INDIAN SHIPPING EXEMPTION: A COMPARATIVE ANALYSIS

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This dissertation is submitted in partial fulfillment of the degree of B.B.A., LL.B. (Hons.)

College of Legal Studies

University of Petroleum and Energy Studies

Dehradun

2015

CERTIFICATE

This is to certify that the research work entitled **"INDIAN SHIPPING EXEMPTION: A COMPARATIVE ANALYSIS"** is the work done by **Mr. Arahant Jain** under my guidance and supervision for the partial fulfillment of the requirement of B.B..A., LL.B. (Hons.) at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

Signature & Name of Supervisor

Designation

Date

DECLARATION

I declare that the dissertation entitled **"INDIAN SHIPPING EXEMPTION: A COMPARATIVE ANALYSIS"** is the outcome of my own work conducted under the supervision of Mr A. Aravindan, at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that parts of this report have been reproduced from my own published work and this report is an extension of the research undertaken for the previous publication. The source can be accessed at http://www.nlujodhpur.ac.in/downloads/competition_law_cirquw.pdf.

This work was also submitted to Journal of Competition Law and policy, National Law University, Orissa, I have not received any information on the link to the publication as on April 5, 2015.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

Signature & Name of Student

Date

ACKNOWLEDGMENT

I wish to express my sincere thanks to Dr. Tabrez Ahmad, Director of ColS, for providing me with all the necessary facilities for the research.

I am also grateful to **Mr A. Aravindan**. I am extremely thankful and indebted to him for sharing expertise, and sincere and valuable guidance and encouragement extended to me.

I take this opportunity to express gratitude to all of the Department faculty members for their help and support. I also thank my parents for the unceasing encouragement, support and attention.

I also place on record, my sense of gratitude to one and all, who directly or indirectly, have lent their hand in this venture.

Contents

ABSTRACT

Ministry of Corporate Affairs issued a notification in September 2012 to exempt Vessel Sharing Agreements and Voluntary Discussions Agreement. The notification clearly is of a bonafide nature, but the haste of drafting has made it a waste.

These agreements promote domestic shipping along with international shipping, but irregular instructions create nothing apart from trouble. Upon comparison with countries like Singapore, USA, Canada, Australia, New Zealand, Japan and European Union- which have a better developed shipping industry than ours, we can easily see the lacunae in the laws governing our shipping industry.Cue should be taken from other nations and proper guidelines should be established for the domestic shipping companies.

In this paper, we aim to look into the advantages and disadvantages of the exemptions granted by the Competition Commission of India. We shall also see how the regulations are imposed on the shipping industry in India. We will also compare the laws pertaining to Vessel Sharing Agreements and Voluntary Discussions Agreement of other nations to ours.

In the end, the question remains, "Are the Shipping Exemptions too much of a good thing?"

The Competition Act, 2002

In the wake of liberalization and privatization that was activated in India in mid nineties, an acknowledgment accumulated energy that the current Monopolistic and Restrictive Trade Practices Act, 1969 ("MRTP Act") was not prepared sufficiently enough to handle the opposition part of the Indian economy. With beginning of the globalization process, Indian ventures began confronting the warmth of Competition from local players and from worldwide monsters, which called for level playing field and speculator benevolent environment. Henceforth, require emerged with respect to Competition laws to move the center from controling restraining infrastructures to urging organizations to contribute and develop, accordingly advancing Competition while keeping any misuse of business sector power.

1. **Competition: significance and profits**

Competition is a circumstance in business, in which merchants autonomously make progress toward purchaser's support to attain to business goals. Competition and liberalization, together unleash the entrepreneurial powers in the economy. Competition offers wide exhibit of decisions to purchasers at sensible costs, empowers development and profit, and prompts ideal allotment of assets.

2. **Misuse of business sector and requirement for new law**

In an open business economy, a couple of tries may undermine the business segment by relying upon unfriendly to forceful practices for transient increments. These practices can absolutely negate the benefits of Competition. It is henceforth that, while countries over the globe are dynamically getting a handle on business segment economy, they are furthermore re-inforcing their economies through the endorsing of Competition law and setting up Competition regulatory force.

As per the overall example and to adjust up to the changing substances India, thus, settled the Competition Act, 2002 (hereinafter implied as "the Act"). Delineated as an omnibus code to oversee matters relating to the vicinity and regulation of Competition and forcing plans of action, the Act is wanted to supersede and supplant the MRTP Act. It is approach genuine and is composed in an uncomplicated way that renders it more versatile and consistence

arranged. Notwithstanding the way that the Act is not exclusivist and works in pair with distinctive laws, the acquirements ought to have sway in spite of anything clashing therewith contained in whatever other law.

3. Three stage move

The Act accommodates three-arranged move, spreading over the initial three years from the date of notice of the Act, wherein the Competition Commission of India (hereinafter, alluded to as "CCI") would supplant the MRTP Commission.

a. First and foremost year

- At the onset of first year, MRTP Commission stoped to exist and CCI accepts the part of a report body.
- The pending cases in the MRTP Commission identifying with unreasonable exchange practices would be exchanged to the concerned shopper courts under the Consumer Protection Act, 1986.
- The pending cases identifying with monopolistic and prohibitive exchange practices must be taken up for mediation by CCI.

b. Second year

- During the second year, CCI would investigate the opposition to focused practices.

c. Third year

- During the third year, CCI would start directing the mergers and acquisitions that will have unfriendly effect on Competition.

4. Takeoff from the MRTP Act

In a critical takeoff from the letter and soul of the MRTP Act, the Act depends on the "Impact Theory" and does not completely denounce or censure the presence of a restraining infrastructure in the pertinent business sector, rather the utilization of the syndication status such that it works to the impediment of the potential and genuine contenders is looked to be checked.

- The prior enactment, considered draconian in the changed situation, was in light of size as a variable, while the new law is in view of structure as a component, went for bringing alleviation to the players in the business sector.

- The Act enables CCI to force punishment on reprobate undertakings, while in the MRTP Act there were no procurements in regards to such ventures

- MRTP Act could just pass "quit it" arranges and did not have some other forces to counteract or rebuff while the new law contains corrective procurements.

- MRTP Act was appropriate to Private and Public segment endeavors just, though, the new Act extends its compass to administrative offices occupied with business exercises.

- As respects assentions, necessary enlistment has been carried out away with.

- The most way softening section up the Act has been the accentuation on Competition Advocacy that was not in any way thought about by the MRTP Act.

5. The goals

I. To check against aggressive practices

II. To restrict misuse of predominance

III. Regulation of blends.

IV. To accommodate the foundation of CCI, a semi legal body to perform underneath said obligations:

- Prevent works on having unfavorable effect on Competition

- Promote and support Competition in the business

- Protect shopper engages on the loose

- Ensure opportunity of exchange carried on by different members in the business sector

- Look into matters associated therewith or coincidental thereto.

6. Anti-Competitive Agreements

The flight is reflected in section 3 of the Act, which communicates that attempts, persons or relationship of endeavors or persons, including cartels, may not go into understandings in valuation for era, supply, dissemination, stockpiling, obtainment or control of items or acquirement of organizations, which cause or are inclined to cause a "measurable unpleasant impact" on Competition in India. Such understandings would therefore be seen as void.

The sorts of assention which would be considered to have an 'evident hostile impact" would be those assentions which:

- Directly or by suggestion center arrangement or purchase costs;

- Limit or control era, supply, showcases, specific headway, endeavor or acquisition of organizations;

- Share the business or wellspring of era or acquirement of organizations by task of bury alia land region of business area, nature of stock or number of customers or some other relative way

- Directly or in an indirect manner achieve offer device or precarious advertising.

Further, the understandings, which are gone into in profound respect of diverse authorized development rights and which see the elite benefits of one social affair over the other in energy about trademarks, licenses, copyrights, geographical markers, mechanical arrangements and semi conductors have been withdrawn from the space of "threatening to centered assentions". The regularly monopolistic rights made for honest holders of distinctive sorts of ensured development have been managed as blessed.

