

ASSESSING THE ARBITRABILITY OF ANTI-TRUST DISPUTES

SAKSHAM GADIA AND LAVANYA MALANI*

The rise of arbitration in dispute resolution has sparked debate on its suitability for antitrust cases. While arbitration offers confidentiality and efficiency, concerns about regulatory oversight challenge its role in competition law. This paper examines Indian judicial precedents and statutory provisions to assess arbitration's feasibility in antitrust disputes. The Vidya Drolia test (2021) indicates some private claims may be arbitrable, but the Competition Act, 2002 grants exclusive jurisdiction to the CCI and NCLT, barring arbitration in public interest cases. Comparing U.S. and European perspectives, the U.S. Supreme Court in Mitsubishi Motors (1985) introduced judicial review of arbitral awards in antitrust cases. The European Court of Justice in Eco Swiss (1999) acknowledged arbitration's role while ensuring legal compliance. As India embraces ADR, this paper advocates for reforms allowing arbitration in private antitrust claims with CCI oversight. A balanced approach can improve dispute resolution while maintaining regulatory integrity, aligning India with global practices.

TABLE OF CONTENTS

I.	INTRODUCTION	120
II.	ARBITRABILITY OF COMPETITION LAW DISPUTES IN INDIA	121
III.	POSITION OF AMERICAN JURISPRUDENCE	126
IV.	POSITION OF EUROPEAN JURISPRUDENCE	128
V.	SHOULD WE MAKE A CASE FOR CHANGE?	129
VI.	CONCLUSION	131

I. INTRODUCTION

In today's world, where global trade and commercial conflicts are constantly escalating, the utilisation of alternate dispute resolution ('ADR') has become a

* 5th Year Law Students at Jindal Global Law School.

widespread mechanism,¹ wherein arbitration has taken the centre stage for dispute resolution.² Majority of countries permit settlement of disputes via arbitration,³ with the awards of the arbitral tribunal being binding in nature.⁴ Arbitration has become an important method of dispute resolution instead of court proceedings,⁵ with one of the foremost merits for opting for arbitration being the veil of confidentiality and private nature that comes with it.⁶ This veil of secrecy and the intricate private nature of the resolution process invoke the age-old debate, i.e., whether these mechanisms can be utilised to resolve disputes intricate of public law nuances.⁷ The arbitrability of antitrust disputes therefore becomes fundamental to examine in a situation where the opposing parties possess an already existing contractual relationship, and the said contract contains a mandate to refer any potential disputes to arbitration.⁸ Therefore, the pertinent issue that remains to be examined is whether an arbitral tribunal can preside over competition law disputes. Thus, this paper seeks to shed light on this critical issue. This article first seeks to address the issue as to whether competition law disputes are arbitrable in the Indian context. In doing so, this discourse will evaluate the notion of arbitrability and the various tests pertaining to it. Further, the paper highlights the position of comparative jurisdictions of American and European Union ('EU') courts on the notion of arbitration in anti-trust disputes, and how the concept has evolved over time in their jurisdictions. The paper finally enumerates the potential advantages for allowing arbitration of competition law disputes and concludes that the legislature must undertake cohesive amendments to ensure arbitrability of competition law disputes.

II. ARBITRABILITY OF COMPETITION LAW DISPUTES IN INDIA

¹ Marna Lourens, 'The Issue of Arbitrability in the Context of International Commercial Arbitration' (Part I) (1999) 11 SAMLJ 363, 363.

² Francisco Orrego Vicuña, 'Arbitration in a new International Alternative Dispute Resolution System' (2001) 18 ICSID 2.

³ Alexandra Theobald, 'Mandatory Antitrust Law and Multiparty International Arbitration' (2016) 37 UPJL 1059.

⁴ Phillippe Fouchard et al, Fouchard Gaillard Goldman on International Commercial Arbitration (1st edn, Kluwer Law International, 1999), 9-10.

⁵ Steven C. Nelson, 'Alternatives to litigation of international disputes' (1989) IC, 187.

