Role Of Arbitrability Of Private Enforcement In Competition Law

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I. INTRODUCTION

The onset of the 1990s in India brought multiple changes in existing regimes. The open gate strategy of *the Narsimha Rao government paved the way for much-needed globalisation, liberalisation and privatisation*.[1] In the wake of changing scenarios, the existing Monopolistic and Restrictive Trade Practices Act, 1969 (MRTP Act) was inadequately equipped to tackle the competition aspect of the changing Indian economy. [2]This act primarily focused on restricting one entity occupying a dominant position in the market at the cost of others.

The idea of competition was understood as a situation where one entity would control the market, and the powerless would be deprived of power.[3] However, with ongoing globalisation, Indian enterprises now face competition from domestic players and global giants. This is one of the reasons that led to a call for re-examining the existing MRTP, 1969. The Indian legislators procured this opportunity to obtain a different perspective on market competition. They realised the need for competition which can be expressed in three ways, firstly, a buyer has the opportunity to have best offers suiting to his needs, secondly, a seller applies best ways to increase output at cheapest, ensuring greater efficiency and lastly it can be seen from market's perspective as survival of competition ultimately would benefit all. This ideology is reflected in the preamble to The Competition Act 2002 (12 of 2003). Thus, to make the environment investor-friendly, protect consumers, promote healthy competition and shift the focus from curbing monopolies to encouraging entities to invest and grow, thereby promoting competition while preventing any abuse of market power, the existing Competition Act 2002 came into being.

The Act established the Competition Commission of India (CCI), the statutory body responsible for enforcing competition in India. Most legal regimes in the world provide for two

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[1] ABIR ROY & JAYANT KUMAR, COMPETITION LAW IN INDIA, (2nd ed., Eastern Law House, New Delhi, 2016)

[2] *See generally*, Shalaka Patil & Priya Chatterjee*, Competition Law in India – Jurisprudential Trends and the Way Forward,* 2013, NISHIT DESAI ASSOCIATES *available at*http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Competition_Law_in_India.pdf (last visited on July 24, 2020)

[3] *Supra* 1 at 2-3

kinds of enforcement. In the same mould, the enforcement scheme in India is also based upon two foundations: Public *Enforcement* and *Private Enforcement*. [4]Public enforcement signifies that statutory authorities enforce antitrust rules. Public enforcers here are vested with special powers and use special procedures to investigate an infringement. However, decisions of antitrust authorities are subject to judicial review. Private enforcement under Competition law is based upon the principle of *Right in Personam*, an individual-initiated action before an authority for enforcing respective rights, only after the authority finds a violation. [5]The objective for private enforcement is to ensure victims of anti-competitive behaviour receive their dues.

As per a report published by the World Bank rating on Ease of Doing Business, India ranked 163 out of 190 countries under the head of enforcing contracts.[6] Legal infrastructure and dispute resolution mechanisms are major roadblocks to India's image as a new centre for investment. Often in the case of commercial disputes, entities tend to rest their cases at the doors of arbitration; in fact, arbitration is the fastest-growing Alternative Dispute Resolution System(ADR).

Arbitration is preferred over traditional courts as it provides parties with an amicable resort in a much shorter time. Its non-rigid approach, impartiality, and neutrality of the adjudicator surely make this process a one avenue for all such disputes. The nucleus of any arbitration lies in its 'arbitrability', which signifies whether the subject matter can be heard in arbitration.[7]

Whether competition law disputes can be submitted to arbitration was a rising question not only in developed jurisdictions but also in Indian jurisdiction, while European Union (EU) and United States (US) courts allowed competition issues to be submitted to an arbitration forum in case of international contracts, however, Indian legislators reserved their say. Antitrust laws and arbitration are antithetical to each other, while arbitration welcomes any dispute between private entities, antitrust issues involve a large public interest.

The very purpose of competition law is to prevent the market from withering away and safeguard consumers' interests; thus, it involves substantial public interest, and hence, certain penal provisions have been incorporated into it, which brings the arbitrability of competition

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[4]*See generally*, Kai Huschelrath & Sebastein Peyer, *Public and Private Enforcement of Competition Law – A Differentiated Approach*, 2013, CENTER FOR COMPETITION POLICY, ECONOMIC AND SOCIAL RESEARCH COUNCIL, UNIVERSITY OF EAST ANGLIA *available at*https://ueaeco.github.io/working-papers/papers/ccp/CCP-13-05.pdf (last visited on July 26, 2020)

[5]*Supra* at 4-5

[6]*Ease of Doing Business rankings,* THE WORLD BANK *available at*https://www.doingbusiness.org/en/rankings