7. Abuse of Dominant Position

Section 4 of the Act encourages, "no endeavor ought to sick utilize its predominant position". Overwhelming position is the position of value took pleasure in by an endeavor in the essential business, which engages it to work self-rulingly of centered qualities winning market, or impact its opponents or customers or the germane business sector to bolster it. There ought to be an evil utilization of prevalent position if an endeavor revels into the underneath said activities:

- Directly or in a circuitous manner compelling one-sided conditions in the purchase or offer of items or organization, or setting expenses in the purchase or arrangement (numbering savage assessing) of stock or organizations;

- Limiting or restricting the era of items or acquirement of organizations or market in this way; or limiting particular or test progression relating to stock or organizations to the inclination of customers;

- Indulging basically or chips away at achieving the foreswearing of business access

- Making completion of assention subject to affirmation by distinctive social events of supplementary duties, which has no relationship with the subject of such contract;

- Utilization of the transcendent position in one related business division to go into, or secure, another relevant business area.

8. Blends

The Act is proposed to control the operation and activities of "mixes", a term, which thinks about obtaining, mergers or amalgamations. Blend that surpasses the extent that this would be possible shown in the Act the extent that assets or turnover, which causes or is subject to cause an extensive threatening impact on Competition inside the critical market in India, can be analyzed by the Commission.

Edge compels that would welcome the examination are resolved underneath:

For securing:

- Combined assets of the firm more than Rs 3,000 crore (these cutoff focuses are US $ 500 millions in case one of the associations is organized outside India).

- The cutoff focuses are more than Rs 4,000 crore or 12,000 crore and US $ 2 billion and 6 billion if acquirer is a get-together in India or outside India separately.

For mergers:

- Assets of the merged/amalgamated substance more than Rs 1,000 crore or turnover more than Rs 3,000 crore (these limits are US $ 500 millions and 1,500 millions in case one of the associations is masterminded outside India).

- These limits are more than Rs 4,000 crore or Rs 12,000 crore and US $ 2 billions and 6 billions in case consolidated/amalgamated substance fits in with a social occasion in India or outside India independently.

Further, such blend, which causes or is inclined to cause "clear unfavorable impact" on Competition, would be managed as void.

A system is given under the Act wherein at the option of the individual or endeavor proposing to go into a mix may haul out to the Competition Commission of India of such point giving purposes of enthusiasm of the blend. The Commission after due thought, would issue its supposition on the proposed mix to approach the Commission therefore. Regardless, open cash related establishments, remote institutional theorists, banks or financing trusts which are considering offer participation financing or acquiring according to any specific stipulation in a development understanding or monetary pro assention are not expected to appr

7. Competition Commission of India

CCI, endowed with taking out restricted practices, is a body corporate and autonomous substance having a typical seal with the ability to go into contracts and to sue in its name. It is to comprise of an administrator, who is to be supported by at least two, and a greatest of ten, different individuals.

8. Acts occurring outside India

CCI has the ability to enquire into uncalled for understandings or misuse of predominant position or blends occurring outside India however having antagonistic impact on Competition in India, gave that any of the underneath specified circumstances exists:

An understanding has been executed outside India

Any contracting gathering lives outside India

Any endeavor misapplying overwhelming position is outside India

A blend has been secured outside India

A gathering to a blend is placed abroad.

Whatever other matter or practice or activity emerging out of such understanding or overwhelming position or blend is outside India.

To manage cross outskirt issues, CCI is enabled to go into any Memorandum of Understanding or game plan with any outside office of any remote nation with the earlier endorsement of Central Government.

9. **Seats**

For the execution of commitments, the Act thinks about the movement of the region, powers and force of CCI by number of Benches. If crucial, a Bench would be constituted by the official of no under two people; it being requested that no under one single person from each Bench would be a "Lawful Member". The Bench over which the official oversees is to be known as the Principal Bench and exchange Benches known as Additional Benches. Regardless, the Act further empowers the executive to further constitute one or more Benches known as Mergers Benches singularly to oversee mix and the regulation of blends.

Expansion of the official forces

The Act thinks about the expansion of the official forces of CCI by the arrangement of a Director General and the same number of different persons with the end goal of aiding it in directing enquiries into repudiations of the procurements of the Act and in addition leading cases before the Commission.

CCI is engaged to lead enquiries into:

"Certain assentions and predominant position of big business"

"Mixes"

CCI, either all alone movement, on receipt of a grievance or on a reference made to it by the Center or State Government may enquire into any charged negation with respect to the way of the understanding, which is suspected to be characteristically hostile to focused, or the misuse of predominant position. Any individual, buyer, customer affiliation or exchange affiliation can make a protest.

An enquiry into a mix, existing or proposed, may be launched upon the learning or data in the ownership of CCI endless supply of the individual or element proposing to go into a blend or upon a reference made by a statutory power. Confinement of time for launch of enquiry is one year from the date on which the mix has produced results when CCI directs such enquiry.

10. Locale

An enquiry or challenge could be propelled or recorded before the Bench of CCI if inside the area farthest reaches of its ward the respondent\s truly or deliberately lives, carries on business or works for individual increment, or where the purpose behind movement totally or to some degree rises.

CCI has been vested with the strengths of a typical court including those gave under fragments 240 and 240A of the Companies Act, 1956 on an "Inspector of Investigation" while endeavoring a suit, including the capacity to summon and assess any single person on pledge, obliging the exposure and formation of records and tolerating affirmation on sworn articulations. CCI is moreover vested with particular powers of legislative approach in regards to minorities in the public arena to act in an encouraged manner. Regular courts or whatever other tantamount force won't have any ward to redirect any suit or making headway or outfit arrange as to any matter which would typically fall inside the ambit of CCI.

11. System of Investigation and Order Thereof:

In case a by all appearances body of evidence exists with respect to against forceful understandings and abuse of winning position, CCI is empowered to direct the Director General to lead an examination in the matter.

In choosing the method for assentions, the going hand in hand with parts are to be considered:

Obstacles to new members in the business area

Driving existing contenders out of the business

Surrender of Competition by forestalling passage into the business

Gathering of benefits of customers

Changes in progress or course of stock or acquisition of organizations

Progression of particular, exploratory and financial change.

In choosing the method for the mind-boggling position increased in value by an endeavor, taking after parts are to considered:

Bit of the general business of the try and business structure and size

Size and resources of the endeavor

Monetary power of the try including business inclination over the contenders

Size and noteworthiness of the contenders

Dependence of clients on the attempt

The level of vertical consolidation and customer dependence

Whether the limiting framework was gotten by reason of statute or for the most part

Area limits including hindrances, for instance, managerial deterrents, budgetary threat, high capital cost of passage, business division section obstructions, particular passageway limits, economies of scale "Countervailing obtaining power" and "social duties and costs". Whatever other segment which CCI may consider critical for the enquiry.

The Director General would give his report recommendations. In case CCI is of the point of view that there are no advantages to the case, the grievance would be discharged, with costs. Regardless, in the midst of the course of enquiry, CCI may yield interim lightening by technique for temporary requests controlling a get-together from continuing with the tunneling little animal forceful assentions or abuse of transcendent position.

An appeal of CCI ensuing to an enquiry, could embody:

Facilitating the persons or substances ruled against to prevent from twisting a staggering position or completion catching up on threatening to forceful assentions

Constraining discipline to the best level of ten percent of the typical turnover for the last going before three cash related years upon each individual or substance social event to the abuse

Reward pay

Conform understandings

Endorse the division of the predominant try to the Center, which has an authoritative energy to pick the predetermination of a staggering undertaking

Recovery of pay from any endeavor for any incident or damage exhibited to host persevered by the other get-together.

The strategy for examination of mixes is to some degree unmistakable, as the Act analyzes direct examination to be coordinated by CCI rather than by relying upon the through media of the Directorate General. It may call upon any social affair to outfit all related information concerning their business operation to land at a conclusion as to the method for the mix.

While the segments to be considered are similar to the parameters to be associated while taking a gander at antagonistic to centered understandings and sick utilization of overpowering position the CCI ought to similarly have due admiration to the going with variables:

- Real and potential level of Competition through imports in the business sector
- Degree of viable Competition liable to manage in the business sector
- Probability that the opposition would bring about the evacuation of an overwhelming and powerful contender or rivals in the business.
- Probability of a coming up short business
- Nature and degree of advancement
- Relative point of interest, by method for the commitment to the monetary advancement
- Whether the profits of the blend exceed the unfriendly effect of the mix if any
- If there should be an occurrence of blend, CCI may go taking after requests:
- Endorsement of the blend if no obvious unfriendly impact on Competition is found
- Objection to the blend in the event of unfriendly impact
- It may propose suitable change as acknowledged by the gatherings

- Amid enquiry award break alleviation by method for transitory orders
- Honor pay
- Punishments

If there should be an occurrence of inability to conform to the bearings of CCI and Director General or bogus representation of realities by gatherings, punishments running from Rs 1lac to Rs 1 crore may be forced as the case may be.

