILITY

Arbitrability is a matter of law that concerns the extent of disputes that parties can legally submit to arbitration, a private and consensual dispute resolution process, rather than subject them to public judicial processes. This is not an absolute rule but is rooted firmly in the sovereignty of each state, which still has the prerogative to determine what kinds of disputes are arbitrable within its borders. The limits of arbitrability are informed by the then-prevailing public policy concerns that define a state's legal, social, and ethical priorities. Such concerns change over time and vary across states, so the factors that inform arbitrability under one jurisdiction or at one time can be considerably different under another jurisdiction or during another period, resulting in arbitration practices being diversified across the world.[25] The New York Convention and the Model Law leave it to the states to decide the question of arbitrability, considering each states social and economic conditions.[26]

Under the UNCITRAL Model Law on International Commercial Arbitration, a court can set aside an arbitral award where it finds that the subject matter of the dispute is not capable of being resolved by arbitration according to the law of the State.[27] The non-arbitrability doctrine is founded on the premise that some disputes are so intimately related to public rights or third-party interests that they cannot be settled by private arbitration. [28]

Simply put, arbitrability refers to the capacity of a tribunal to adjudicate on the concerned subject-matter or 'capable of settlement by arbitration'.[29] Under the A&C Act, arbitrability is governed by judicial decisions, not through the Act itself. The only reference to arbitrability is contained in Section 2(3) of the Arbitration Act which merely provides that "certain disputes may not be submitted to arbitration".[30]

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[25] INDU MALHOTRA, O.P. MALHOTRA ON LAW AND PRACTICE OF ARBITRATION AND CONCILIATION (Thomas Reuters, 2014), 443.
[26] *Id.*
[27] Article 34(2) (b) (i).
[28] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION (Kluwer Law International, 2009).
[29] The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(1) and art. V(2)(a), June 7, 1959, 330 U.N.T.S. 38; United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration art. 34(2)(b) and 36(1)(b)(i), 1985 U.N.G.A. Res. 40/72 ( 1985), as amended by U.N.G.A. Res 61/33 (2006).
[30] Aftab Singh v. Emaar MGF Land Limited (2018) 14 S.C.R. 791.

The importance of arbitrability is such that if the tribunal wrongly holds that a dispute is arbitrable, the party can challenge the award under Section 34 (2)(b)(i) of the A&C Act. Even where there exists a valid arbitration agreement and the dispute is covered by the arbitration agreement, the court will refuse an application under Section 8 to refer the parties to arbitration, if the subject matter can be exclusively adjudicated only by a public forum or the relief can only be granted by a special court or Tribunal.

The doctrine of arbitrability is the juncture at which contractual freedom meets the imperatives of public adjudication. Arbitrability is the site where the parties' freedom to contract and choose arbitration as the dispute resolution forum of their preference is curbed by the duty of the state to safeguard public societal interests. This limit is usually determined by the character of the controversy itself – some things, like those involving criminal law, family law (e.g., child custody cases), and bankruptcy are routinely beyond the reach of arbitration.[31]

In the landmark judgment of *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd,* the Supreme Court discussed arbitrability of disputes. Presently, this decision stands as the test for arbitrability. However, it is crucial to note the critique levied against this approach. The most crucial element laid down by the Court, for the purpose of this paper is:

> *"Whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the Arbitral Tribunal) or whether they would exclusively fall within the domain of public fora (courts)."*

At this juncture, there are two questions to consider – whether the Competition Act bars the jurisdiction of tribunals; and whether competition law disputes are arbitrable.

### i. Exclusion of jurisdiction

Under Section 61 of the Competition Act, no civil court has jurisdiction to hear any matter where the CCI or the Appellate Tribunal has jurisdiction. Under Section 62, the provisions of the Competition Act will. be in addition to other laws. A similar jurisdictional bar was considered by the Guwahati High Court, concerning RERA. Similar to Section 61 above,

[31] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd (2011) 7 S.C.R. 310, 22.