[7]MAUD PIERS & CHRISTIAN ASCHAUER, ARBITRATION IN THE DIGITAL AGE – THE BRAVE NEW WORLD OF ARBITRATION, 9-12, (Cambridge University Press) (1st ed., 2018)

law into a dubious position. Considering the number of pending cases before CCI or NCLAT, the notion of bringing private enforcement disputes of competition law disputes under arbitration calls for a viable option. [8]In developed jurisdictions like the EU and, more prominently, in the USA, a regulatory framework allows arbitration to be a dispute resolution mechanism in the case of private enforcement of antitrust issues. In this paper, the researchers discuss the viability of arbitration in the private enforcement of competition law in India.

II. UNDERSTANDING PRIVATE ENFORCEMENT REGIMES UNDER COMPETITION LAW IN THE US, EU AND INDIA

UNITED STATES

Private enforcement was never a debatable issue in the United States antitrust regime. Private Enforcement was presumed to be the primary way of enforcing the law.[9] Legislation merely provided administrative support to private litigants to approach the Federal Court to enforce their rights. Codification led to substantive interpretation by the authorities. The US antitrust regime has evolved institutionally from its origin, i.e. the Sherman Act of 1890. The institutional evolution of the US antitrust regime can be differentiated into three phases. The first phase of evolution lasted till the Second World War; this phase also experienced the Great Economic Depression of the 1930s. During this phase, the courts often wrestled with the objective and interpretation of antitrust laws.[10]

The second phase of evolution started after the Second World War and lasted for the next three decades. This phase experienced the exponential growth of litigation relating to antitrust laws, and the judiciary responded to these litigations affirmatively and provided a remedy to the affected party. This led to an increase in public enforcement and private enforcement of the antitrust regime. Private parties were encouraged to pursue enforcement of their rights, and during the 1960s, it seemed highly unlikely that any party would lose the case.[11]

The Third Phase of development started in the late 1970s with the inception of globalisation. After the 1970s, the US antitrust law regime saw a sea change from its earlier phase. Some of the highlights of this phase include an ideological shift in administration from social and political to laissez-faire economy, judicial reluctance in granting remedies or imposing heavy

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[8]*See generally,* Karen Yaung, *Privatizing Competition Regulation*, 1998 OXFORD JOURNAL OF LEGAL STUDIES – OXFORD UNIVERSITY PRESS *available at*https://www.jstor.org/stable/764693?seq=1 (last visited July 25, 2020)
[9] 26 Stat. 209
[10]*Ibid.*
[11]*Ibid* at 434.

penalties for violations of regulations.[12] Private enforcement in this phase toppled drastically due to these obstacles.

In the United States, public enforcement is considered inefficient in achieving the desirable goals of regulations. They incentivise the private litigants to file the case and encourage them to seek compensation as high as three times the actual damage suffered by the party.[13] Thus, private enforcement was used as a mode for public enforcement, and private enforcement directly influenced the public applicability of antitrust laws.[14]

The above brief summary of the applicability of private enforcement in the United States antitrust regime brings out that private enforcement was an inherent part of this regime since its inception. Therefore, the question of the usage and importance of private enforcement holds no water.

EUROPEAN UNION

Modern development of the competition law regime in the European Union can be traced to the Rome Treaty of 1957, which provided the basis for the protection of competition. This development was reflected in German Competition law, which can be considered a pioneer in the European competition law regime. German law was considered the most developed and efficient system in Europe.[15] Till the 1970s, the private enforcement scheme was insignificant and negligible. EU laws did not recognise any private enforcement scheme. In the 1970s, though legal barriers were lifted, the litigants were not inclined to file any suit for private enforcement. Though several efforts were made by the EU regime to encourage private enforcement, public enforcement remained prominent. Thus, private enforcement remained alien to the EU competition law regime till the 20th Century.[16]

On May 01st 2004, EC Regulation 1/2003 (The Modernisation regulation) allowed the National Competition authorities and the National courts to act as a primary forum for the enforcement of EU Competition law. This regulation led to a surge in the number of cases of private enforcement in the EU.

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[12] ANESTIS S. PAPADOPOULOS, THE INTERNATIONAL DIMENSION OF EU LAW AND POLICY, (Cambridge University Press, U.K.), (1st ed., 2010)

[13] *Supra* 11 at 436

[14] *See generally*, Alan O. Sykes, *Public v Private Enforcement of International Economic Law: Standing and Remedy* , 2005, THE UNIVERSITY OF CHICAGO PRESS, *available at* http://www.jstor.org/stable/10.1086/431781/

[15] *See generally*, Kurt E. Markerd, *German Anti-trust Laws and Internationalisation of Market,* 1998, CHICAGO – KENT LAW REVIEW, *available at* https://core.ac.uk/reader/217426160 (last visited on July 25, 2020)

[16] *Supra* 12.