12. Execution of the request

So far the execution of the request is concerned, it is the obligation CCI. Notwithstanding, in the occasion of its failure to execute it, CCI may send such request for execution to the High Court or the central common court, as the case may be.

13. Post-Decisional Options

The wronged individual may apply to CCI for survey of the request inside thirty days from the date of the request, gave that the beneath said conditions are satisfied:

- A claim is permitted by this Act
- No claim has been favored

Procurement has been made for a claim against any request or choice of CCI by any wronged individual. An application for this reason must be made to the Supreme Court inside sixty days from the date of correspondence of the choice or request.

14. Competition Advocacy

Maybe a standout amongst the most essential parts of the Act is Competition promotion. Aim is to help advance Competition law through survey of strategy, advancement of Competition promotion, making mindfulness and conferring preparing about Competition issues. For this reason Government might, in its prudence, make a reference to CCI for its sentiment consequently yet is not bound by it. The force of the Center to issue headings to CCI is intrinsic, and such bearings would tie it.

15. Over-All

The demonstration is far sufficiently reaching and carefully cut out to meet the necessities of the new time of business economy, which has dawned upon the skyline of Indian monetary

framework. It is in synchronization with other arrangement of strategies, for example, changed exchange approach, loose FDI standards, FEMA, deregulation and so forth, that would guarantee consistency in general Competition strategy. It's simply a question of time when the Act is made successful and CCI gets to be practical, which would, thus, encourage understand our yearning to get up to speed with the worldwide economy. Then again, the Act is really intelligent of changing monetary milieu of our nation and is decently prepared to advance reasonable Competition and deal with impinging business practices, encourage residential players versus pariahs, defend the premiums of shoppers and therefore, guarantee dynamic quality and strength in the Indian market.

Combinations and Need for Exemptions

The Report of the Monopolies Inquiry Commission starts with the observation "Power contaminates and aggregate power spoils completely. This is routinely said of political foundations; nonetheless it is said to be no less substantial for money related power. It is not amazing thusly that as political larger part lead governments developed in the different countries of the world there was a creating perception of the necessity for keeping the monetary power whether in the hands of associations or affiliations or individuals inside control. Distinctive measures have been taken in the midst of the last 75% of a century therefore." While the discernment was way back in the late 60s, the substance of the same is of congruity even in today's setting and the need to direct accumulating of fiscal power has been and continues being one of the discriminating guidelines of a welfare state. For example, Article 39 of the Constitution of India, 1950 gives that the State may direct its courses of action bury alia to ensure that (a) the proprietorship and control of the material resources of the gathering are so scattered as best to sub-serve the profit of everybody and (b) the operation of the budgetary structure does not realize the accumulating of wealth and technique for era to the customary weakness. The advancement system of an economy is driven both by common and inorganic improvement of business. Inorganic advancement is basically coordinated through mergers and acquisitions between business attempts.

A merger is a blend of two or more business endeavors into one, an essential ordinary for which (either through ingestion or combining) is that, one association (existing or new) expect control over the obligation regarding company(ies) and joins their operations with its own specific operations. A securing may be portrayed as a show of picking up gives or voting rights or assets or control of an endeavor, with no merger or amalgamation of the associations included, where two or more associations will stay to have free vicinity as discrete components.

In antitrust discourse, the articulation "merger" joins mergers, amalgamations, and acquisitions, and merger control suggests the regulation of mergers with a viewpoint to thwart undesirable center/action of business part control, that may inclination customer excitement as an outcome of the hostile changes in the business structure. It gives Competition controls, the ability to assess and cure the potential unfavorable effects of a merger, in this way, finally securing the energy of the buyers. The restriction issues are more

all things considered associated with level mergers where contenders at the same level of era and/or dispersal of a good or organization, i.e., in the same relevant business division, coordinate with each other. These mergers may offer climb to (an) uneven effects - generally called non-formed effects, where, as a result of the merger, Competition between the aftereffects of the mixing firms is murdered, allowing the combined substance to independently hone business division power, for instance by profitably raising the expense of one or both of the joining parties' things, thusly harming customers; and/or (b) encouraged effects - as an eventual outcome of the diminishing of the amount of players in the business part as per the merger, the business segment obsession may grow empowering the solidifying social occasions and/or their opponents to adequately orchestrate their behavior in a threatening to forceful course, for case, by changing expenses. Competition concerns may in like manner rise in vertical mergers where two players, at unmistakable levels of the era chain in the huge thing business sector, mix. Regardless, such a likelihood is tolerably less. Total mergers (i.e. mergers between endeavors possessed with different associations and are not joined at unmistakable levels of the era chain) were all things considered found not to offer climb to any adversary concerns. Essentially, merger control expects to dismiss adversarial auxiliary changes in the business that may hurt the inspirations to fight, while Competition law/antitrust preventions look to fight particular sorts of against forceful comprehension and conduct. One may fight that the prerequisite for merger control is broken in the region of acquirements confining unfriendly to forceful understandings and sick utilization of quality, as merger control essentially plans to keep up a vital separation from potential abuse of transcendence and against centered courses of action. In any case, the need to rely on upon the acquisitions relating to unfriendly to centered interests and sick utilization of quality is reduced by keeping up forceful conditions so that the spurring strengths and open entryway for interest or abuse of business division prevalence are kept from rising, in any occasion insofar as they result from mergers. Further, even where basic cures are open ex post, there can be high money related costs of unwinding a trade where the united component has subsequently been found to harm Competition. Existing written work moreover prescribes that two endeavors intending to go into an against centered assention may consolidate themselves to avoid the compass of the obtainments relating to the anticompetitive assentions. While mergers may have unfriendly to forceful conceivable outcomes, it is neither achievable nor fitting to overview all the mergers and acquisitions. For sure in created domains like the United States, right around 95% of the merger filings don't raise any against centered concerns. On the off chance that there ought to be an event of making economies,

merger control laws - to evade unfavorable business division structures and to keep up buyer welfare - need to be balanced and the same may not inclination the advancement process. This could be the reason behind the introduction of the [Indian] Competition Act, 2002 to give that the said Act is requested keeping in context of the monetary progression of the country. As needs be, the merger control organization ought to support capable mergers without being an obstruction to their satisfaction which along these lines obliges recognition of efficiencies and trade off between the shocking and incredible effects of a merger. In this association, it is similarly obliged that the resistance forces recognize trades that are at risk to have against centered result and subject just such trade to merger control.

The managing standards behind Competition law are to advance smoother markets by repressing private players from hindering business sector. Its expands customer welfare, empowers dynamic productivity and adds to the advancement of the economy. The Competition Commission of India keeps a nearby eye on the opposition to aggressive assentions, might it be level or vertical understandings. Universal delivery liners attempt to undermine little local players the whole way across the globe, and thus the administration ventures into spare them from the usurping forces. Be that as it may once in a while these understandings which appear to be hostile to aggressive on the substance of it, advantage both the purchasers and additionally the administration suppliers.

The current situation of the global delivery industry is commanded by a Danish titan "Maersk". In India, an open segment venture "Shipping Corporation of India" makes waves in the local oceans. The exception concerning Vessel Sharing Agreement and Voluntary Discussion Agreement has been invited with open arms by the transportation business around the world. Vessel Sharing Agreement sanctions liners to impart space on one another's vessels, offer terminals, and enhance gainfulness by decreasing expense and ecological weights. Intentional Discussion Agreement permits bearers to impart market data, embrace basic administration models and propose a bound together voice in exchanges with government bodies and delivery organizations. The exception liberates the liner organizations for a year. The trip past this time period stays misty.