Section 79 of the RERA bars invocation of civil courts. The High Court held that an Arbitral Tribunal is not a Court. Thus, recourse to the Arbitration Act is not barred.[32]

The Indian courts have, in a string of rulings, indicated a uniformly pro-arbitration trend, especially in situations where the arbitrability of the disputes is in issue, on account of the presence of statutory tribunals. Of particular note was the court's ruling in *Kingfisher Airlines Limited v. Prithvi Malhotra Instructor*, where it dealt with whether the constitution of a statutory tribunal would automatically exclude arbitration. The court ruled that the creation of a special tribunal does not *ipso facto* preclude recourse to arbitration. It insisted that legislative intent to exclude arbitration must be express or clearly implied, especially where the statute involved grants special rights, duties, and adjudicatory powers that are essentially incompatible with private resolution of disputes.[33] The judgment made it clear that unless the statutory scheme is so exhaustive that it leaves out arbitral mechanisms by necessary implication, the jurisdiction of the arbitral tribunals must not be excluded.

This rationale was restated in *HDFC Bank v. Satpal Singh*, wherein the court analyzed the arbitrability of a dispute that arose in the context of debt recovery. The contention advanced was that the existence of specialized debt recovery tribunals under the Recovery of Debts Due to Banks and Financial Institutions Act (RDDBFI Act), 1993, indicated an exclusion of arbitration. However, the Court dismissed this argument and reaffirmed that except where the statute expressly forbids arbitration or impliedly establishes an exclusive adjudicatory scheme by vesting exclusive powers in a tribunal, which are powers that are not capable of being exercised by an arbitral tribunal – the availability of a statutory remedy does not in itself preclude arbitration.[34] The Court allowed arbitration to continue, thus respecting party autonomy and the doctrine of minimal judicial intervention as enshrined in the A&C Act.

Furthermore, in *M/S. National Seeds Corpn. Ltd vs M.Madhusudhan Reddy & Anr*, the Court noted that akin to S. 62 of the Competition Act, S. 3 of the Consumer Protection Act declares it is in addition to laws, not in derogation thereof. Thus, the Court held that the remedy of

[32] Shashwat Singh, *No bar on invoking arbitration even if alternative remedy available under RERA Act: Gauhati High Court,* BAR AND BENCH (June 14, 2024) https://www.barandbench.com/news/no-bar-invoking-arbitration-alternative-remedy-rera-act-gauhati-high-court#:~:text=News-,No%20bar%20on%20invoking%20arbitration%20even%20if%20alternative%20remedy%20available,Debt%20Recovery%20Tribunal (last visited May 5, 2025).
[33] Kingfisher Airlines Limited v. Prithvi Malhotra Instructor (2013) (1) AIR Bom R 255.
[34] HDFC Bank v. Satpal Singh Bakshi 2013 (134) DRJ 566.

arbitration can be sought as an alternative.[35] The above decisions must be contrasted with the decision of *Vimal Kishore Shah v Jayesh Dinesh Shah* wherein under the Indian Trust Act, 1882, there was an implied bar on jurisdiction of the tribunal as exclusive jurisdiction was granted to the principal civil court of original jurisdiction.[36]

Thus, *prima facie*, the Competition Act *per se* does not exclude the application of the A&C Act. Although a special tribunal is created, the Competition Act does not expressly preclude arbitration. However, an incorrect approach has been taken by courts in this regard. In *Union of India v CCI,* the Delhi High Court interpreted the bar to the jurisdiction of civil courts as a bar to arbitration – when the same has no mention in the statute.[37]

The reading that precludes competition law disputes from arbitration by virtue of the exclusion of civil court jurisdiction in competition legislation is too narrow and legalistic. Although the Competition Act in most jurisdictions allocates the main enforcement functions to public institutions such as competition commissions or regulatory agencies, it does not *per se* prohibit arbitration in competition law related matters. This reading is further inconsistent with international perspectives. In the EU and US as discussed prior, courts have taken a broad approach – recognizing that tribunals are competent to handle competition law disputes.

In other words, statutory silence regarding arbitration must not be interpreted as exclusion, especially when arbitration can be a more efficient and flexible forum for the resolution of complex commercial disputes. A more liberal and contemporary approach would acknowledge that although public enforcement is still essential for systemic regulation of the market, private enforcement by arbitration can be a complementary role.

