Applying Vidya Drolia's "Four-Fold Arbitrability Test" to Antitrust Disputes in India

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Despite traditionally being considered unsuitable for arbitration, recent practice evidence that the concrete lines separating antitrust disputes and arbitration have blurred. Ever since the US Supreme Court approved arbitrability of antitrust disputes in Mitsubishi Motors v Soler ("**Mitsubishi Motors**") (discussed here and here), similar understanding has been accepted in EU (Eco Swiss v Benetton), England (Microsoft Mobile OY (Ltd) v Sony Europe Limited), discussed here), Germany (Judgement 8 O 30/16, discussed here), Switzerland (Tensacciai v Freyssinet Terra Armata), France (SNF v Cytec, discussed here), New Zealand (Gvt. of New Zealand v Mobil Oil), Italy (Nuovo Pignone SpA v Schlumberger), Sweden (Systembolaget v Absolut Company), Canada (Murphy v Amway, discussed here), among others. That said, a similar pro-arbitration stance concerning antitrust disputes is not mirrored in several jurisdictions, including India. This post examines the arbitrability of antitrust disputes in India, in light of the recently expounded "four-fold test" by the Supreme Court of India (**"SCI"**) in Vidya Drolia v Durga Trading Corporation (**"Vidya Drolia"**).

Indian standpoint

The arbitrability of antitrust disputes has not been directly addressed in any case in India to date. The closest an Indian court has come to deliberate on the issue was in Union of India v Competition Commission of India (2012). In this case, the Delhi High Court decided an objection to the maintainability of proceedings before the Competition Commission of India (**"CCI"**) in light of an existing arbitration agreement between the parties. The Court upheld the jurisdiction of the CCI, and opined that the scope of proceedings before the CCI and the focus of its investigation would be different from the scope of enquiry before the arbitral tribunal. The Court also held that the mandate of the arbitral tribunal was limited to the contractual clauses, and it would not have the mandate nor the expertise to conduct an investigation necessary to decide antitrust issues between the parties. As a result, though the Court did not comment on the objective arbitrability of antitrust disputes, it latently implied that the adjudication of antitrust claims was not suitable for arbitration.

Arbitrability, otherwise, has been discussed in several Indian cases, most notably in Booz Allen and Hamilton v SBI Home Finance (2011) (**"Booz Allen"**) (discussed here). In *Booz Allen*, the SCI listed six categories of disputes which were non-arbitrable in India. However, it did not include antitrust disputes. Thereafter, in Ayyasamy v Paramasivam (2016), the SCI mentioned a category of disputes that were generally treated as non-arbitrable, which did include antitrust disputes (para 9). As the primary issue in *Ayyasamy* pertained to the arbitrability of fraud (discussed here and here), the categorisation of antitrust disputes as non-arbitrable was not a binding pronouncement.

Applying the "four-fold test" to antitrust disputes

In an attempt to streamline the test for arbitrability in India, on December 14, 2020, the SCI in *Vidya Drolia* expounded a "four-fold test" to determine when a dispute shall not be arbitrable in India:

(i) when the 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*;

(ii) when the cause of action and subject matter of the dispute affects third party rights; have *erga omnes* effect; require centralised adjudication;

(iii) when the cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State; and

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

The SCI, by expressly acknowledging that subordinate rights *in personam* arising from actions *in rem* are arbitrable, paved the way for private adjudication of statutory claims in India. Applying this test, the SCI overruled Himangni Enterprises v Kamaljeet Singh Ahluwalia (2017) (discussed here) and held that landlord-tenant disputes, governed by the Transfer of Property Act, are arbitrable in India. Therefore, the arbitrability of antitrust disputes in India will depend upon the non-satisfaction of the aforementioned "four-fold test".

Ordinarily, antitrust disputes carry a public character and concern adjudication of actions and rights *in rem*. This is reflected in Section 19 (1)(a) of the Indian Competition Act, 2002 (**"Act"**), which allows any person, regardless of whether or not such a person has suffered any damage, to approach the CCI to inform about contraventions of the Act. However, importantly, Section 53N of the Act also allows any aggrieved party to claim compensation arising from the *in rem* findings of the CCI, thereby requiring adjudication of subordinate rights *in personam* of the aggrieved parties. Similarly, antitrust claims arising in the context of pre-existing contractual relationships such as franchise agreements, joint-venture agreements, or distribution agreements will also require adjudication of subordinate rights *in personam.* In such cases, (i) and (ii) of the "four-fold test" will not be satisfied as the adjudication would concern rights *inter se* between the parties.