⁶ Andrew Tweeddale, 'Confidentiality in Arbitration and the Public Interest Exception' (2005), 21 AI, 59.

⁷ Robert B. von Mehren, 'From Vynior's Case to Mitsubishi: The Future of Arbitration and Public Law' (1986), 12 BJIL, 583.

⁸ Tanya Choudhary, 'Arbitrability of Competition Law Disputes in India - Where are we now and where do we go from here?' (2016) 4 IJAL, 69.

The primary consideration in arbitrability of competition law disputes is whether the same can be adjudicated by private arbitral tribunals or is it reserved for the public fora. To understand this, it is pertinent to first examine the concept of arbitrability. Universally, there does not exist any cogent definition of as to what the ‘arbitrability’ of any conflict.⁹ Even the Arbitration and Conciliation Act, 1996 (**‘A&C Act’**) does not provide a cohesive definition of the concept of arbitrability, the act merely provides that parties are free to resolve their dispute via the mechanism of arbitration in the presence of a valid agreement.¹⁰ Thus, a perusal of judicial precedents becomes pertinent. Courts have understood arbitrability as the capacity of a dispute to form the subject-matter of a proceeding before a tribunal.¹¹ In this regard, the apex court in the landmark case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited*, 2011 held that rights *in rem* are only amenable to judicial adjudication whilst rights *in personam* are amenable to arbitration proceedings as well.¹² This notion was further elaborated in the judgement of *Kingfisher Airlines v. Prithvi Malhotra Instructor*, 2013,¹³ wherein the court categorically held that *in personam* rights shall also not come under the purview of arbitration tribunals if they are kept for the public fora due to a concern of public policy. Some instances of the disputes reserved for the public for are criminal offences,¹⁴ labour matters,¹⁵ testamentary disputes,¹⁶ mortgage issues,¹⁷ specific matters of tenancy under specific legislations,¹⁸ admiralty conflicts,¹⁹ and insolvency matters.²⁰ The test whether the subject-matter of a dispute is arbitrable in nature so established in *Booz Allen* was recently settled in the seminal judgment of *Vidya Drolia v. Durga Trading Corporation*, 2021 (**‘Vidya Drolia’**).²¹ In the said judgment a three-judge bench of the apex court laid down four-fold test to determine which disputes are non-arbitrable, when an arbitration agreement is present : *firstly*, disputes involving actions *in rem*, not subordinate rights *in personam*,

⁹ U.N. Comm'n on Int'l Trade L., Rep. on its 32d Sess., Supp. No. 17 (June 1999) UN Doc A/54/17.

¹⁰ *Booz Allen and Hamilton Inc v SBI Home Finance Limited* (2011) 5 SCC 532.

¹¹ Abhisar Vidyarthi, ‘Arbitration, Competition Law and Second Look Doctrine: An Indian Perspective’ (2019) 6 RFMLR, 53.

¹² *Booz Allen* (n 10).

¹³ *Kingfisher Airlines v Prithvi Malhotra Instructor* (2013) (7) Bom. C.R. 738.

¹⁴ *State of Orissa v Ujjal Kumar Burdhan* (2012) 4 SCC 547.

¹⁵ *Natraj Studios (P) Ltd v Navrang Studios* (1981) 1 SCC 523.

¹⁶ *Chiranjilal Shrilal Goenka v Jasjit Singh* (1993) 2 SCC 507.

¹⁷ *Booz Allen* (n 10).

¹⁸ *Fingertips Solutions (P) Ltd v. Dhanashree Electronics Ltd* 2011 SCC OnLine Cal 4974.

¹⁹ *Osprey Underwriting Agencies Ltd v ONGC Ltd* 1998 SCC OnLine Bom 88.

²⁰ *Haryana Telecom Ltd v Sterlite Industries (India) Ltd* (1999) 5 SCC 688.