### ii. Rem versus Personam

The Supreme Court in *Booz Allen* highlighted the importance of an enlightened approach, cautioning against a formalistic or unduly rigid application of the customary differentiation between rights in rem (rights enforceable against the world at large) and rights in personam

[35] M/S. National Seeds Corpn. Ltd vs M.Madhusudhan Reddy & Anr 2012 (2) SCC 506.
[36] Vimal Kishor Shah & Ors vs Jayesh Dinesh Shah & Ors [2016] 7 S.C.R. 102.
[37] Union Of India vs Competition Commission Of India And Ors AIR 2012 DELHI 66.

(rights enforceable against particular persons).[38] The Court purposively clarified that such differentiation is not an absolute or rigid exclusionary doctrine of arbitration. It observed that controversy over subordinate or ancillary in personam rights, which stem from or relate to in rem rights, have always been considered arbitrable.

In enunciating this rule, the *Booz Allen* case created a progressive platform, announcing a break with narrow interpretations of arbitrability. While certain categories of disputes, namely those purely in rem – are generally categorized as non-arbitrable because of their public interest dimensions or statutory exclusivity, the Court's rationale brought a progressive touch. It pried open possibilities to expand the field of disputes subject to arbitration even if they carry an element of in rem rights, provided that the essential dispute concerns enforceable personal obligations. This trend reflects a changing judicial mindset that attempts to reconcile the sanctity of public rights with the increasing acknowledgment of arbitration as a viable and consensual means of resolving disputes.

In *Vidya Drolia,* the Court proposed a 4-fold test to determine whether the subject matter is amenable to arbitration:[39]

*(1) when cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem;*

*(2) when cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;*

*(3) when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and*

*(4) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).*

In *A. Ayyasamy v A. Paramasivan*, the Supreme Court of India unequivocally stated that disputes relating to "anti-trust/competition laws" are generally treated as non-arbitrable.

[38] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd (2011) 7 S.C.R. 310, 22.
[39] Vidya Drolia v. Durga Trading Corporation 2019 INSC 290.

However, the rationale for the same was only by referring to one book.[40] The same was re-iterated in *M. Hemalatha Devi v. B. Udayasri.*[41]

In the book referred to by the Supreme Court, the author merely asserts that these disputes are not arbitrable.[42] However, a sweeping generalisation such as that taken by US Courts in *American Safety* ignores the nature of disputes and international perspectives. One crucial distinction is disputes necessarily involving public enforcement as against private enforcement. Arbitration can be used as a private means by which people or companies settle disagreements pertaining to competition law. Companies who believe they have been injured by anti-competitive conduct and want to seek remedies outside of the public court system may fall under this category. In *Mitsubishi as well,* the Court recognised that not all competition law proceedings are of such 'monstrous' gravity but can merely affect inter-se rights.

Under S.20, for example, the CCI can conduct inquiries into combinations wherein it has caused or is likely to affect competition.[43] It is a right *in rem*, that is, exercisable against the whole world at large – with an analysis into the actual or potential level of competition through imports, extent of barriers of entry, inter alia. The activities of one party adversely affect other competitors and consumers – having an *erga omnes* effect. Therefore, private enforcement is not possible, owing to the public nature of competition law disputes, involving a right *in rem*. On the other hand, there can exist rights *inter se* between parties such as an abusive clause in a distributorship agreement, such as *Mitsubishi.* Here, the agreement is between two parties, where one exploits its dominant position. Although third parties may get affected, there is a subordinate right *in personam* that is plainly enforceable – that is, enforceable or protected against a specific person.

In *Vidya Drolia,* the Court noted that the mere involvement of a public policy element or complexity does not render the matter non-arbitrable. Akin to the rationale of *Mitsubishi*, the mere existence of a competition law dispute does not render the matter not amenable to arbitration. The crucial distinction lies in what the parties are asking for. When the relief sought involves public enforcement or penalties meant to protect broader market interests, it is appropriate for such matters to be handled by the CCI. However, when the dispute is essentially

[40] (2016) 10 SCC, 401.
[41] (2024) 4 SCC 255.
[42] MALHOTRA, *supra* n.27, at 445.
[43] The Competition Act, 2002, § 20.

between private parties and concerns contractual or civil claims, even if these involve allegations of anti-competitive conduct, then there is room for such issues to be resolved through arbitration.