In this regard, a reference can be made to Murphy v Amway (2013), wherein the Canadian Federal Court of Appeal **("FCA")** ruled that a private claim for damages brought under Section 36 of the Canadian Competition Act is arbitrable. The FCA, to reach this conclusion, relied upon Seidel v Telus Communications (2011), in which the Supreme Court of Canada had distinguished between Section 171 (which allowed only the person who suffered damages to initiate a claim) and Section 172 (which allowed anyone to initiate a claim) of the Business Practices and Consumer Protection Act, 2004, and concluded that though claims under Section 172 would not be arbitrable, claims under Section 171 could go to arbitration. Drawing a parallel to India, private antitrust claims under Section 53N of the Act and pre-existing contractual relationships should similarly be arbitrable.

Moreover, as private antitrust claims do not ordinarily concern inalienable and sovereign functions of the State, (iii) of the "four-fold test" will also not be satisfied. In fact, inalienable and sovereign functions of the State are exempt from the mandate of the Act itself. Section 54 of the Act provides that enterprises may be exempted from the application of the Act if such exemption is necessary for public interest or such enterprise is engaged in the performance of sovereign or inalienable functions of the State.

The impediment to the arbitrability of antitrust disputes will still arise owing to the satisfaction of (iv) of the "four-fold test". As CCI is a specialised statutory forum enjoying exclusive jurisdiction over antitrust disputes (Section 61 of the Act), it makes antitrust disputes non-arbitrable. This renders even subordinate rights *in personam* arising out of the Act to be non-arbitrable. The rationale behind this criteria, as highlighted by the SCI in *Vidya Drolia*, is to protect the special rights created by statutes and give effect to the legislative intent of stipulating an exclusive forum for the determination of such rights and liabilities.

Nevertheless, the suitability of this criteria to determine the arbitrability of disputes is questionable as arbitrators can give effect to the special rights and obligations created by the Act by applying the mandatory antitrust laws to the disputes. The SCI, in *Vidya Drolia,* acknowledges that considerations such as the need to apply mandatory law, the public policy objective of the statute, and the complexity of disputes do not preclude arbitration (paras 39-41). Parties have the freedom to appoint arbitrators with expertise in antitrust law, such that their rights can be efficiently determined. This was also highlighted in *Mitsubishi Motors*, wherein the US Supreme Court opined that arbitrators can be trusted to accord suitable remedies to the aggrieved parties by applying the substantive antitrust laws of the country (473 US at 635). Therefore, the creation of a specialised forum, i.e., the CCI, should not be the sole factor to preclude arbitration in antitrust disputes.

However, given that courts in India have previously strictly applied these criteria to hold disputes as non-arbitrable (see here, here, and here), it is likely that antitrust disputes will also be held as non-arbitrable in India.

Arbitrability in the international context

Non-arbitrability is a ground, distinct from public policy, for refusing enforcement under Section 34 (2)(b) (Part I; domestic awards) and Section 48 (2)(a) (Part II; foreign awards) of the Indian Arbitration & Conciliation Act, 1996 (**"IACA"**). Both the Sections provide similarly worded provisions. Importantly, the SCI in *Vidya Drolia* began its analysis with the caveat that the judgement does not examine or interpret the transnational provisions of arbitration in Part II of the IACA (para 7). Therefore, in view of *Vidya Drolia*, the "four-fold test" is only applicable to arbitrations under Part I of IACA, and not to foreign awards.

In light of the "four-fold test," the position in India concerning arbitrability of domestic antitrust disputes resembles the position in the US prior to *Mitsubishi Motors*, wherein the need for specialised adjudication of antitrust disputes precluded arbitration (American Safety doctrine). In this regard, it was pointed out by the US Supreme Court in *Mitsubishi Motors* that even if antitrust disputes are not considered arbitrable domestically in the US, they must be held to be arbitrable in the international context, with respect to international arbitration awards. It was stated that "*concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context*" (473 US at 629).

Similarly, it is likely the test to gauge the arbitrability of disputes for foreign awards in India, under Section 48 (2)(a) of the IACA, will be narrower than the "four-fold test" for domestic awards (similar to the distinction between domestic and international public policy, discussed here). A narrower test is sensitive to the need to give effect to transnational agreements, international comity, and predictable framework for global business and trade.

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