²¹ *Vidya Drolia v Durga Trading Corporation* (2021) 2 SCC 1.

secondly, disputes affecting third party rights requiring centralised adjudication, *thirdly* disputes relating to inalienable sovereign and public interest functions, and *fourthly*, subject-matter being expressly or by implication non-arbitrable as per mandatory statutes.²²

Herein, the Apex Court reaffirmed that subordinate rights *in personam* which arise from acts *in rem* are also under the purview of arbitration. The court overruled *Himangni Enterprises v Kamaljeet Singh Ahluwalia*,²³ by holding that landlord-tenant disputes, under the Transfer of Property Act,²⁴ are amenable to arbitration in India.²⁵ The court also gave regard to the doctrine of *kompetenz-kompetenz*, i.e., the arbitral tribunal is itself equipped to primarily adjudicate on the issues of non-arbitrability and by extension their jurisdiction.²⁶ Thus, to evaluate the arbitrability of competition law disputes, it is fundamental to examine three questions: *first*, whether the domain of competition law disputes only considers *in rem* disputes or includes *in personam* conflicts as well and whether this adjudication has an *erga omnes* impact; *second*, whether the cause of action fundamentally deals with a sovereign function of the state; *third*, whether competition law disputes *ipso facto* are either expressly or impliedly barred for arbitration as per the Act by any specific legislation.

In relation to the first question, a perusal of the Competition Act, 2002²⁷ provides that competition law disputes consider the element of both public and private disputes. Under Section 19²⁸ of the act, parties which are empowered to file a claim before the Competition Commission of India (**‘Commission’**) including ‘any person, consumer or association to file information’. Notably, due to usage of the phrase ‘any person’, the legislative intent is conducive to the notion that personal injury is not a *sine qua non* to bring a case before the Commission. Such a wide power is provided in lieu of the nature of the dispute, which is of extreme public importance because competition

²² *ibid.*

²³ *Himangni Enterprises v Kamaljeet Singh Ahluwalia* (2017) 10 SCC 706.

²⁴ Transfer of Property Act 1882.

²⁵ Abhisar Vidyarthi, ‘Applying Vidya Drolia’s “Four-fold Arbitrability Test” To Anti-trust Disputes in India’ (*Kluwer Arbitration Blog*, Sept 26, 2023, 9:50 A.M), <<https://arbitrationblog.kluwerarbitration.com/2021/02/10/applying-vidya-drolia-four-fold-arbitrability-test-to-antitrust-disputes-in-india/>>.

²⁶ Ranjani Ramesh and Atif, ‘Vidya Drolia v. Durga Trading Corporation | An Explainer’ (Mondaq, Sept 26, 2023, 10:50 A.M) <<https://www.mondaq.com/india/arbitration--dispute-resolution/1233904/vidya-drolia-v-durga-trading-corporation-%7C-an-explainer>>.

²⁷ Competition Act 2002, s 19.

²⁸ *ibid.*

law disputes not only relate to the adversely affected party but also exerts a negative impact on the market as a whole.²⁹ However, Section 53N³⁰ of the Act categorically enables third parties affected by the anti-competitive activities to approach the competent authorities and claim compensation for the adverse impact on the party. Herein, the parties only procure monetary compensation or civil claims which is wholly between the parties and involves no penal consequence.³¹ This clearly highlights that such a dispute is indicative of an inter-party dispute only with no bearing on public interest, thereby making these disputes *in personam* in nature. Whilst there exists no Indian jurisprudence on splitting of claims of a private monetary claim from the public element suit in antitrust matters, reference must be given to the Canadian Supreme Court's judgement in the case of *Murphy v. Amway, 2015*,³² wherein the court held that a claim for private monetary damages by an impacted party under Section 36³³ of the concerned Canadian statute can be amenable to arbitration whilst the *in rem* disputes can be adjudicated by the competent tribunal, thereby providing that a specific legislation can include the scope of both *in rem* and *in personam* rights. This decision is paramount for our consideration as the Commission has time and again referred to comparative jurisdictions on adjudicating over novel issues. Transposing the same to India, whilst the *in-rem* nature of competition law disputes is reflective via the legislative drafting of Section 19, on the other hand Section 53N does leave adequate scope for enforcement of subsidiary *in-personam* rights arising out of *in rem* disputes. Thus, the first test of arbitrability stands fulfilled for disputes originating out of Section 53N claims.