Moreover, considering the influence of EU law on Indian competition law, it has increasingly been noted that monitoring of behavioural remedies in the EU benefit from arbitration. Often, as a remedy for approving combinations, parties offer behavioural commitments – wherein the concerned enterprise regulates their activity, in lieu of approving mergers.[44] In the EU, the use of an arbitrator to monitor behavioral commitments offered more flexibility and increased thoroughness. For example, in the NewsCorp/ Telepi case, in which there had been a dispute arising out of the behavioural commitments that were offered to govern the merger of the two entities. In this case, the disputes were referred to arbitration, wherein the Tribunal had then proceeded to hold that the respondents in the case had defaulted in the application of some articles of the commitments that were made.[45]

Further, the OECD has noted that arbitrators are expected to apply competition law and have an obligation to do so. Arbitrators' responsibilities have previously been questioned, with the claim that since arbitration is subject to party autonomy, arbitrators shouldn't go beyond what the parties desire. Nonetheless, it should be expected that arbitrators will apply competition law if legal systems permit arbitration of questions pertaining to competition law. This includes the use of competition law even after the parties have reached an agreement. In order to show the courts during the review process that they have addressed the competition law concerns consistently, logically, and professionally; the arbitrators have a special responsibility to provide thorough justification for their award.[46]

[44] MARC BLESSING, ARBITRATING ANTITRUST AND MERGER CONTROL ISSUES (Helbing & Lichtenhahn, 2003).
[45] *Id.;* Case No COMP/M. 2876 - Newscorp / Telepi.
[46] OECD Roundtables on Competition Policy Papers, *Arbitration and Competition* (December 13, 2011) https://www.oecd.org/en/publications/arbitration-and-competition_828bbff7-en.html (last visited May 5, 2025).

### D. INTENT AND COMPLEXITY

Echoing the *Mitsubishi* case, Indian courts must recognize the fundamental principle of international contracts – that parties benefit from resolving disputes in the manner they wish. In *Food Corpn. of India v. Indian Council of Arbitration,* noted that the intent of the A&C Act was to minimize the role of courts and promote alternate mode of dispute resolution.[47] In light of the same, an unnecessarily conservative view advocating for an absolute ban is unwarranted.

In the case of *Union of India v. Competition Commission of India* in the Delhi High Court, an arbitration agreement existed between the parties. However, the Court held that "the scope of the proceedings", and the focus of its investigation and consideration is very different from the scope of an enquiry before an Arbitral Tribunal. An Arbitral Tribunal may not go into aspects of abuse of dominant position by one of the contracting parties. Its focus is to examine the disputes in the light of the contractual clauses.[48] In other words, matters concerning abuse of dominant position are beyond the Tribunal's scope. The Court pointed to the practical difficulties of allowing arbitration regarding this, stating that "*the Arbitral Tribunal would neither have the mandate, nor the expertise, nor the wherewithal to conduct an investigation to come up with a report, which may be necessary to decide issues of abuse of dominant position by one of the parties to the contract*".[49]

This approach echoes the earlier approach in the *American Safety case.* However, this conception is flawed owing to the nature of expertise of arbitrators. In India, the know-how required to resolve competition law disputes already exists in arbitration tribunals because of the expanding number of arbitrators with specialist knowledge and expertise in legal and economic areas. Indian arbitration tribunals have developed immensely in order to overcome the challenges offered by complex commercial and regulatory cases, including those relating to competition law. This experience is there not just with the arbitrators themselves but also with the infrastructure, institutional backing, and the entire network of practitioners who are participating in the process of arbitration. In the 2018 LCIA Note on Experts, it has been noted that experts are used in several fields, including economics and accountancy.[50] Experts are

[47] (2003) 6 SCC 564.
[48] A.I.R. 2012 Del 66.
[49] *Id.,* at 6.
[50] London Court of International Arbitration (LCIA), *Note on Experts* (2018) https://www.acerislaw.com/wp-content/uploads/2022/03/2018-LCIAs-Note-on-Experts-in-International-Arbitration.pdf (last visited May 4, 2025).

assumed to act with independence and neutrality.[51] As discussed in *Mitsubishi,* parties often prefer arbitration owing to the consensual selection of experts in the matter. Several arbitration centres, such Delhi International Arbitration Centre, and the Mumbai Centre For International Arbitration, which list their panel of arbitrators, who have specific expertise in several practice areas.