Exemptions in Foreign Jurisdictions

Certain mergers are exempted by Competition laws of most wards from being advised to the different Competition workplaces as they are implausible to offer rising to any unfavorable Competition concerns. Such exemptions are outfitted with a viewpoint to have gainful/procompetitive/Competition neutral mergers built up and finally finished rapidly with no unnecessary regulatory intercessions and to pass on the advantages of the restriction association in a perfect world just in cases that are at risk to have unfavorable effect on Competition. The up and coming inspects the method for trades that are exempted from merger control (i.e. premerger cautioning) in the United States, the European Union and India, however the trades really constitute a merger/blend under the laws and regulations of the United States, European Union and India.

United States

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (§ 7A of the Clayton Act or the 'Clayton Act') obliges gatherings to specific mergers or acquisitions to inform the Federal Trade Commission ('FTC') and the Department of Justice ('DoJ'), both being the antitrust authorization orgs in the United States, before fulfilling the proposed securing/merger gave the exchange fulfills the size basis conceived under the Clayton Act. The said segment manages different parts of merger control including notifiable mergers, holding up period, exception to specific mergers from notice necessities, making of principles by the FTC, method for looking for extra data and expansion of holding up period, and so on. After warning, the gatherings to the merger must sit tight for a particular period while the said orgs audit the proposed exchange.

Exonerations under the Clayton Act:

The very obtainment obliging premerger cautioning as per the Clayton Act start saying that such cautioning is obliged unless the merger is exempted under the said Act. Zone 7A(c) of the Clayton Act selects the trades that are met all requirements for special case from premerger cautioning, the purposes of enthusiasm of which are according to the accompanying:

(an) acquisitions of items or realty moved in the standard course of business;

(b) acquisitions of bonds, home advances, deeds of trust, or distinctive duties which are not voting securities;

(c) acquisitions of voting securities of a supporter no under 50 each centum of the voting securities of which are asserted by the acquiring individual going before such acquisition;

(d) trades to or from a Federal office or a State or political subdivision thereof;

(e) exchanges particularly exempted from the antitrust laws by Federal statute;

(f) exchanges particularly exempted from the antitrust laws by Federal statute if sanction by a Federal organization, if duplicates of all data and narrative material recorded with such office are contemporaneously documented with the Federal Trade Commission and the Assistant Attorney General;

(g) certain exchanges which oblige organization support, if duplicates of all data and narrative material recorded with any such office are contemporaneously documented with the Federal Trade Commission and the Assistant Attorney General no less than 30 days before fulfillment of the proposed exchange;

(h) acquisitions, singularly with the end goal of speculation, of voting securities, if, as a consequence of such procurement, the securities gained or held don't surpass 10 every centum of the exceptional voting securities of the guarantor;

(i) acquisitions of voting securities, if, as an aftereffect of such obtaining, the voting securities obtained don't increment, straightforwardly or by implication, the gaining individual's every centum offer of extraordinary voting securities of the backer;

(j) acquisitions, singularly with the end goal of speculation, by any bank, saving money affiliation, trust organization, venture organization, or insurance agency, of voting securities according to an arrangement of rearrangement or disintegration; or (b) resources in the customary course of its business; and

(k) such different acquisitions, exchanges, or exchanges, as may be exempted as per the guidelines made under the Section 7 of the Clayton Act.

ii. Exemptions under the Pre-merger Notification Rules:

> Towards authorization of the procurements of the Clayton Act, the FTC has additionally issued the Premerger Notification Rules, 16 C.F.R. Parts 801, 802 and 803 (the 'Premerger Notification Rules') that arrangements with different angles identifying with the premerger warning system including the way of exchanges that are exempted from premerger notice. These guidelines additionally give more prominent clarity on the absolutions gave in the Clayton Act including the extent of those exceptions. The points of interest of exclusions gave under section 802 are as per the following:
>
> (a) Acquisitions of products and realty in the standard course of busines : A procurement of another merchandise; (b) current supplies or (c) utilized tough products as a part of the conventional course of business not bringing about obtaining of all or considerably all the advantages of a working unit .

Certain acquisitions of genuine property resources: A procurement of an: another facility;(b) inefficient genuine property;(c) office and private property;(d) recreational area; (e) rural property and resources coincidental to the responsibility for horticultural property; (f) utilized office ; (g) inn or motel ; or (h) retail rental space (counting malls) or warehouses27 . In a securing that incorporates the said things, the exchange of some other resource that is not a piece of the above things should be liable to the necessities of the Clayton Act and the Pre-merger Notification Rules as though such resources were being moved in a different procurement.

Exemptions in India:

If there should be an occurrence of India, certain exceptions are given by the Government warnings under Section 54 of the Competition Act and the Combination Regulation gives alternative to gatherings to certain mix for not giving premerger notification to the CCI.

i. Absolutions compliant with the Government notices:

At the time of authorization of the procurements identifying with mixes, the Central Government has additionally issued few exclusion notices identifying with blends, the points of interest of which are as per the following:

(a) Target absolution warning: In activity of the forces gave by statement (an) of Section 54 of the Competition Act, the Central Government, openly hobby, has exempted an undertaking, whose control, shares, voting rights or resources are being obtained has either

resources of the estimation of not more than 250 crores in India or turnover of not more than 750 crores in India from the procurements of Section 5 of the said Act for a time of five years . The warning is comprehended to give absolution to acquisitions where the gained venture (target) has resources or turnover not exactly the said levels.

(b) Group exception warning: In activity of the forces gave by provision (an) of Section 54 of the Competition Act, the Central Government, in broad daylight hobby, has exempted

"Gathering" practicing under fifty every penny of voting rights in other venture from the procurements of Section 5 of the Competition Act for a time of five years .

There has been no choice or any definitive understanding in regards to the extent of exception of these warnings. Then again, issues, for example, (a) whether target absolution notice applies to an exchange or is restricted to the target venture said in that; and(b) whether the gathering exception warning is in the setting of registering edges for the reasons of Section 5 or corrects the shareholding criteria in the clarification of gathering are generally hazy and worth examination .

Falling flat banks absolution warning: In activity of the forces gave by proviso (an) of Section 54 of the Competition Act, the Central Government, out in the open premium, has exempted a managing an account organization in appreciation of which the Central Government has issued a notice under Section 45 of the Banking Regulation Act, 1949 ('Banking Regulation Act'), from the use of the procurements of Sections 5 and 6 of the Competition Act for a time of five years . The Central Government has energy to issue a request of ban against a bank under the said procurement of the Banking Regulation Act. Such measure would be taken by the

Focal Government upon the suggestions of the Reserve Bank of India ('RBI'). Amid the time of ban, the greatest of which could be just six months, the RBI in (an) open premium; or (b) the enthusiasm of the investors; or (c) the best possible administration of the bank; or

(d) the enthusiasm of the keeping money framework, propose a plan for remaking or amalgamation of the concerned managing an account organization and the Central Government may support such proposition. There have been just couple of occasions where the RBI has conjured the forces under Section 45 of Banking Regulation Act and proposed a plan. All these couple of mergers were sought after just in situations where the individual managing an account organizations were in an upset monetary condition or were inclined to budgetary vulnerabilities. The last such occurrence was the merger of Global Trust Bank with Oriental Bank of Commerce in 2004.

ii. Exemptions pursuant to Schedule I of the Combination Regulations:

Regulation 4 of the Combination Regulations gives choice to the gatherings of the mixes determined under Schedule I for not documenting premerger notice with the CCI, as those exchanges are conventionally not prone to cause AAEC in India. These exchanges are like the way of specific exchanges exempted from premerger recognize in the United States and the European Union. The points of interest of the classes of mixes determined under Schedule I are as per the following:

(a) *Acquisition of non-controlling minority stake*[1]: A securing of shares or voting rights not bringing about the acquirer holding 25% or a greater amount of the aggregate imparts or voting privileges of the target undertaking gave: (a) the procurement has been made exclusively as a venture or in the customary course of business; and (b) the obtaining does not prompt procurement of control over the target endeavor.

(b) *Creeping acquisitions in 25-50% shareholding slab*[2]*:* Extra obtaining of shares or voting rights bringing about securing of under 5% of the shares or voting rights in the target endeavor in a budgetary year gave: (a) preceding the procurement, the acquirer or its gathering holds 25% or a greater amount of the shares or voting rights in the target venture; (b) the acquirer does not hold half or more imparts or voting rights in the target undertaking before or after the securing; and (c) the exchange does not bring about obtaining of sole or joint control.

