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CARTEL DAMAGE CLAIMS UNDER PRIVATE INTERNATIONAL LAW

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Abstract: When we state the concept of Cartels emerged a very long time ago, even saying that it dates back to time immemorial might actually turn out to be an understatement. It is said so as because cartel in philosophy, involves people coming together in concert and setting up something in such a way as to manipulate the outcome to be gainful for them, which is also something human race has been carrying on instinctively since early ages of civilization when hunter gatherers would live in groups and hunt in groups and would share whatever they gain. One can also come up that the notion of comparing concerted efforts of hunter gatherers for survival and operations of cartel affecting competition and impeding economic growth as a whole are hardly comparable, though it cannot be denied that the instinct that causes the drive in men to commit to engagement in such Cartels are the very same as lust for money and power are omnipresent in mankind.

One of the greatest challenges faced by private individuals and institutions in healthy conduct of businesses is the maleficent operation of cartels around the world. Cartels might seem like innately profitable affair to cartelists initially, although in the long run, it often turns out that it has more vices than virtues. Needless to assert that all forms of cartel are heavily injurious to the market competition. However, there is much less cautiousness about it among common people involved and affected by it. Cartel damage claims are right which does provide some amount of relief to businesses and enterprises which feel the heat of losses due to Cartels and acts as quite a beneficial remedy.

This paper shall deal with various facets of cartel damage claims and various national and international guidelines and regulations that govern when such claims or disputes arise. This paper shall also delve deep into analyzing how an operating cartel can be recognized and when a cause of action might arise along with various instances across a number of countries like Switzerland, Turkey, Germany, Europe, India etc., where disputes cartel damage claims have been dealt with innovative national competition or Cartel prevention laws.

RESEARCH METHODOLOGY

The study is based on theoretical data and its analysis. In this study, data collection method is primary and secondary in nature from existing theoretical data available in public domain various sources like journals, newspaper, websites, magazines, brochure, handbooks, financial press reports etc., so as to get insights about the role of international trade & bankruptcy tourism. Numerous secondary sources don't clearly characterize the issue and reason for an investigation. Nonetheless, the information has been accumulated, dissected, and deciphered for research. "For this paper, an analytical theoretical research method has been used.

INTRODUCTION

This article attempts to unravel the concept of cartel, its background, what relief can be sought when cause of action arises, how Cartels around the world operate impeding domestic competition, affecting economy and instances of cartel disputes around the world demonstrating how they are dealt by tribunals in their particular jurisdiction.

BACKGROUND

During the late 1920s, the world was once again looking forward to reinstate their old hearty economic relations. The financial instability of the post-war period destroyed industries completely whichever developed in the earlier centuries. Due to some immediate post war events, the European industries were hit hard which led to the inevitable formation of The International Steel Cartel of 1926 subsequently, which is mainly Cartel policy yet a primary challenge to it existed- which is international cooperation with domestic cartels. But slowly the countries were able to agree and operate on the terms of the Cartel.¹

The Competition Act and the MRTP Act² was enacted with the objective of preventing unhealthy trade practices affecting market competition in order to protect consumer's interest. The provision of this Act handles issues like abuse of dominance and anti-competitive contracts which includes cartels. Section 3 read with section 3(1) prohibits Cartel conduct. A conduct of forming and operating a cartel is presumed to have appreciable adverse effect on competition until proven otherwise.³

Cartelization is when more than two companies execute an express or implied contract for pricing, limiting production and supply, allocating market share or sales quota, or agreeing to one or more markets or rig bids. An important aspect of the cartel's definition is the need for an agreement between competing companies so that competition is not limited. The existence of an international cartel is said to be when the companies of the

¹Daniel Barbezat," Cooperation and Rivalry in the International Steel Cartel, 1926-1933", The Journal of Economic History, Vol. 49, No. 2, (1989), pp. 435-447.

² The Monopolies and Restrictive Trade Practices Act, 1969.