INDIA

a. Legislative Provisions for Private Enforcement in India under the Competition Act 2002

The Private Enforcement antitrust claims are governed by the Competition Act 2002 and subsequent regulations therein. The NCLAT has original jurisdiction in accepting applications from aggrieved parties in cases of private enforcement, and the Competition Act 2002 expressly bars the civil courts from the same. The Act envisages the right to compensation by the Central or State government or a local authority, any consumer, enterprise, and it also allows for class action claims, i.e. a class or group of people with a common grievance.[17] Under Section 42a and 53q (2) for recovery of compensation from any enterprise for any loss or damage, one has to show losses suffered as a result of the contravention of the orders of the CCI or NCLAT.

b. Procedural Formalities

- *Only Follow-On Actions*- The private enforcement litigation regime makes it mandatory that any claim can only arise after a finding of the violation of the substantive provisions of the Act has been established by the regulator or the appellate authority. An infringement action can be brought regardless of whether the CCI's decision has been appealed before the NCLAT. However, in case of an appeal, the compensation applications are usually adjourned, pending final determination of the appeal by NCLAT or the Supreme Court. The adjudication by the NCLAT in follow-on action is limited to the quantum of compensation payable to the claimant only.[18]
- *Individual Action Allowed* - Private Enforcement can be brought against individuals such as directors of corporate entities, whether domiciled within or outside the jurisdiction. However, there has so far been no case.[19]
- *Limitation Periods* -The limitation for filing a follow-on action for compensation is determined by the Limitation Act, 1963. Under section 62 of the Competition Act, read in conjunction with section 3 of the Limitation Act 1963, there is a limitation period of one year for filing a claim for compensation for follow-on actions. The NCLAT can

[17] § 53 N Competition Act, 2002
[18] *See generally,* Anshuman Sakle, *Private Enforcement under Indian Competition Law – A Road Map,* 2017, COMPETITION LAW – CYRIL AMARCHANDBLOG, *available at* https://competition.cyrilamarchandblogs.com/2017/07/private-enforcement-indian-competition-law-roadmap/ (last visited July 25, 2020)
[19] *Supra* 20

condone a delay provided sufficient cause is shown to the satisfaction of the court. The Supreme Court, in the case of Corporation Bank v. Navin J. Shalhoud, laid down the doctrine of laches, saying that if a claim is to be made, it has to be made within a reasonable time period.

- *Damages*- Section 53n of the Competition Act only provides for monetary compensation for losses or damages caused by the contravention of the substantive provisions of the Competition Act. At present, five compensation applications are pending before the NCLAT that have been filed by parties under section 53n of the Competition Act.[20]

c. Private Enforcement – Approach of Indian Judiciary?

The judicial dictum in the case of private enforcement in competition law is a road less travelled by. In DLF Ltd., aggrieved parties sought private enforcement. However, it was later withdrawn.[21] The first case in Indian Jurisdiction where 'private enforcement' was first brought before COMPAT– (MCX v. NSE)[22]MCX(MCX Stock Exchange Ltd.) v. NSE(National Stock Exchange Ltd.) The question of predatory pricing came up for the CCI in this case. The NSE and MCX-SX had entered into currency derivatives trading in 2008. In 2009, MCX-SX filed a complaint against NSE for abusing its dominant position, thereby engaging in predatory pricing in order to drive MCX-SX out of the market in the Currency Derivative – CD segment. The Commission ruled out that CD, as contended by NSE, is in its nascent stage and hence, the need for a zero pricing policy was completely ruled out. The CCI, however, did not consider it predatory; rather, it said it is 'unfair'. The commission noted – *'If even zero pricing by the dominant player cannot be interpreted as unfair, while its competitor slowly bleeds to death, then this Commission would never be able to prevent any form of unfair pricing, including predatory pricing, in future.'* The CCI asked NSE to cease and desist immediately. The commission imposed a penalty of Rs. 55.50 crore on NSE for contravention of the provisions of the Competition Act.