(c) *Acquisition of shares/voting rights where the acquirer already holds 50% stake*[3] *: An obtaining of shares or voting rights in a venture where the acquirer as of now holds half or more imparts or voting privileges of the target undertaking and the exchange does not bring about exchange from joint control to sole control over the target endeavor.*

Acquisition of certain assets[4]*:* Obtaining of advantages that are not straightforwardly identified with the business action of the acquirer or made singularly as a venture or in the normal course of business gave: (a) the securing does not bring about control over the target undertaking (whose benefits are being obtained); and (b) the advantages that are being gained ought not speak to considerable business operations in a specific area or for a specific item or administration of the target endeavor.

(d) *Revised takeover offer*[5]*:* Amended or renewed offer to the public shareholders, pursuant to the requirements of the applicable securities law, provided the CCI was given a pre-

[1] Item 1A of schedule I to Combination Regulations.
[2] Item 2 of schedule I to Combination Regulations.
[3] Item 2 of schedule I to Combination Regulations.
[4] Item 3 of schedule I to Combination Regulations.
[5] Item 4 of schedule I to Combination Regulations.

merger notice in respect of the initial offer.

(e) Acquisition of benefits in living up to expectations capital cycle: A procurement of stock-in-exchange, crude materials , stores and extras and exchange receivables and other comparative resources, in the common course of business.

(f) Acquisition compliant with reward issue, rights issue and so forth.: An obtaining of shares or voting rights according to a reward issue, stock parts, combining of face estimation of shares, purchase back of shares or membership to rights issue of shares gave the same does not prompt procurement of control.

(g) Acquisition by securities market go-betweens: Acquisition of shares or voting rights by securities guarantor or an enrolled stock representative gave (a) securing has been made in the normal course of business; (b) obtaining has been made in the interest of the customers; and (c) procurement has been made during the time spent endorsing or stock broking, as the case may be.

(h) Intra-bunch merger combinations:An procurement of shares or voting rights or resources by one individual or endeavor of someone else or undertaking inside the same gathering with the exception of in situations where the target venture is mutually controlled.

(i) Intra-bunch mergers or amalgamation between: (i) completely possessed backups of the guardian organization between se, or (ii) entirely claimed backup with the guardian organization gave that the exchange does not bring about exchange from joint control to sole control.

(j) Combinations with unimportant neighborhood nexus : Any exchange satisfying the edge specified in Section 5 of the Competition Act occurring totally outside India, that is, in a remote locale and the exchange does not have noteworthy nearby nexus and impact on business sectors in India.

(j) Basically, taking a gander at the above procurements, it can be deduced that a notification to the CCI is compulsory if there is a securing of shares or voting rights, as an aftereffect of which the acquirer's shareholding would surpass any of the accompanying limits:

(k) 25% - Acquisition/holding of shares/voting rights in abundance of 25% in an organization gives the acquirer/the shareholder, the capacity to piece an activity that obliges exceptional determination under the Companies Act, 1956. Such capacity is for the most part alluded to as negative control.

(l) half - Acquisition/holding of shares/voting rights in abundance of half in an organization gives the acquirer/the shareholder, the capacity to make the organization perform a few exercises that obliges standard determination under the Companies Act, 1956. Such a shareholding may additionally give sole control to the acquirer/the shareholder gave no different shareholder(s) in the organization have negative control.

(m) 75% - Acquisition/holding of shares/voting rights in abundance of 75% in an organization gives the acquirer/the shareholder, the capacity to make the organization perform any movement as the acquirer/the shareholder can pass an extraordinary determination under the Companies Act, 1956. Further, without any contractual rights in actuality, for example, those contained in the shareholders' assention, shareholding more than 75% gives sole and total control.

(n) Be that as it may, despite the above limits, a notification might need to be documented with the CCI at whatever point there is change in control over the target venture. At the end of the day, regardless of the fact that there is no procurement of shareholding, however there is change in control of an undertaking, the acquirer of such control needs to inform the same to the CCI. Such occurrences of securing incorporate vesting of control rights according to an assention between the shareholders. The rights under the shareholders' assention could be relative or independent of the quantum of shareholding. Further, control over an endeavor might likewise be obtained in accordance with contractual courses of action with no obtaining of shares100.

Taking a gander at the things gave in Schedule I of Combination Regulations, it is pass that the CCI obliges notice at whatever point there is a change in control in any undertaking either by method for securing of shares/voting rights or overall including through contractual plans. It is likewise pass that the Combination Regulations require premerger notice at whatever point there is a change from joint to sole control. Subsequently, the exceptions are conceived in such a path, to the point that any change in control over an undertaking should be

notifiable to the CCI. The CCI's attempt in Schedule I of the Combination Regulations is to arrange exchanges that require watchful examination and the ones that can be given a green flag as no unfavorable hostile to focused issues emerge out of them.

The Notification:Shipping exemption[6]

The Ministry of Corporate Affairs ("**MCA**"), Government of India issued a notification dated September 19, 2012 ("**Shipping Notification**"), to exempt Vessel Sharing Agreements ("**VSA**") and Voluntary Discussions Agreement ("**VDA**") (collectively "**Agreements**") from being anti-competitive, for a period of one year.[7] By virtue of this notification, shipping liners will be free to enter into VSA and VDA within the sector, including the foreign companies operating in India.

VSA is a term used to refer to an agreement which is, entered into between the liners for sharing space on each other's vessels, consolidate duplicative services and share terminals to improve productivity and lower costs.

Example: Liner A has a deck space of 25 containers and it is sailing with only 10 containers at one instance, liner B's ship is undergoing repair, but it has 15 containers to be shipped on the route liner A is plying, hence A and B enter into a VSA to share vessel space and set forth conditions for future sharing of the vessel, by this action both the liners share space and utilize space to the possible limit resulting in sharing of sailing costs. Whereas VDA refers to the agreement entered into between parties, to share market information, adopt common service standards and offer a single point of contact in discussions with government bodies and shipper organizations, to a limited extent, depending on the parties.

The Shipping Notification seems to provide a blanket exemption, while the Competition Commission of India ("**CCI**") in the past has shown its reluctance from allowing blanket exemptions, this increases the ambiguity related to this notification issued by the MCA. Although the MCA has put these agreements under the scanner by having Director General of Shipping ("**DGShipping**") monitor such agreements in order to discuss and evaluate possible extension of this exemption. However, in the absence of any guidance/clarity, the implementation and use of this notification may potentially raise issues, and it would be highly ambiguous for the DG Shipping to monitor agreements in absence of any mechanism.

This article aims to analyze the Shipping Exemption in the light of models followed by leading foreign jurisdictions. By comparative analysis of the Indian shipping industry's regulatory regime with the industries across the globe we aim to reach a consensus as to the applicability and likely problems which may arise from the Shipping Exemption.

[6] This chapter is a reproduction of my previously published work accessible at http://www.nlujodhpur.ac.in/downloads/competition_law_crique.pdf .

[7] http://www.mca.gov.in/Ministry/pdf/draft_notification_19_sept_2012.pdf last accessed on February 18,2014.

The CCI and its Impact[8]

The Competition Act, 2002 ("**Act**") was passed by the Parliament in the year 2002, to which the President of India accorded assent and was also published in the Official Gazette of India in January, 2003. It was subsequently amended by the Competition (Amendment) Act, 2007. Effective May 20, 2009, the substantive provisions dealing with anti-competitive agreements (Section 3) and abuse of dominance (Section 4) under the Competition Act were notified and are currently in force. Further, effective June 1, 2011 the provisions dealing with regulation of mergers and acquisitions were notified.

CCI is the regulatory body with respect to application of the Act, in the recent past it has come forward as a stringent regulator, with an aim to provide the ultimate benefit to the customers by fostering healthy competition throughout all business sectors. CCI in the recent past has taken an active stand against anti-competitive agreements and imposed heavy penalty on defaulting entities; this has had a significant impact the business community and the economy as a whole.