With regard to the second evaluation, it is *prima facie* evident that private competition law disputes comprising between two private individuals does not fall under the ambit of sovereign function of the state³⁴. On the contrary, the Act itself makes an exception for the sovereign and inalienable functions of the state from its purview of the meaning of an enterprise as mentioned in Section 2(h).³⁵ Herein the Central

²⁹ n 15.

³⁰ Competition Act 2002, s 53N.

³¹ *Murphy v Amway et al* (2013) 443 N.R. 356 (FCA).

³² *ibid.*

³³ Competition Act 1986, s 36 (Canada).

³⁴ Kanishka Bhukya, 'Harmonizing Arbitration and Competition Law Disputes: Pursuing Consistency In Adjudication' (*Aria Blog*, 26 Sept 2023, 9:30 A.M) <<https://aria.law.columbia.edu/harmonizing-arbitration-and-competition-law-disputes/?cn-reloaded=1>>.

³⁵ Competition Act 2002, s 2(h).

Government is even empowered to exempt private enterprises from the purview of Competition Act, 2002 if they are engaged in that activity for public interest.³⁶ Thus, the second requirement of arbitrability, i.e. the dispute not being an unalienable or sovereign function of the state, also stands fulfilled. On the consideration of the third evaluation, i.e., whether the jurisdiction of arbitral tribunal are excluded and such disputes reserved for public fora in public interest, Section 61³⁷ of the Competition Act, 2002 provides the Commission and the National Company Law Tribunal ('NCLT') with exclusive jurisdiction to hear such disputes and identifies the apex court as the final appellate authority.³⁸ Whilst one may argue that by virtue of Section 5 of the A&C Act which provides for the jurisdiction of a court in the existence of an arbitration agreement,³⁹ the effect of Section 61 of the Competition Act, 2002 which confers the sole jurisdiction of competition law matters to the Commission is nullified. However, such an understanding would be incongruent,⁴⁰ because the section must be read in conjunction with Section 2(3)⁴¹ of the Arbitration Act when deciding the competence of arbitral tribunal to adjudicate a dispute, which clearly indicates that an arbitration agreement does not exclude the jurisdiction of the Commission. Therefore, no valid arguments relating to Section 5 of the A&C Act can be raised against the merits of Section 61 of the Competition Act, 2002.⁴² Further, on this notion, the Delhi High Court ('HC') in the seminal judgment of *Union of India v. Competition Commission of India*,⁴³ noted that the presence of an arbitration agreement does not preclude the jurisdiction of the Commission. The court highlighted that the scope of proceedings, and the focus of investigation before an arbitral tribunal is substantially different from that of the Commission, and that the tribunal might not be vested with adequate powers to assess such an issue of abuse of market dominance.⁴⁴ Additionally, former CJ Chandrachud's dictum in *A. Ayyasamy v. A. Paramasivam and Ors.*,⁴⁵ categorically provides that in instances where the jurisdiction of the civil court is also barred by a special legislation and the jurisdiction

³⁶ Competition Act 2002, s 54.

³⁷ Competition Act 2002, s 61.

³⁸ Competition Act 2002, s 53T.

³⁹ Arbitration and Conciliation Act 1996, s 5.

⁴⁰ Kanishka Bhukya (n 34).

⁴¹ Arbitration and Conciliation Act 1996, s 2 cl 3.

⁴² *Central Warehousing Corporation v Frontpoint Automotive Pvt Ltd* 2009 SCC OnLine Bom 2023.

⁴³ *Union of India v Competition Commission of India* (2012) 115 AIC 454 (Del).