After the findings of the CCI and the COMPAT, MCX-SX filed an application with the COMPAT for compensation to the tune of INR 588.65 crore from NSE for the damages suffered as a result of the abusive conduct of NSE. However, it was adjourned as MCX-

[20] *Supra* 21 at 4.
[21] Case No. 19 of 2010 on Aug 12, 2011.
[22] Case No. 13/2009 on June 23, 2011

SX wanted to review the sum. Later, it filed a compensation claim for a monetary sum of INR 856 crore. The matter remains *sub-judice*. In 2014, in another decision, CCI found Coal India guilty of abusing its dominant position. The compensation application filed by the aggrieved party is still pending before NCLAT. [23]Similarly, a compensation proceeding is pending against Ghaziabad Development Authority (GDA) for losses suffered by an aggrieved party who took flats from GDA on account of the imposition of unfair prices and conditions for allotment.[24]NCLAT is yet to render a final view on these applications.

d. The Road Ahead

The two classic approaches to competition enforcement can be understood as causing deterrence or reaching out to infringer's deep pockets for compensation. The mature jurisdictions of the EU and the US treat the private enforcement of competition law as equally formidable a deterrent to anti-competitive conduct as that of public enforcement. The underutilisation of the compensation provisions can be attributable to the scheme of the Act itself. In the vast majority of cases where the CCI has found a contravention, the parties have refuted the CCI's findings and have appealed in the NCLAT or the Supreme Court thereafter. Most of the cases do not reach the final determination; hence, private enforcement is delayed, too.

III. THE DICHOTOMY OF ALTERNATIVE DISPUTE RESOLUTION(ADR) & ANTITRUST

a. ADR and it's Development in India

Alternative Dispute Resolution mechanism is a medium for settling disputes that is different from opting for regular legal recourse. The need for alternative ways of settling disputes can be ascertained by the fact that courts are massively clogged with a huge backlog of cases.[25] Arbitration is one such way, a less formal process of settling disputes between private parties in the presence of an impartial arbitrator[26], who is specifically skilled in the area of dispute. There has been a plethora of amendments to

[23](2017) PL (Comp. L) July 78 *available at*https://www.scconline.com/blog/post/2018/07/23/private-enforcement-under-indian-competition-law-a-roadmap/ (last visited on July 25, 2020)
[24]*Supra* 21.
[25]EMILIA ONYEMA, INTERNATIONAL COMMERCIAL ARBITRATION & THE ARBITRATORS CONTRACT, (Routledge Taylor and Francis Group London & New York) (1st ed., 2010).
[26]§ 12 and Schedule V - identifies the circumstances that give rise to justifiable doubts about the independence and/or impartiality of arbitrators. Arbitrators must disclose any: personal and/or professional relationship with parties or their counsel, relationship with the dispute and interest in the dispute.

improve the arbitration in India. Apart from increasing the efficiency of arbitration, the amendments have provided for limiting the time for the conduct of arbitration, minimising the court's interference, etc.[27]

The arbitration process is not something new to the Indian lands, an excerpt from one of the oldest texts written by Yagnavalka shows the presence of Arbitration.'Panchayats' that were reinforced under the domestic regime by the 73rd 74 74th Amendment, were always a part of settling disputes.[28] Even after the Britishers came to India, they drafted several regulations to include arbitration, for e.g., The Bengal Regulation of 1772, Madras Regulation 1816, etc., speak volumes for the process. In 1859, Civil Procedure for courts codified the arbitration process for the first time. This was applicable only to princely states, hence posed several challenges. This was later cured in the Civil Procedure Code 1908. Thereafter, drawing inspiration from the English Arbitration Act, 1934, we drafted The Arbitration Act, 1940. The Arbitration and Conciliation Act 1996 was introduced in order to encourage more arbitration proceedings. The Act had numerous problems; hence, various amendments were suggested by the 178th Law Commission Report, Justice B.P. Saraf Committee (2004), and the 246th Law Commission Report was submitted in 2014. The 2015 Act brought much-needed changes, such as communication through electronic means, fast-track proceedings, etc. In 2017, the Shri Krishna Committee was constituted by the Ministry of Law and Justice, and it recommended the establishment of the Arbitration Promotion Council of India (APCI), which will provide grading of arbitral institutions in India and recognise institutions that provide accreditation to the arbitrators. As per the reports, India is lacking in infrastructure when it comes to arbitration.[29]

b. Make in India &Challenges in the Arbitration Regime

The government of India launched the celebrated Make in India Movement to promote the infrastructural development of the Indian economy. Such goals can be achieved by enabling an efficient dispute resolution mechanism to gain investor confidence. A study

[27]*See generally,* Bibek Debroy&Suparana Jain, *Strengthening Arbitration and it's Enforcement in India – Resolve in India*, 2016, NITI- AAYOG, GOVERNMENT OF INIDA GOV. OF INDIA *available at*https://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf (last visited July 25, 2020)