In the real estate sector, DLF on account of imposing one sided unfair terms on flat buyers was found to have abused its dominant position. The CCI imposed a penalty of INR 630 Crore i.e. 7% of the average turnover. Further in compliance with the CCI order DLF amended its agreement with respect to flat buyers. Subsequently other real estate players indulging in same manner of business amended their respective agreements in order to comply with the CCI order.[9]

In certain sectors, after the CCI found a set of conduct to be anti-competitive, there has been a change in the manner in which business is carried out and/or regulated by respective sectorial regulator. The sectorial regulator for telecom, Telecom RegulatAory Authority of India ("**TRAI**") came up with a Consultation Paper on Monopoly / Market Dominance in Cable TV Services[10] which addressed the concerns relating to cross ownership and cable TV/local cable operator regulations in this sector. The TRAI Consultation Paper was issued

[8] Supra 6
[9] *Belaire Owner's Association Vs. DLF Limited* Case no. 19/2010 *available at* http://www.cci.gov.in/May2011/OrderOfCommission/192010S.pdflast accessed on February 18, 2014
[10] TRAI Consultation Paper Consultation paper no. 5/2013, released on February 18, 2014

after an order of CCI in the case of *Kansan News Pvt. Ltd. vs. Fastway Transmission Pvt. Ltd*[11].

It is understood that in today's economic scenario, the CCI and its role is very crucial in order to maintain business conduct and competition across sectors. CCI aims to prove consumers with a safe competitive market environment.

In recent a step, MCA has provided banking sector with an exemption to facilitate Merger and Acquisition ("**M&A**") activities in this sector ("**BankingExemption**"), it is noteworthy that this exemption is very strict and abides with an array of prerequisites and compliances. A banking corporation has to undergo scrutiny and has to be screen by the RBI in order to avail the banking M&A exemption.

Prior to this exemption the MCA in the past has only exempted banking sector from the scope of the Act, though the Banking Exemption is subject to regulations and prerequisites and is only applicable with respect to merger and acquisition transactions undertaken between banks. The exemption in the shipping industry is the second exemption from the CCI, though it is not as regulated and specific as the prior exemption.

In a recent interview[12], Mr. Ashok Chawla, Chairperson CCI was quoted saying that the CCI has no plans to provide exemptions to any sector, and the exemptions provided will not be blanket exemptions at all. This makes it clear that the shipping industry is considered to be one of high importance and such exemption was considered necessary by the govt. to foster growth and cut costs in the sector. It may be noted that CCI usually does not provide any blanket exemptions, , whereas in the present case this exemption for the shipping sector is devoid of any check, balance and scrutiny mechanism. For a balanced understanding of the effectiveness of the exemption,the current state of the Shipping industry in India should also be studies.

[11] Case no. 36/2011; *available at http://www.cci.gov.in/May2011/OrderOfCommission/362011.pdf*, last accessed on February 18, 2013

[12] www.livemint.com/politics/hxdCNNCkZxca3QeWc7ADnM/There-Shouldnt-be-a-blanket-exemption-CCIs-Ashok-Chawla.html, last accessed on February 18, 2014.

Shipping Industry: World Scenario

With the changing financial situation, variables, for example, globalization of businesses, universal monetary coordination, evacuation of obstructions to business and exchange and expanded Competition have improved the need of transportation. It is a standout amongst the most essential foundation necessities which is crucial for the development of chances and assumes a vital part in manifesting the moment of truth the aggressive situating.

Within transportation, shipping industry is a standout amongst the most globalized commercial enterprises working in a profoundly focused business environment that is much more changed than a large portion of alternate businesses and is, in this way, complicatedly connected to the world economy and exchange. Transportation is the lynchpin of the worldwide economy. More than 90% of world exchange is conveyed by the worldwide transportation industry. Without delivery, it would not be conceivable to lead intercontinental exchange, the mass transport of crude materials or the import/fare of moderate nourishment and fabricated products. Boats are in fact refined, high esteem resources (the biggest howdy tech vessel can cost over US $150 to construct) and the operation of dealer boats creates an expected yearly wage approaching US $500 billion in cargo rates, speaking to around 5% of the aggregate worldwide economy.

There are around 50,000 dealer boats exchanging globally, transporting each sort of freight. The world armada is enlisted in more than 150 countries, and kept an eye on by over a million seafarers of basically every nationality.

World exchange keeps on growing and the global transportation industry reacted to interest for its administrations. As of late the administration has delighted in what has turned into the biggest supported time of light markets inside living memory. Delivery markets are cyclical and famous unstable, and today's exceptional markets are unrealistic to proceed for eternity. Then again, practically all divisions of the business have profited from the late worldwide delivery blast.

The international shipping industry is responsible for the carriage of 90% of world trade and is the life blood of the global economy. Without shipping the import and export of goods on

the scale necessary for the modern world would not be possiblehalf the world would starve and the other half would freeze! However, the growth potential of the shipping industry is directly dependent on growth in world output, world trade, and world maritime trade. In 2005, world output increased 4.8%, as compared with a growth of 5.3% in 2004. World output is expected to increase 4.9% in 2006, and 4.7% in 2007; primarily driven by higher growth in emerging economies. While output growth in emerging/developing countries is expected to be 6.9% in 2006 (7.2% in 2005), output growth in advanced economies is expected to be 3% in 2006 (2.7% in 2005). Over the period 1998-2007, world output is expected to expand 4.1% per annum. During 2005, the volume of world trade increased 7.2%, as compared with a growth of 10.7% in 2004 as shown in table 1. The increase in trade was driven by high oil and metals trade.

Industry Structure: India[13]

In view of the continued liberalization and increasing globalization of the Indian economy, India's overseas trade has been growing at a rapid pace. Presently, India's exports formed about 0.8% of the world merchandise exports and currently, India is ranked as the 31st leading exporter and 24th leading importer in world merchandise trade. During the post liberalization period i.e., FY1992-2006, India's trade has performed at a much better rate than in the pre-reform period. India's trade has been increasing since 2002. In value terms, its exports are almost US $100,607 million and imports are around $140,238 million leading to a large trade deficit. Approximately 95% of India's international trade by volume and 70% by value are seaborne. India has 12 major and 185 minor/intermediate ports along its coastline of around 7,517 Kms. India ranks 15th in the world by flag of registry forming approximately 1.5% of the world total tonnage with a favorable average age as compared to the world fleet. Contributing approximately 0.3 percent to the country's GDP, share of Indian shipping industry in India's sea borne trade has declined from 40.7% in FY 1988 to around 30-32% over the last few years. In terms of India's overseas trade, the share of Indian shipping industry is only around 14% (ICRA Research Analysis, 2006).

Indian shipping tonnage which was only 1.92 lakhs Gross Tonnage (GT) on the eve of Independence increased to 70.5 lakhs GT on 01.06.2004 stands at 84.17 lakhs GT with 774 vessels and 139.22 lakhs dead weight tonnage (dwt) as on 31.12.2006.

The Indian shipping industry and its significance are not alien to anyone, ranked 15th in the world, the Indian Shipping industry with around 600 million gross tons per year, is one of the most crucial and important industry with regards to international trade. The shipping industry is responsible for the movement of approximately 95% of India's international trade, and is thus acts like a back bone for our international trade.[14]

India has around 1100 ships with 800 coastal and 439 overseas ships; The Indian coastal shipping is highly fragmented, this fleet of around 1900 ships caters to the high volume demands of the importer and exporters. However, the growth and large volumes or concentrated among the top 9 liners who account for 75% of the total tonnage being

[13] Supra 6
[14] DIBS-OMII survey, Indian Marine Industry – Shipping, April 2012,

addressed by the Indian Shipping industry, industry at present India has about 40 companies functioning under this industry, many amongst these companies have a fleet of not more than two ships.

The shipping industry involves high investments and costs, the cost-revenue equilibrium is hard to achieve without high volumes in sails. Apart from the sailing costs, the poor state of port infrastructure lands up in ships docking for unreasonable time. It is understood that the revenue in the industry flows from the sail done by the respective liners and the docking period results in only cost addition with no revenue generating from such operations. In light of the above stated facts, we can rightly say that the poor state of infrastructure and high level or risk and investments makes sustaining in the market difficult for seasonal operators and also for the streamlined liners.

After an analysis of this industry we can outline the following advantages for the growth of this sector: (a) access to major shipping routes, (b) more than 7500 km of coastline, (c) fleet expansion by major domestic liners, (d) overseas acquisitions by Indian liners, (e) more than USD 4 billion is expected to be invested in Indian ports, (f) container terminals being built at Mumbai and Chennai.