⁴⁴ *ibid.*

⁴⁵ *A. Ayyasamy v A. Paramasivam and Others* (2016) 10 SCC 386.

of those disputes are given to a specific court or tribunal for a public policy perspective, such a dispute would not be amenable to the arbitration proceedings. In this case, Section 61 of the Competition Act, 2002 categorically ousts the jurisdiction of civil courts thereby making the jurisdiction of arbitral tribunal incongruent. Another argument that vouches that the jurisdiction of competition law disputes is reserved for the Commission is the nature of inquiry required in a competition law dispute. The Commission is vested with wide investigative powers to assess market dominance and adverse impact by procuring evidence, witnesses, etc. whilst the investigative powers of an Arbitral Tribunal are rather restricted in comparison with the Commission. The legislative intent of providing the Commission such wide powers can be a coherent indicator of exclusive jurisdiction of the Commission in public interest. This argument is also fostered by the notion that inquiries conducted are *in rem* in nature and not *in personam* like that of a tribunal as highlighted in the case of *Samir Aggarwal v. Commission of India and Ors.*⁴⁶ Further this was reiterated by an order of Commission against Tata Motors⁴⁷ passed on 4th May, 2021 wherein the Commission noted that it undertakes inquisitorial functions in public function rather than merely functioning as an adjudicatory body.

Thus, it can be noted that while competition law does indeed provide scope for both public and private disputes. Further, these disputes do not arise out of unalienable sovereign functions of the state. However, the jurisdiction of all these disputes currently in the landscape of Competition Act, 2002 is categorically restricted for the Commission and the jurisdiction of any such Arbitral Tribunal is excluded in public interest. Therefore, in accordance with law today, competition law disputes do not satisfy the test of *Vidya Drolia* and *Booz Allen*, failing the test of arbitrability for competition law disputes. After evaluating the current landscape of arbitrability of anti-trust disputes in India, it is fundamental to examine the same from more mature anti-trust disputes, of American and European Jurisprudence.

III. POSITION OF AMERICAN JURISPRUDENCE

Originally in the American landscape it has been held that antitrust claims cannot be arbitrated as they are of extreme importance for public interest and court would be a

⁴⁶ *Samir Agrawal v CCI* (2021) 3 SCC 136 2020.

⁴⁷ *Neha Gupta v Tata Motors Ltd* 2021 SCC OnLine CCI 25.

more suitable authority rather than an arbitrator to deal and decide the matter.⁴⁸ Further, it has also been asserted that the legal knowledge requirement for competition law matters were very sophisticated, and arbitrators are not accustomed to that.⁴⁹ The case of *AMERICAN SAFETY EQUITY CORPORATION V. J.P. MCGUIRE* was one of the initial case laws pertaining to arbitrability of competition law matters.⁵⁰ The federal court declared that a trademark license agreement dispute cannot be arbitrated as the interest of general public is in jeopardy. Further, it also stated that the third-party rights can be affected as arbitrators do not have resources like courts to gather evidence against antitrust disputes.⁵¹ As per the American safety doctrine, the issues of public interest and complexity of antitrust laws made arbitration in antitrust law matters unlikely. The case of *Applied Digital Technology Inc. v. Continental Casualty Co., 1977* held that antitrust law issues are not arbitrable in nature.⁵² Further, *Cobb v. Lewis, 1984* held that antitrust matters are generally considered to be non-arbitrable except when arbitration agreement is reached after the dispute has initiated.⁵³

The historic case of *Mitsubishi Motors v. Soler, 1985*⁵⁴ changed the global position on arbitrability of competition law matters as it led to recognition of arbitration in antitrust disputes with the assumption that both the parties' consent to arbitration proceedings.⁵⁵ In this case, Mitsubishi entered into an agreement with Soler to sell automobiles. When the respondent did not reach the agreed sales volume, the contract was breached. Mitsubishi alleged that the petitioner engaged in actions of market division which goes against the Sherman Antitrust Act, 1890. This matter contended to competition law, and it was argued that arbitration is an unsuitable avenue. Nonetheless, the US Supreme Court ('SC') held that the agreement between the two parties was sufficiently broad enough to consist of all statutory provisions, including competition law matters. Further, the Second Look Doctrine was established wherein

⁴⁸ Andrew L. Foster and Peter E. Greene, *EU and US Antitrust Arbitration: A Handbook for Practitioners* (1st edn, Kluwer Law International, 2011) 1297.