[28]*Panchayati Raj System in India*, L.M. Singh Report (1986)

[29]*Supra* 31 at 5.

undertaken by *Niti-Aayog* in 2016 postulates that entities from various jurisdictions consider India not a very viable option for doing business. [30]Strengthening the governance framework for arbitration is the need of the time. The institutional arbitration system lags behind many other developing countries, such as China and Singapore.[31] Strengthening arbitral institutions with better infrastructure, more human capital, and more awareness is the biggest task at hand. Apart from this, the scope for challenging the awards before courts is another impediment. The Act says an award would be considered to be in conflict with public policy in India only if the making of the award was induced or affected by fraud or corruption, if it is in contravention of the fundamental policy of Indian Law, or if it is in conflict with basic notions of morality or justice. [32]A report published by *Niti-Aayog* in 2016 says almost 20% of the awards are challenged by losing parties invoking the grounds of '*public policy'* only.[33] Neither the legislature nor the judiciary seems to have attained a sound status on the denotation of public policy. The interpretation of the Supreme Court in the last decade in the array of cases clearly shows this. Therefore, the 246th Law Commission Report took an assessment of these cases (discussed ahead) and suggested a narrowed definition of '*public policy',* which was thereafter accepted in the Act of 2015.[34] The Supreme Court in ONGC V Saw Pipes considered that reviewing the merits of an arbitral award can be accepted on the grounds that the arbitrator had erred in applying the law of the land. Again in 2014, the Supreme Court in ONGC v Western Geco International Ltd.[35], applied the above approach and in fact even extended it to mean that the judiciary can also check if the tribunal rendered an award arbitrarily, if the tribunal followed the principles of natural justice and if the tribunal was objective in reaching its conclusions. In 2014 only, the SC in Associate Builders v DDA[36] contended that section 34 doesn't allow the courts to go again for review after the tribunal has done fact finding. The researchers, therefore, infer that unclear government policies and ambiguous judicial interpretation tamper with the goals sought to be achieved. The amendment seems to

[30]*Supra* 6
[31] § 34 of Arbitration and Conciliation Act 1996
[32]*Supra* 32 at 87.
[33]*Supra* 31 at 6-7.
[34]Exp. § 34 of Arbitration and Conciliation Act 1996
[35] (2014) 9 SCC 263
[36] 2014 (4) ARBLR 307 (SC)

have paved the way for reaching courts; however, until a prima facie case of violation of public policy appears, all matters should be disposed of.

c. Arbitration in Competition Law

India's major development goals, reflected in the Voluntary National Review Report on the Implementation of Sustainable Development Goals by NITI Aayog, state that India plans to align with major developed countries in the coming decades. [37]A developed economy like the U.S., the U.K., Denmark and Canada suggests alternative dispute resolution mechanisms are the backbone for its growth.[38] The difference between these countries and India lies in the enforcement regime. These countries provide for the arbitrability of competition disputes. The major challenge in the Indian legal regime is that arbitration and antitrust have been thought to be poles apart. On one hand, arbitration is considered to be a matter of right in personam, and antitrust is considered to be that of *right in rem*. While private matters can be amicably resolved between private parties, the question of public interest rests with a statutory body, especially entrusted with protecting the public interest. (CCI in case of the Competition Act 2002). Another is ambiguity in the existing provisions of both regimes. The researchers in this segment try to analyse provisions under the existing Arbitration Act and Competition Act to draw an inference whether the two regimes can be brought under one umbrella.[39]

Section 7 of the Arbitration Act says that arbitration can be applied to any dispute where disputes arise from a valid, legitimate relationship. It doesn't matter if the arbitration was entered into before the dispute or made to be adhered to after the dispute. The Code of Civil Procedure, 1908, also says cases must be encouraged to go in for ADR under section 89(1). A bar is put on courts to set aside an arbitral award or refuse its enforcement if the subject matter is unsuitable for arbitration or is in conflict with public

[37]*On the Implementation of Sustainable Development Goals*, United Nations High Level Political Forum 2017, Niti-Aayog, *available at*https://niti.gov.in/writereaddata/files/India%20VNR_Final.pdf (last visited on July 24, 2020)
[38]*Supra* 6
[39]*See generally*, Payel Chatterjee and Simone Reis, *Private Enforcement of Competition Law Issues, CCI vis-à-vis Alternate Forum, Is it actually an option?* 2013, NISHITH DESAI ASSOCIATES, *available at*http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Private_Enforcement_of_Competition_Law_Issues.pdf (last visited ON July 26,2020)