The demerits and threats to the industry are as follows: (a) Underinvestment has affected the development of ports, (b) high levels of bureaucracy preventing the government funding, (c) major developments taking place in Sri Lankan port sector may reduce demand for trans-shipment, (d) Indian ports have suffered from congestion during 2012, potentially slowing countries growth trajectory.

Regulatory regime in Shipping

The shipping liners in India are subjected to the provisions of the Merchant Shipping Act, 1958 ("**MS Act**") which deals with the Indian ships and their registration amongst other guidelines for sailing in the Indian waters, but this statute does not create any regulations or conditions addressing the business aspect.

The power to regulate and supervise shipping in India rests with the DG Shipping at the top level and is further delegated to various Captain of Ports ("**CoP**") and Mercantile Marine Departments ("**MMD**") at various coastal states. The state wise delegation helps DG Shipping in addressing the problems and issues of coastal states and liners across the country.

DG Shipping along with various CoPs and the MMD draft and discuss rules and guidelines which are then implemented for the shipping industry. It is interesting to note that, CoP and MMD are responsible for granting permissions of various kinds, as prescribed in the MS Act, further the overall monitoring is done by the DG Shipping and in certain cases, approval from the DG Shipping is mandatory.

Except the issues which this notification aims to relax, the other major issue with the shipping industry is the rule of cabotage ("**Cabotage Rule**") which is provided in the MS Act, along with DG Shipping's objective to secure 100 % of coastal trade for national flag bearing vessels[15], which means that foreign vessels are not allowed to sail on a domestic route in Indian waters. Cabotage Rule has two sides, which are set out below:

i. It provides national flag vessels with opportunities of business in the domestic circuit and also cuts down competition for these national entities from the foreign players which deal with high volume.

ii. The total cabotage levies high costs on the foreign shippers, as they have to unload their total capacity on one Indian port and from there, the goods are transported to other destinations via sea/road/rail etc. This activity involves high costs and is a lot more time consuming.

In the year 1992, Cabotage Rule was relaxed for a period of 5 years, i.e. till the year 1997, but again the rule has been imposed and it is found to have a lot of disadvantages amongst fewer

[15] www.dgshipping.com/dgship/final/manual/mchapter12.htm, Last Accessed on February 18, 2014

advantages. With the Shipping Notification in place, the industry accepts some relaxation to the foreign players, as they will now be equipped with the power to agree with domestic players on sharing vessels and voluntarily discuss confidential terms.

The Shipping Notification seeks to exempt VDA and VSA. These agreements include price fixing and market sharing clauses, which make these agreements anti-competitive, by the effect of this notification, the liners will be able to enter into these agreements without the scrutiny of the CCI. The agreements are considered to be catalysts for growth in the shipping segment as they aim at easing the shipping companies market burden as well as relaxing investment in the said. It is discussed that the sector asks for high risk investments which may be eased by way of pooling in of resources. The notification aims to smoothen the above.

Any such exemption on the shipping liners would not only have an effect on domestic companies but also have an effect on international liners. Accordingly, it becomes important to look at how such agreements are dealt with by authorities in other jurisdictions.

Exemption in other jurisdiction

1. Singapore

Under Section 36 of Singapore's Competition Act, 2004 ("**SC Act**") the Minister for Trade & Industry has the power to make an order at the recommendation of Competition Commission of Singapore ("**CCS**") to exempt a particular category of agreements from the prohibition on anti-competitive agreements, decisions and practices under Section 34 of the SC Act. These exempted agreements must contain the following characteristics: Firstly, the agreement/decision/ practice should lead to improvement in production/distribution. Secondly, it should lead to the promotion of technical/economic progress. Thirdly, such practices, decisions or agreements should not impose on the concerned undertakings any restrictions which are not indispensable to the attainment of their objectives and lastly they should not allow undertakings, the possibility of eliminating competition in respect of a substantial part of the services in question.

Another condition imposed by CCS is that when the aggregate market share of the parties to a liner shipping agreement exceeds 50 percent, the parties are required to file their agreement and any variation or amendment of it with the CCS. This is done to ensure healthy competition and eliminate chances of any anti-competitive behavior.[16]

2. USA

In the United States of America ("**USA**"), the US Ocean Shipping Reform Act, 1998 ("**OSRA**") is enacted to grant immunity to liner shipping conferences in the USA, however it places rigid pre-conditions for availing the benefits in the exemption for the same which reduced the chances of formulation of an anti-competitive agreement. The main objectives of the OSRA is to increase the flexibility of carriers/shippers to tailor their contractual relationships in a manner that best meets their need, whilst at the same time ensuring that the result would not be anti-competitive. It is necessary for the liners, wishing to avail the exemptions to satisfy the following conditions, Firstly, shippers and carriers have to negotiate liner service agreements and keep the terms of the contracts safe from other carriers and shippers; Secondly, conference tariffs have to be published; and lastly, independent rate

[16] Order of the Competition Commission Singapore available at http://www.ccs.gov.sg/content/ccs/en/Legislation/Block-Exemption-Order.html, last accessed on July 30. 2013.

action for carriers should be allowed so that they can cover multiple trade lanes which makes it easier for larger shippers to engage in one stop shipping.

3. Canada

In Canada the Shipping Conferences Exception Act, 1987 ("**Canadian Shipping Act**") deals with granting of competition law exemptions to shipping liners. Section 4 of the Canadian Shipping Act declares that the Competition Act, 1985 ("**Canadian Competition Act**") will not apply to any agreements entered into by a liner conference to the extent that,

Firstly, the conference agreement requires a member of a conference to use a tariff. Secondly, the conference agreement requires a conference member to carry out a loyalty contract if it provides for the following: (a) Termination by either party at any time within 90 days from the date when a notice to conveying intention to terminate is communicated to other member in writing; (b) Application to goods shipped by the shipper of tariffs that incorporate a dual rate system in which no contract rate for any goods is less than 85% of the non-contract rate for those goods; (c) No provision exists to the effect that a payment has to be made by any member of a conference of a rebate charged for the transportation of any goods shipped by the shipper; (d) Contains no terms / conditions in a standard form approved by the members of a conference requiring a shipper of goods to offer to those members for transportation by them of all goods shipped by that shipper; (e) Regulates the timing of sailing of vessel, members and the kind of service that members of a conference may provide; (f) Regulates the admission and expulsion of members; (g) for sharing of transportation of goods as well as the earnings and losses arising out of each transportation.

4. Australia & New Zealand

A. Australia

In Australia the pre-dominant legislation with regard to competition law is the Competition and Consumer Act, 2010 ("**Australian Competition Act**"). Part X of the Australian Competition Act ("**PartX**") deals with liner shipping services, it provides for an exemption to liner shipping services and stevedoring services which enter into agreements revolving around fixation of prices, pooling or apportioning of earnings/losses/traffic and regulation of capacity etc. For obtaining this exemption, shipping liners have to abide to the conditions set

out as follows: Firstly, all liner shipping companies are required to register under an Australian agent and update information at regular intervals. Secondly, any shipping company which proposes to make any agreement with another shipping company must apply to register these agreements to obtain approvals for exemption, these agreements can include verbal agreements, discussion groups as well as joint shipping operations. Thirdly, registered agreements must meet a range of pre-conditions. Fourthly, Shipping companies are required to notify designated shipping bodies of their proposed agreements. Fifthly, any shipping company with a major market share must be registered with the Registrar of Liner Shipping whether operating under an agreement or not. Lastly, shipping bodies intending to discuss shipping agreements and negotiate with shipping lines are also required to register.

However, in spite of an exemption provided, investigations can be started at the initiative of the Minister for Infrastructure and Transport, Government of Australia or by the Australian Competition and Consumer Commission into a range of issues including unfair pricing practices.

B. New Zealand

In New Zealand, Commerce Act, 1986 ("**NZCommerceAct**") by virtue of its section 44(2) provides exemption for liner shipping from competition law. Section 44(2) of the NZ Commerce Act provides that the provisions relating to restrictive trade practices will not apply in an instance where the following have been observed: Firstly, where a contract, arrangement or understanding has arisen which contains a provision for the carriage of goods by sea from a place in New Zealand to a place outside New Zealand or from a place outside New Zealand to a place in New Zealand and Secondly, where any act has been undertaken to give effect to the activities enumerated in the above-mentioned point. However any contract, undertaking or arrangement that arises which contains a provision with regard to the loading or unloading of a ship will not be considered for the exemption.