Under S. 27 of the A&C Act, the Tribunal can appoint experts who can participate in the oral hearing. The inclusion and involvement of expert witnesses in competition law arbitration also enhances the tribunal's technical expertise. In competition law cases, economic experts, regulatory experts, and industry experts are often appointed to shed light and provide analysis on intricate market dynamics and economic impacts. These experts help arbitrators by providing objective and evidence-based analysis that supplements the arbitrators' legal and regulatory expertise. Arbitrators, with their experience in both economics and law, are in a unique position to understand and analyze the testimony of these experts. In a case concerning cartel allegations, for example, an economic expert may give evidence on market behavior, trends in prices, and the effects on consumers.

Arbitrators, with their experience in both economics and law, are in a unique position to understand and analyze the testimony of these experts. In a case concerning cartel allegations, for example, an economic expert may give evidence on market behavior, trends in prices, and the effects on consumers. Further, checks and balances on such expert are present under S.12(1)(b) of the A&C Act relating to grounds of challenge for the appointment of an arbitrator, particularly the Fifth Schedule. Here, an individual approached to be an arbitrator must disclose if he has submitted an expert opinion to either of the parties prior.

Arbitration centers such as the Indian Council of Arbitration (ICA) and Delhi International Arbitration Centre (DIAC) have developed special programs to make arbitrators proficient to deal with specialized cases, such as competition law cases.[52] These institutions provide continuing professional development, advanced training, and seminars, including on economic analysis. These training programs have assisted in ensuring that the arbitrators are well

[51] Steven Bennett, *Use of Experts in Arbitration: Alternatives for Improved Efficiency,* 73 DRJ https://go.adr.org/rs/294-SFS-516/images/73%202%20-%2010-Bennett-Expert%20Submissions%20In%20Arbitration.pdf.

[52] *See* Indian Council of Arbitration, *Arbitrators,* https://icaindia.co.in/arbitrators (last visited May 4, 2025); Delhi International Arbitration Centre, *Panel of Arbitrators,* https://dhcdiac.nic.in/panel-of-arbitrators/ (last visited May 4, 2025).

informed about recent developments in competition law and able to deal with the intricacies involved in such disputes.

The notion that expertise is lacking in resolution of these disputes thus cannot stand. Not only are there expert arbitrators, but calling for expert opinions, with checks on the same, cannot be ignored. The presence of specialized training, the growing sophistication of competition law disputes, and the institutional backing of arbitrators possessing special expertise all provide for the pool of expertise in Indian arbitration tribunals. With support from expert witnesses and institutional infrastructures, drawing on legal, economic, as well as regulatory experience, Indian arbitration courts have the capacity to efficiently arbitrate competition law conflicts, offering sound, prompt, and reasonable awards that promote the evolution of Indian competition law jurisprudence.

### E. A Changing Perspective on Alternate Forms of Redressal

A willingness to encourage voluntary proceedings has been seen through the adoption of settlements. The Competition Commission of India (Settlement) Regulations, 2024 (henceforth, "Settlement Regulations") brought forth by the Competition (Amendment) Act, 2023 constitute a profound paradigm shift in the antitrust enforcement regime in India, characterized by a more practical, efficiency-focused, and cooperative style of redressing competition concerns. In essence, the regulations seek to provide businesses, against whom contravention has been found by the Director General, with a structured means of resolving the issue without facing lengthy and adversarial adjudicatory proceedings at the Competition Commission of India (CCI).

This system is not merely intended as a procedural short cut, but as a strategic mechanism to improve regulatory effectiveness by saving institutional resources and enabling the CCI to prioritize complex or high-impact cases which necessitate further examination. Settlements also foster cooperation through rewards in the form of lower penalties and quicker legal closure contingent on parties' acceptance of possible non-compliance and constructive interaction with the regulator. For companies, this provides an avenue to rapidly settle disputes, prevent reputational damage, decrease litigation expenses, and maintain business continuity, which is clearly essential in highly competitive economies. Simultaneously, the mechanism for settlement seeks to promote an enhanced culture of compliance by imposing upon parties'

introspection and fixing of their conduct through interaction with the CCI, as opposed to viewing enforcement as solely punitive.[53]

Though the Settlement Regulations operates under the regulatory jurisdiction of the CCI, its structure and objectives bear close resemblance to prime characteristics of arbitration, which is a tried-and-tested ADR technique. Arbitration is renowned for its voluntary character, neutrality, flexibility, confidentiality, and enforcement, rendering it a go-to option for resolving commercial disputes in an effective manner. The following sections point out how the Settlement Regulations reflect such arbitration-like features.