policy. A bare reading of section 7 would imply a check of 'arbitrability' and 'public-policy' comes secondary, and the presence of a legitimate relationship gains importance; however, section 2(3) saves the effect of other laws which are considered unsuitable for arbitration. Section 2(3) reads - '*This part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.'* There are certain special bodies created specifically to enforce certain kinds of rights. However, it doesn't mean the presence of a special tribunal can negate the possibilities of arbitration. [40]Negation arises only when a particular enactment creates special rights, special obligations and provides for power to special tribunals which are not enjoyed by civil courts.[41] We understand so far that there are two parameters to check arbitrability: a.) The subject matter of dispute involves a question of private rights or *right in personam*? b.) Is any special tribunal reserved for such disputes? Analysing the same in competition law in India, we rely on UOI v CCI, where the Supreme Court concluded that the focus of competition disputes requires expertise and proper investigation, as a violation here leads to penal consequences. The adjudication of anti-competitive agreements and abuse of dominant position will be drawn under section 19which essentially involves a wider and huge public interest. However, section 53 provides a remedy only to aggrieved parties(the detailed explanation has been made above, refer to pages 3-4); hence, a right in personam can be brought under arbitration. The Competition Act does not provide for ADR, nor do CCI or NCLAT have the power to direct parties to use such a method. However, researchers infer that, under provision 53 N of the Competition Act, arbitration can be resorted to. Secondly, CCI under section 18 is made an expert body to examine anti-competitive agreements—section 61 of the Competition Act bars jurisdiction of civil courts. Comprehending this, it is understood that CCI is an expert body. However, a question arose concerning section 5 of the Arbitration Act, saying that wherever there is an arbitration agreement, the jurisdiction of the court is excluded. This was said not to be read unilaterally, and that it will always be read with section 2(3) saying provisions of the Arbitration Act will not affect any other law by virtue of which certain disputes cannot be submitted to arbitration. [42]This means the second check of

[40]*See generally*, Alefiyah M. Shipchandler, *Arbitrability of Competition Law Issues*, RMNLU LAW REVIEW BLOG, *available at* https://rmlnlulawreview.com/2018/02/01/arbitrability-of-competition-law-issues/ (last visited on July 25, 2020)
[41]*Supra* 45
[42]Central Ware housing v. Fortpoint Automotive Pvt Ltd. 2010 (1) Bom. C.R. 560.

arbitrability weakens. Section 27 of the Arbitration Act says that a tribunal can obtain assistance to procure evidence from the court. Considering this, it can be concluded that CCI can enlarge its role and act both as *parens patriae and amicus curiae*.[43]

The researchers in the next chapter specifically discuss the viability of using arbitration as a recourse in cases of private enforcement in competition laws.

IV. ANALYSIS OF ARBITRATION IN PRIVATE ENFORCEMENT

a. The Effectiveness-Efficiency of Policy

Jeremy Bentham, the father of modern utilitarianism, postulates the concept of *'hedonic calculus'*, a calculator to test the effectiveness of any existing legislation.[44] If existing legislation is beneficial to a larger section and provides more pleasure than pain, the legislation is considered beneficial. It is important for us to undertake policy analysis under inspection. Analysis offers a systematic approach to solving policy problems. Each policy is analysed in terms of its scheme, which is then tested for its objectiveness and likely consequences. Policy analysis can help us reduce the burden of trying to implement poor legislation and then rectify issues with subsequent amendments.

Under this analysis, we need to identify the reason behind the legislation, the implementation mechanism, the estimated costs of each mechanism, and the issue of distributive fairness. [45]

While evaluating the introduction of private enforcement in competition into any regime, it is quite necessary to identify the purpose and aim of the regulation. Any type of legal enforcement scheme aims to attain the objectives of effectiveness and efficiency. Effective guidelines necessitate that the enforcement schemes achieve their stated purpose[46], whereas efficient guideline necessitates that those targets are accomplished economically and must be cost-efficient.[47]

While discussing the effectiveness aspect of the regulatory scheme, it is important to ascertain the far-reaching impact of such a scheme. Assessing the regulatory scheme

[43]Mitsubishi Motors Corp. v Soler Chryslear – Plymouth INC., 473 US 614 (1995)
[44] R W M DIAS, JURISPRUDENCE, 331 (Lexis-Nexis, India) (5th ed., 2013)
[45]PRACTICAL GUIDE ON LEGISLATIVE DRAFTING (Nils, Nigeria) (2nd , 2014)
[46]*Enhancing Effective Legislative Research Policy Analysis and Research Project Publications*, PDETRA DIGITAL PRESS, ABUJA, 2011.
[47]*Ibid.*

based upon its effectiveness becomes difficult because the goals of regulations might be disputed or unclear, or they might carry certain subsidiary goals that require their due credit. Without giving due credit to all subsidiary goals, it is insignificant to ascertain the effectiveness of any scheme.[48]