⁴⁹ Alexandra Theobald, 'Mandatory Antitrust Law and Multiparty International Arbitration' (2016) 37 UPJIL 1059.

⁵⁰ Alexis Mourre, *EU and US Antitrust Arbitration: A Handbook for Practitioners*, (1st edn, Kluwer Law International 2011) 5.

⁵¹ *ibid.*

⁵² *Applied Digital Technology Inc v Continental Casualty Co* (1977) 576 F 2d 116.

⁵³ *Cobb v Lewis* (1984) 753 F.2d 1080.

⁵⁴ *Mitsubishi Motors v Soler* (1985) 473 U.S. 614.

⁵⁵ Richard C Levin, "On Arbitration of Competition/Antitrust Disputes: A Tribute to Mitsubishi" (2018) 73 DRJ 39.

national courts can assess the arbitrator's decision to ensure that the award was in compliance with antitrust laws.⁵⁶ This provided courts the right to review the decision and ensure that it does not go against the public policy of the country. Through this judgment the court highlighted that the parties have the freedom to resolve the disputes in their contracts however they wish to.⁵⁷ The principle of the Mitsubishi corporation has been affirmed in various of judgments in the US.⁵⁸ The court's reasoning for allowing arbitration was that the parties are not sacrificing their rights, rather they are just agreeing to resolution in arbitration method rather than getting courtroom proceeding. It gets them the advantage of a faster resolution and a more relaxed setting. Further, as for the complex issues in antitrust laws argument, the arbitrators appointed should be experts on the matter. After the establishment of the landmark judgment of the US SC in the *Mitsubishi* case, many courts started ruling in the favour of arbitrability of antitrust matters.⁵⁹ Courts maintained this trajectory in cases *GKG Caribe Inc. v. Nokia Mobira, Inc.*, 1989,⁶⁰ *Gemco Latino-America, Inc. v. Seiko Time Corp.*,⁶¹ the American Safety doctrine was declined, and arbitration was endorsed in domestic antitrust disputes. Furthermore, the worldwide position on arbitration in antitrust matters also shifted and courts became more open to introducing arbitration in competition law matters.

IV. POSITION OF EUROPEAN JURISPRUDENCE

Whether or not competition law disputes are amenable to arbitration has been an age-old debate in European jurisprudence.⁶² *Eco Swiss China Time v Benetton Int'l* ('**Eco Swiss**')⁶³ was a monumental case in the EU, being the first one in EU to recognise arbitrability of antitrust matters. Originally, the domain of dispute resolution for competition law disputes were restricted for courts because of public policy concerns,

⁵⁶ Abhisar Vidyarthi, "Arbitration, Competition Law and Second Look Doctrine: An Indian Perspective" (2019) 6 RFMLR 53.

⁵⁷ Richard C Levin, "On Arbitration of Competition/Antitrust Disputes: A Tribute to Mitsubishi" (2018) 73 DRJ 39.

⁵⁸ *Kotam Elecs Inc v JBL Consumer Prod. Inc* (1996) 93 F.3d 724; *Seacoast Motors of Salisbury Inc v Daimler-Chrysler Motors Corp* (2001) 271 F.3d 6; *JLM Industries, Inc et al v Stolt-Nielsen SA et al* (2004) US App. LEXIS 22253.

⁵⁹ *Nghiem v NEC Electronics Inc* (1994) 25 F.3d 1437; *Syscomm Int'l Corp v Synoptics Communications Inc* (1994) 856 F. Supp. 135; *Western International Media Corporation v Johnson* (1991) 754 F. Supp. 871.

⁶⁰ *GKG Caribe Inc v Nokia Mobira Inc* (1989) 725 F. Supp. 109.

⁶¹ *Gemco Latinoamerica Inc v Seiko Time Corporation* (1985) 671 F. Supp. 972.

⁶² Assimakis Komninou, *Arbitration and EU Competition Law* (SSRN, 2009).