Arbitration itself is based fundamentally on mutual consent. The parties agree that their differences should be resolved by a third-party decision-maker who is neutral. Likewise, the Settlement Regulations also hinges on voluntarism, offering enterprises the possibility of making settlement or commitment applications rather than going through formal adversarial processes. Voluntarism reinforces the twin theme of party autonomy that is fundamental to arbitration.

One of the main advantages of arbitration is its efficiency compared with traditional litigation. The Settlement Regulations follows a similar pattern by placing severe time limits on the processing of applications. Settlement proceedings should be completed within 180 days, and commitment proceedings within 130 days, with extensions permissible only upon legitimate grounds.[54] This time-limited strategy conforms to arbitration's accelerated procedure, like the ICC's Expedited Procedure Rules, which are used in lower-value claims to provide speedy resolution.

Arbitration provides parties with the ability to create tailored solutions, as opposed to the typically rigid nature of court decisions. The Settlement Regulations model demonstrates this flexibility by permitting businesses to propose behavioral or structural commitments, or settlement terms, that address explicitly identified competition problems. For example, if a firm were accused of abusing dominance, the CCI may accept proposed terms such as better market access or new price models if these redress the competition effectively. In essence, this

[53] Competition Commission of India, *General Statement,* https://www.cci.gov.in/images/whatsnew/en/cci-settlement-regulations-2024-general-statement1709738560.pdf (last visited May 5, 2025).
[54] Abhay Joshi et.al, *CCI (Settlement) Regulations, 2024 & the CCI (Commitment) Regulations, 2024*, ELP, https://elplaw.in/leadership/cc-settlement-regulations-2024-the-cci-commitment-regulations-2024/ (last visited May 5, 2025).

approach complements arbitration's ability to try novel solutions in the form of performance-conditioned remedies or segmented implementation schemes suitable to the peculiarity of the dispute.

### F. SECOND LOOK

The "second look doctrine," originating in the *Mitsubishi* case, is a bedrock of judicial review of competition law disputes in arbitration.[55] It enables national courts to scrutinize arbitral awards at the stage of enforcement to ensure that arbitrators have sufficiently addressed issues of competition law. The U.S. Supreme Court in Mitsubishi put a premium on the fact that although arbitration is favored, it must be guaranteed that awards will not violate antitrust laws, which are instrumental to public policy. The review does not amount to a renewed examination of merits but is an inquiry into whether the arbitral tribunal applied itself to competition law with reasonable efforts and arrived at a conclusion in accordance with public policy. For example, courts can invalidate or deny enforcement of awards that impose hardcore anti-competitive measures or flagrantly disregard competition law issues raised by the parties. This ensures that parties cannot use arbitration to evade mandatory laws, thus preserving the integrity of competition policy.

A review of an arbitral award, in light of public policy concerns, as discussed in *Mitsubishi,* can be seen in two approaches. Under the maximalist approach, when an arbitral award is challenged or subject to enforcement, national courts should carry out an exhaustive review of the whole case and all the related evidence. The rationale is to avoid using arbitration as a means to circumvent competition law. Courts are empowered to closely examine whether competition law has been properly applied during the arbitration procedure, ensuring antitrust principles are upheld.[56]

Conversely, the minimalist approach is more relaxed in nature. No preferential treatment is accorded to awards covering competition law concerns in this case, with court intervention not being favored over arbitration to settle disputes. The basis of this approach is that an extensive review would undermine the whole purpose of arbitration itself, which is based on trust in

[55] Kanishka Bhukya, *Harmonizing Arbitration and Competition Law Disputes: Pursuing Consistency In Adjudication,* THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION, https://aria.law.columbia.edu/harmonizing-arbitration-and-competition-law-disputes/ (last visited May 5, 2025).
[56] OECD Roundtables on Competition Policy Papers, *Arbitration and Competition* (December 13, 2011) https://www.oecd.org/en/publications/arbitration-and-competition_828bbff7-en.html (last visited May 5, 2025).

arbitrators and the process. Courts should intervene only to set aside an award where there has been a patent contravention of public policy.[57] The advantage of this minimalist stance acknowledges not all infringements of competition law are inevitably in public interest. Competition law tends to involve intricate economic analysis, possibly more appropriate for a court's technical expertise than for an arbitral tribunal.