However if an investigation is initiated and the Minister of Transport finds evidence of carriers engaged in unfair practice which would affect the interests of any New Zealand shipper in a substantial way then information must be furnished by the impugned carriers to the Secretary of Transport detailing all information relating to agreements containing the following elements:

(a) Fixing/regulation of freight rates; (b) Withholding special rates or other special privileges/advantages or the imposition of any detriment or disadvantage to any New Zealand shipper; (c) Allocation of ports to any particular vessel or carrier or the restriction or other regulation of the number or character of goods to be carried; (d) Restriction/Regulation of the volume of goods being carried by any particular vessel.

For the purposes of NZ Commerce Act, an association of carriers (i.e. liner conference) would be engaged in unfair practice if they engage in the following activities: (a) Abuse of Dominant Position; (b) Substantial failure to give reasonable notice to any New Zealand shipper who is likely to be affected by impending changes in terms and conditions on which such shipper entered into an agreement with the association of carriers; (c) Unreasonable refusal./failure to enter into negotiation or consultation requested by any New Zealand shipper relating to the terms and conditions upon which goods were transported; (d) Engaging in Bid-Rigging.

5. Japan

In Japan, Antimonopoly Act, 1945 ("**AMAct**") provides for exemptions with regard to liner conferences. These exemptions have been justified on the three grounds, Firstly, seasonal fluctuations in the volume of cargo; secondly, large scale process industry and lastly, market is prone to extreme fluctuation in prices due to shifts in supply and demand.

Article 28, AM Act provides for exemptions with respect to agreements dealing with the following subject-matter (provided that certain conditions are satisfied): (a) Freight Rates; (b) Charges; (c) Other Transport conditions; (d) Trade Routes; (e) Ship Deployment; (f) Cargo loading.

However, it is mandatory for shipping services that wish to avail of this exemption to file the requisite information regarding such agreements with the Minister of Transport, Government of Japan who would then scrutinize the agreement and sanction or modify or refuse the same. Whilst deciding the application the Japanese Minister for Transport must also consult with the Fair Trade Commission in order to comply with all competition law provisions.

6. European Union

The European Union's competition regime is governed by Treaty on Functioning of European Union ("**TFEU**"). The European Commission ("**EC**") has adopted a new block exemption regulation revising the old exemption for liner shipping consortia, the recently implemented exemption, allows shipping liners to enter into cooperation for the purpose of providing a joint service in transporting cargo. The new regulation extends the exemption for such cooperation until April 2015, within a new legislative and economic environment. Changes notably include a reduction of the market share threshold from 35% to 30% above which companies do not qualify for automatic exemption under the regulation and an extension of the scope of the exemption to all cargo shipping liners.

Any agreement or arrangement crossing the automatic route threshold goes through strict scrutiny by the EC in order to examine its adaptability and consequences. It is noteworthy that the commission has stressed on having a mechanism to provide healthy competition, whereby no party can take any undue advantage.

Approach

It is important for us to examine the Indian policy of exemption in contract to the policies adopted by the leading international jurisdictions; this contrast study will help us understand the practice in other jurisdictions, while helping us construct our strategy for such exemptions.

The approach taken by Singapore, USA, Japan, Canada, Australia & New Zealand in this regard does not create a specific distinction between the VSA(s) and VDA(s), but there are specific outlines as to the content and conditions of the agreement which are exempted and content and conditions which are not exempted, making it clear, as to what is exempted and what is not. This approach has given advantages to these jurisdictions in terms of effective control and monitoring over these agreements. It is understood through the press release of the Singaporean commission that the commission finds it easy to monitor and keep track of such agreements where there are conditions instituted in order to avail certain exemptions, this way the task of the commission is reduced and effectiveness is increased. Various jurisdictions namely Japan amongst others, prefers that such agreements should be submitted to the government departments for scrutiny and comments before being executed, this ex-ante method has helped the country safeguard its national flag bearing ships in the foreign markets.

Comparison

The foreign jurisdictions discussed in this study have separate provisions and statutes to control the activities of shipping liners. These enactments give the governments a better understand and control over the conduct of the business. It is understood that the specific provisions and statutes increase the efficiency of commissions. In contrast, we can clearly see that this particular sector has been given credit in all major jurisdictions and certain exemptions have been put in place by the respective commissions, in order to provide business opportunities to the shipping liners. The primary reason behind imposing such exemptions has been the high cost in the sector and also the aim of the commissions to prove customers with the benefit of lowered costs and stability in the industry.

A distinction can be made between the policies adopted across various important jurisdictions and the one page notification which has come out from the MCA. It can be now construed that the Shipping Notification has brought about a blanket exemption and it is not sufficient enough to control the conduct of the sector. We can construe from the above mentioned policies in other countries that, all these nations have strictly formulated schemes of mechanism and content to be taken care of by the shipping liners while entering into VSA and VDA, this is done in order to maintain order in the industry and keeping track of the activities. So far these jurisdictions have been successful in maintain healthy competition in their respective jurisdictions.

Whereas the Indian exemption does not put across any condition or perquisite compliance in order to avail such exemptions, this blind folded exemption is not in the spirit of the CCI. It is also seen that the monitoring which the notification talks about, does not have a specified mechanism to be in force, in the absence of such mechanism, it is almost impossible for the DG shipping to evaluate and monitor such agreements.

From the above it can be seen that there is a need to further look into the shipping exemption in order to eliminate instances of misuse and ensure proper implementation.

Conclusion

Through their Shipping Notification, MCA's attempt to promote economic activities falls short of perfection. It needs to establish guidelines to ensure the maintenance of law and order.

After looking at the laws in different jurisdictions and understanding the shipping industry, it is interesting to note that all of the foreign jurisdictions, follow a strict scrutiny mechanism before allowing shipping companies to enjoy privileges. The primary points taken care of by foreign jurisdictions in contrast to the Shipping Notification brought out by the MCA are as follows -

- Firstly, these exemptions are granted for a specific period of time, only after consultation with various stake holders, this exercise helps in increasing the effectiveness of the exemptions.
- Secondly, there is a need to draw a line of distinction between the VSA and VDA and their application, it is important to understand the distinction and nature of both types of agreement, though other jurisdictions have not specifically marked a distinction between the two except for Singapore and European Union, but the rules and prerequisites put forth by these countries draw a clear distinction as to till what extent these agreements are exempted and what subject matter is accepted.
- Thirdly, exemptions should not be blanket in nature, this fosters the possibility of rightful governance and reduces risk of misuse.
- Fourthly, jurisdictions like Japan have their respective ministries examine the agreements proposed to be entered into by the shipping companies even after they meet the prerequisites, this steps further helps in eliminating all the chances of misuse of this privilege; lastly, there is power reserved by the respective governments of these countries to start investigations even after the exemption is granted, this step further immunes the industry from any misuse or anti-competitive behavior.

In summary, it is right to state that for successful implementation of any exemption the two essentials are non-blanket nature and presence of remedy, i.e. exemptions should have prerequisites to be followed and further there should be power with the authorities to examine and take decision on any misuse of such exemption.

Consultation should be the basis of any approval granted for exemption. A certain prerequisite conditions should be put in force and a method of application to the respective authority for approving/modifying/rejecting such application should be put in place. Further

upon receipt of such application, ministry shall consult the CCI on the implications of such agreement before deciding upon the application. Additionally, to ensure there is no unnecessary delay in processing and arriving on a decision for the application, a deeming provision should be built in. For example, if an application is not decided for a period of 45 days from the date of submission of application, it would be deemed to have been approved.

The Shipping notification needs a mechanism for the DG Shipping to evaluate the use of such exemptions, in order to evaluate the scope of extension of Shipping Notification, in absence of a mechanism is it very difficult for the DG Shipping to reach consensus as to the future course of Shipping Notification.

In light of the above it is concluded that, it is imperative to revise the Shipping Notification, which will enable to authorities to prevent any misuse or anti-competitive behavior.

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