⁶³ *Eco Swiss China Time Ltd v Benetton International NV* C-126/97 [1999] E.C.R. I-3055.

not because of inadequate powers of a tribunal to undertake the requisite investigation, private nature of the proceedings, complexities in a competition law proceeding or that the process of ADR would be exploited for corporations for illegally settling such disputes.⁶⁴ Furthermore, one of the biggest impediments was the lack of right to appeal on merits from an arbitral award.⁶⁵ Lastly, the EU originally held a concentration of jurisdiction of matters relating to competition law disputes, i.e., only EU was allowed to administer these disputes with no domestic court having jurisdiction over them.⁶⁶ However after the proliferation of the Mitsubishi Motors Corporation case, the position in the EU undertook a paradigm shift post the landmark judgment of *Eco Swiss*.⁶⁷ Herein, the European Court of Justice for the first time held that competition law disputes can be amenable to arbitration proceedings because Regulation 1/2003⁶⁸ decentralised the monopoly over these disputes and thereby the arbitration tribunals also procured the necessary jurisdiction. Since then, it has become a cornerstone principle that competition law disputes are amenable to arbitration proceedings as again affirmed by *E.T. Plus S.A. v. Welter*.⁶⁹

V. SHOULD WE MAKE A CASE FOR CHANGE?

The fundamental deliberation whether anti-trust disputes should be amenable to arbitration is rooted on the need to hold such proceedings in a public forum before a conventional court due to the adverse impact on the market itself in the quest for public interest. In our jurisdiction, the standard jurisprudence of excluding competition law disputes from the purview of arbitration rests on this perspective only. Although, as highlighted earlier via the examples of comparative jurisdictions such an argument is an incongruent consideration in the current world⁷⁰ and with the prominence of ADR mechanisms the public policy argument does not seem strong now.⁷¹ To address the issue of private resolution of disputes in contravention with the

⁶⁴ *ibid.*

⁶⁵ Tanya Choudhary, 'Arbitrability of Competition Law Disputes in India - Where are we now and where do we go from here?' (2016) 4 IJAL 69.

⁶⁶ Reg. No. 17 of 6 February 1962 - First Regulation Implementing Articles 85 and 86 of the Treaty, JO [1962] L 13/204.

⁶⁷ *Eco Swiss China Time Ltd v Benetton International NV* C-126/97 [1999] E.C.R. I-3055.

⁶⁸ Council Regulation 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.

⁶⁹ *ET Plus SA v Welter* [2005] 1 Lloyd's Rep 251.

⁷⁰ *GKG Caribe Inc v Nokia-Mobira Inc* (1989) 725 F Supp 109.

⁷¹ Flere Pavle, "Impact on EC Competition Law on Arbitration Proceedings" (2016) 3 SLR 155.

public policy, the courts can very well adopt the second look doctrine established in the *Mitsubishi* case, where even though the US Supreme Court ruled in the favour of the arbitrator to apply anti-trust laws but also vested the courts a power to examine this disputes as a second look at the enforcement stage.⁷² Such a position has also been fostered in EU's anti-trust proceedings as well.⁷³ Further, the doubts over investigative restrictions of an arbitral tribunal can be mitigated via the operation of Section 27⁷⁴ of the A&C Act which empowers the arbitral tribunal to procure the assistance of a court in procuring evidence. Based on this, the Commission can also function as the *parens patriae* and the *amicus curiae* to these proceedings as the European commission does so in their arbitration proceedings to mitigate the conundrum of public policy.⁷⁵ However, cogent caution must be undertaken herein with respect to the heavy cost and time required in adopting this procedure which may exert more pressure on an already burden justice system of the courts. Additionally there are strong arguments relating to efficiency and speedy disposal of private disputes with reducing the burden on Commission through the means of arbitration.⁷⁶ The curtailment of arbitration from these proceedings the State's policy to promote arbitration as a cogent dispute resolution mechanism in light of the recent advancements in the field via the proliferation of online dispute resolution⁷⁷ and the establishment of the All India Arbitration Bar Association.⁷⁸ Further, this non-inclusion also hampers India's duty to respect international arbitral awards of different jurisdictions which may provide the scope for arbitration in anti-trust disputes, making admissibility of these awards impossible in the Indian landscape.⁷⁹ The way to resolve the current lacunae is via an amendment to the current law relating to

⁷² Radicati di Brozolo, 'Antitrust: A Paradigm of the Relations Between Mandatory Rules and Arbitration — A Fresh Look at the "Second Look"' (2004) 1 IALR, 23.