The Supreme Court has clarified its scope of review under Section 34 of the A&C Act, reflecting the minimalist approach.[58] The Court in the case of *Batliboi Environmental Engineers Ltd. v. Hindustan Petroleum Corpn. Ltd.,* asserted that even though arbitration is a confidential dispute resolution process, courts are bound to intervene where an arbitral award is found to be unfair, arbitrary, or legally unsound in some important manner.[59] The Court clarified that arbitral proceedings still need to comply with basic legal norms, such as due process, fairness, and reasonableness. These requirements are needed to prevent the decision in arbitration from being either unjust or legally flawed. In the event that the award is not conforming to these minimum requirements, the Court said that intervention is proper to rectify injustice.

For this purpose, the Court cited the seminal *ONGC Ltd. v. Saw Pipes Ltd.* case, which expanded the notion of "public policy" in Section 34 of the A&C Act. The Court defined that "public policy" involves more than adherence to the law in a technical sense; it involves issues relating to the greater good of the public and social interests.[60] With regard to this case, the Court underscored that in the event an arbitral award is against public interest at large or detracts from cardinal principles of justice, including fairness or justice, the courts will have the discretion and obligation to act.

Although arbitration remains a confidential forum for resolving conflicts, the readiness of the Court to intervene if public policy comes into play ensures that it does not lose sight of the very basic pillars of justice and fairness. This decision reminds us that even such private systems of

[57] OECD Roundtables on Competition Policy Papers, *Arbitration and Competition* (December 13, 2011) https://www.oecd.org/en/publications/arbitration-and-competition_828bbff7-en.html (last visited May 5, 2025).
[58] SC discusses scope of Judicial Interference with arbitral awards under Section 34 of A&C Act, SCC ONLINE, https://www.scconline.com/blog/post/2023/09/28/sc-discusses-scope-of-judicial-interference-with-arbitral-awards-legal-news/ (last visited May 4, 2025).
[59] Batliboi Environmental Engineers Ltd. v. Hindustan Petroleum Corpn. Ltd., 2023 SCC OnLine SC 1208
[60] Oil & Natural Gas corporation Ltd. v. Saw Pipes Ltd. 2003(5) SCC 705

settling disputes must stay attuned to the public interest and the general legal principles that protect society.

## CONCLUSION

The intersection of competition law and arbitration in India continues to be at a nascent stage, with traditional judicial approaches and institutional constraints. Indian courts have viewed competition law as a public policy-related, only concerning rights in rem and thus, outside the scope of arbitration. The lack of express judicial pronouncements categorising the arbitrability of disputes arising under competition law has blurred the lines regarding the same. In contrast, the United States' method, as enunciated in *Mitsubishi* adopts a liberal, arbitration-compliant paradigm. The approach reinforced party autonomy and the enforceability of arbitration agreements even in intricate, antitrust litigation, subject to the precondition that procedural fairness is maintained. The EU takes a more cautious stance, emphasising that awards must comply with competition law and policy.

India remains rigid akin to Justice Feinberg's opinion in *American Safety,* casting doubt on expertise and a fear on the impact on public policy. However, just as they were allayed by Justice Blackmun in *Mitsubishi,* the global trend of arbitration and its capacity to handle complex disputes can no longer be ignored.

Indian courts should provide clearer guidelines for differentiating between competition law disputes concerning right in rem and personam – clarifying the scope of arbitrability. Moreover, lessons from other jurisdictions, specifically the nature of experts can encourage increased belief in arbitration. India must borrow and take measures to balance respecting regulatory intervention with effective resolution through other forms – a push towards the later is seen through the Settlement Regulations. A balanced, jurisprudentially justified paradigm can ensure neither party autonomy nor competition law enforcement are compromised at the end, promoting commercial certainty and public interest.