Let us consider that the regulatory scheme identifies and addresses each of the goals and subsidiary goals that it seeks to achieve. The next fundamental step, then, for us is to examine whether the provided scheme is efficient or not. In case of efficient enforcement of the regulatory scheme, the focus is on limiting the total expenses of planning and complying, along with the cost of wrongs which the regulatory scheme seeks to curb. In case the cost of the regulatory scheme is higher than the cost of the wrong that regulations seek to curb, then it is desirable to allow such an act. Thus, it is more efficient for any legal framework to allow such undesirable conduct rather than to detect and punish it. [49]Although the above matrix is quite simple when speaking sparingly or hypothetically, practically, it comes with other bundled issues. It is upon the government and regulatory authorities to resolve such issues. Despite the theoretical restriction in examining the efficiency and effectiveness of any scheme, it provides a certain standard to evaluate the scheme dealing with the private enforcement of competition law. Accordingly, we discuss the standards of efficiency and effectiveness of Private enforcement of Competition law.

b. Identifying Goals of Private Enforcement in Competition Law

i. I Testing Effectiveness -

As discussed in the paper earlier, private enforcement draws its genesis from the common law principle of "*Ubi Jus Ibi Remedium*". Therefore, we need to address the debate concerning whether commercial legislation should pursue any non-economic goals. Objectives of Private enforcement in competition law are quite unclear. In the United States regime, deterrence is considered an objective, whereas in the European Union regime, the focus is on a Compensatory nature. [50]Restricting the objective of private enforcement to compensatory will narrow down the remedies available under private law. The compensatory scheme only includes the damages or loss suffered by

[48]G C THORTON, LEGISLATIVE DRAFTING, (Butterworths Publication, U.K.) (3rd ed., 1987)
[49]*Supra* 4.
[50]Claus-Dieter Ehlermann& Isabela Atanasiu, *European Competition law Annual 2001 Effective Private Enforcement of EC Anti-trustLaw*,2003, HART PUBLICATIONS.

the other party. At the same time, restricting the objective of private enforcement to deterrence will also include the public enforcement of competition law. Another prominent goal that private enforcement seeks to achieve is regulating the market behaviour of all market players and restricting them from engaging in any anti-competitive activities by incentivising the market players. Private enforcement puts an extra financial burden upon the infringer, and unless the benefits of non-compliance with the law are higher than the penalty and damages imposed upon the infringer, their market behaviour will be as per the scheme.[51] An extra financial burden under the head of private enforcement, other than the penalty imposed, acts as a powerful deterrence for the infringer. Thus, private enforcement is fundamentally important for discouraging anti-competitive activity. Therefore, private enforcement not only achieves the primary objective of competition law, i.e. to discourage anti-competitive activities, but also makes the law participatory as it allows the aggrieved parties to seek damages for such acts. Remedy to aggrieve the party or incentivise the private player to act as a subsidiary goal of private enforcement.

ii. Testing Efficiency of Private Enforcement-

The efficiency of any enforcement scheme is checked against its cost-effectiveness. Private enforcement facilitates achieving the object of competition law. Promotion of private enforcement is cost-effective for the public authorities as the money involved in the litigation is paid by private individuals. [52]However, the above proposition can lead to the other scenario in which the aggrieved party may avoid litigation due to the cost involved in the enforcement of the scheme or the time involved in the litigation. While keeping a more liberal approach might result in the over-enforcement of the scheme, which will make the whole purpose redundant. Thus, we need to identify the benefits arising out of private enforcement and then tabulate the costs involved.[53]

1. Private enforcement can continue to serve the purpose of the competition scheme despite the failure of public enforcement for various reasons, like inadequate training or insufficient funds for public officials.
2. Enforcement, whether it is public or private, acts as a deterrence to society and thus serves the greater public interest.

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[51]*Supra* 9 at 590
[52]*Supra* 56.
[53] THOMAS MJ MOLARS & ANDREAS HEINEMANN, THE ENFORCEMENT OF COMPETITION LAW IN EUROPE (Cambridge Law Press , UK) (1st ed., 2007). Also, *Supra* 9 at 591.

3. Private enforcement can raise the issues addressed to a large public rather than generating benefits to private individuals.
4. Private enforcement is incentive-based enforcement, and therefore, the litigant involved in the case has personal motivation.
5. Private enforcement is an individual-driven scheme; therefore, it is important to structure the rules of the scheme to serve as an incentive and drive individual behaviour to enforce their rights.