⁷³ Abhisar Vidyarthi, "Arbitration, Competition Law and Second Look Doctrine: An Indian Perspective" (2019) 6 RFMLR 53.

⁷⁴ Assimakis Komninos, *Arbitration and EU Competition Law* (SSRN, 2009).

⁷⁵ Kanishka Bhukya (n 34).

⁷⁶ Carl W. Hittinger and Terry Smith, 'Arbitrating Antitrust: Are Things Getting More Complicated?' (ALM 28 Sept 2023, 9:30 A.M) <<https://www.law.com/thelegalintelligencer/almID/1202541387095/>>.

⁷⁷ Niti Ayog, 'Designing the Future of Dispute Resolution: The ODR Policy Plan for India' (Niti Ayog, 29 Sept 2023, 9:30 A.M) <<https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf>>.

⁷⁸ R. Venkataramani, The Attorney General for India Announces the creation of All India Arbitration Bar, India International Arbitration Centre (25 Sept 2023).

⁷⁹ Niti Ayog, 'Designing the Future of Dispute Resolution: The ODR Policy Plan for India' (Niti Ayog, 29 Sept 2023, 9:30 A.M) <<https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf>>.

competition law and removing the implied restrictions on arbitration proceedings in the interest of decentralisation as envisaged in the EU framework in 2003. This amendment would be reflected by first amending Section 61 of the Competition Act with carving out an exception for undertaking arbitration in private competition law disputes. This change has still not been reflected due to an inherent displeasure of the legislature of considering Arbitration as a cogent mechanism to settle private disputes of public nature, albeit as already showcased above that both of these frontiers can cogently be differentiated, providing the avenue for arbitration for private disputes *per se*. With the omission of this implied bar on the jurisdiction of arbitral tribunal, these disputes would also fulfil the test of arbitrability as envisaged in *Vidya Drolia* and *Booz Allen*. Thus, it can be deduced that the vehement need of inclusion of arbitration in competition law proceedings, and the same would also pander to furtherance of the interests originally envisaged in the Competition Act, 2002 and A&C Act.

VI. CONCLUSION

In conclusion, in this paper we have envisaged to highlight the current landscape of arbitrability of anti-trust disputes in India. To study the same, this paper first highlights the concept of arbitrability of a dispute first established in the landmark judgement of *Booz Allen* and then expanded in the recent ‘four-fold’ test of *Vidya Drolia*. Whilst in rem disputes of competition law matters should be reserved for the adjudication before the Commission, however subordinate *in personam* rights that arise via the virtue of Section 53N of the Competition Act, i.e., private complaints for compensation can be amenable to adjudication before an arbitral tribunal. However, the current legal framework of arbitration in India as established in *Vidya Drolia* does not permit arbitration in competition law disputes, this discourse has highlighted that the numerous benefits of permitting the same, in the form of efficiency, expertise, reduced burden on the Commission, better cohesion with international standards and overall efficacy of dispute resolution, etc. For this, the paper argues that the legislature should undertake cohesive amendments to the Competition Act, 2002 and allow scope for inclusion of arbitration in private anti-trust disputes that may arise via Section 53N of the act. This discourse also rebuts various apprehension that the courts have maintained against allowing arbitration of anti-trust disputes. Drawing from the

recourse in more mature competition law jurisdictions of the United States and the EU, the courts can undertake the approach of a second look doctrine of the *Mitsubishi* case, or the Commission can also perform the dual role of *parens patriae* and *amicus curiae* in these arbitration proceedings to assist the tribunal is effectively adjudicating the disputes. Thus, this paper effectively endeavours to bridge a gap in the discourse between arbitration and competition law disputes and argues the arbitrability of competition law disputes must be efficaciously allowed in the interest of justice.