Thus, mathematically explaining the cost of litigants, costs to access courts, and the cost of time spent should be less than the damages claimed and the settlement amount claimed.

c. Glitch in Private Enforcement Scheme

1. Over-enforcement of rights- The primary issue with private enforcement is the over-enforcement of rights, which will result in a burden on the public forum. Over-incentivising the aggrieved party might lead to a plethora of cases. Another aspect that needs to be addressed is the high cost of litigation, which will help the big market players to throw out the small players and new entrants. Thus, it will make the whole process redundant.
2. Issue of Free-rider- In case of over-reliance of private enforcement and weakening the public enforcement, it can lead to a scenario in which no market player is willing to approach the authority, as the other party will approach the authority and they will benefit from it.[54]

d. Efficiency of the implementation mechanism

The implementation mechanism acts as a major challenge for any governmental scheme. In case of private enforcement, the costs of litigation and the cost of time play a major role in driving an individual's decision to pursue litigation or not. We have already discussed the procedural nuances of private enforcement in India. The Indian adjudication system is flooded with a superfluity of cases. As of 01st July 2020, more than 60,000 cases are pending before the Supreme Court of India, and around 43 lakh cases are pending before various High Courts.[55] More than 70% of prisoners are awaiting trial in various courts. Legal infrastructure and dispute resolution mechanisms play an important role in the economy and market. In India, NCLAT is responsible for

[54] *Supra* 9 at 591.
[55] *Supra* 31.

enforcing private rights under the Competition Act 2002.[56] NCLAT also acts as an appellate tribunal for the Insolvency and Bankruptcy Code, 2016 and all litigation arising under company law.[57] Private enforcement of competition law can involve multiple litigants approaching courts for the same cause of action, and the authority has to hear each case on its merits. It will not only frustrate the purpose of private enforcement in case of flooded litigation, but it will also render the purpose of NCLAT, i.e. prompt disposal of company law disputes. In the United States antitrust regime, the Antitrust Division's implementation regulation, along with the Administrative Dispute Resolution (ADR) Act of 1996, promotes arbitration as a disposal mechanism for antitrust cases.[58] Under this mechanism, fact discovery is headed by the District court, and then it is submitted to arbitration for the disposal of the case. In a similar manner, arbitration has developed as an efficient implementation of the competition law regime in the European Union as well. As discussed in the case of *Booz-Allen & Hamilton Inc v. SBI Home Finance LTD.*[59], the Hon'ble Supreme Court of India referred to Mustill & Boyd, which observed that subordinate rights of personam arising out of real rights, i.e. right in rem, may be subject to arbitration. In the case of Olympus Superstructures Pvt. Ltd. V Meena Vijay Khetan & Ors[60]., the Hon'ble Supreme Court of India held that when law provides that discretion must be exercised by courts in certain matters, it will not mean that any forum, as decided by the parties, cannot exercise such discretion. Therefore, it is advisable as private enforcement involves a violation of right in personam, and we must allow arbitration as an implementation mechanism for private enforcement of competition.

V. CONCLUSION

The 21st century is all about globalisation and technology. What we thought twenty years back as innovative is now slowly losing its value, and marching ahead, no domestic regime can be thought of as holding us back on the road to ease of business and global advantage. The Indian legal regime should be modified continuously in order to suit the changing needs. The World Bank postulates certain standards for determining a country on the basis of its investor friendliness in terms of easy business

[56]§ 53 N of Competition Act, 2002
[57]§ 202 & 211 of Insolvency and Bankruptcy Court 2016.
[58]Federal Register Vol. 61, No. 136 / 1996, *available at* https://www.govinfo.gov/content/pkg/FR-1996-07-15/pdf/96-17744.pdf (last visited on July 26, 2020).
[59](2011) 5 SCC 532
[60](1999) 5 SCC 651

operation. It ranks us 163rd in contract enforcement and 136th in starting a business, which is quite poor compared to India's overall 63rd rank. Parties in intercommercial transactions often try to invoke arbitration of antitrust claims, which is very well accepted by other mature states.

It is true that arbitration and competition law in India differ from each other in genesis, yet it is necessary to acknowledge that they are not irreconcilable. It is imperative to read the resolution of competition law issues into broadly framed arbitration agreements. It is important to re-examine the role of CCI on the one hand and to re-examine the challenges faced by the arbitration regime on the other hand. Bringing private enforcement into the realm of arbitration can be the most rewarding step today. However, it is not short of roadblocks; hence, legislators can issue guidelines on the same and carry forward a vast awareness programme.