³Rajasthan Cylinders and Containers Limited vs. UOI SCC 2018 SC 1718; <https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/india>.

particular cartel are not all located in one exact country or when the cartel bears consequence on the market of multiple nations.⁴

In 2020, The CCI published a draft amendment bill to the Act referred as the proposed bill which would include “buyer” in the definition of Cartel to recognize buyer Cartel. The Bill suggests broadening the scope of the legislation which is in liable with the BCCI judgement.⁵

Unlike competitive sanctions in USA which are mostly criminal, the nature of penalties in India is excessively administrative or civil. Under section 27 of this Act, the CCI has the right to impose a penalty upon an entity upto 3 times its profit or 10% of its turnover, among these whichever is higher for every such year which the Cartel was in force. In *Excel Crop case*⁶, the CCI imposed penalty over an MNC relying upon its relevant turnover and not the total turnover of the entity who has infringed.⁷

WHEN DISPUTES ARISES

Certain basic features of Cartel agreements that determine whether a cartel damage claim can arise in India are:

1. Cartels function in secrecy. The cartel members mostly conceal their functioning to refrain from discovery.
2. The perpetuation of a cartel is secured by intimidation of reprisals. In case a member is found to defraud, other members strike back with temporary downsizing of price to regain business or may resolve to the path of isolating the member committing fraud to them.
3. The compensation system is used to discourage cheating. Under this plan, for instance, if it is discovered that a cartel member has sold in excess of the shares allocated to him, he should indemnify the other members.⁸

Apart from CCI, the member countries can move to the Permanent Court of Arbitration, which was set up in 1899 at a coastal city in Netherlands called Hague in 1899 where international disputes are settled, in which large variety of cases are dealt with including trans-boundary disputes, trade and investment disputes, human rights violations and such other legal issues.

JURISDICTION BEYOND TERRITORY

Anti-competitive activities, including cartels that take place outside India but have an impact on competition in India, fall within the scope of the Act and may be investigated by the Commission. The Act thus has extra

⁴ https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/cartel%20book.pdf.

⁵ Sh. Surinder Singh Barmi vs. Board of Cricket Control of India, 2013 CompLR 297 (CCI), 2013 (118) SCL 226.

⁶ Excel Crop Care Ltd vs. Competition Commission of India, (2017) 8 SCC 47; AIR 2017 SC 2734.

⁷ <https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/india>.

⁸ https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/cartel%20book.pdf.

regional reach under section 32.⁹ The scope of this clause is wide because it limits the space for the addition of an entity and there was an agreement where it was not limited. Section 18 of the Act gives the CCI power to enter into memorandums and arrangements, with prior approval to it by the central government, with any foreign institutions or agencies.¹⁰

Unlike Europe and India, there is no extra territorial jurisdiction ascribed to Competition laws in US. In 2005, the United States Court of Appeal concluded that the damages caused by the cartels beyond United States territory were independent of those within the territory of the United States and hence, jurisdiction should not be granted in such instances.

The basis of granting immunity in international law is equality of states. It therefore deals with the issues of a foreign Sovereign being impleaded in the local courts. The general principle of state immunity is recognized in the UK, US and is subjected matter of legislation of other states.

CROSS BORDER CARTELS AROUND THE WORLD

Owing its origin to Marrakesh Agreement, Article 2.3 of the Anti-Dumping Agreement allows the use of an alternative method in order to ascertain suitable export price where, firstly, if there is no export price for a particular product like what happens an internal transfer takes place in a transaction or in case of barter transaction and secondly, when there exists non-reliable export price due to an association or a compensatory arrangement (referring to cartel) between the exporter and the importer or a third party.

In both cases, whether it is absence of export price or lack of reliability due to an association or a compensatory agreement among the parties whether its exporter or importer or any third party as mentioned above, the price of export can be fabricated basing on price of imported products which are first merchandised to an independent buyer. Also, when products are not merchandised to a third party, self-supporting purchasers, are not merchandised in the situation in which they were imported, on a reasonable parameter which remains in the hands of the authorities to ascertain.

SWITZERLAND

Cartel law disputes in Switzerland are governed by a “Federal Act on Cartels and Other Restraints of Competition Act, 1995¹¹”, which is their own ‘Cartel Act’. Competition Commission (ComCo), the counterpart of CCI, imposes sanctions for restraints of competition. Certain latest landmark decisions include those in *Gaba/Elmex*¹² and *Engadin I*. In 2009, Elmex toothpaste manufacturer Gaba, prohibited a licensed

⁹ https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/cartel%20book.pdf.

¹⁰ <https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/india>.

¹¹ https://froiexp.com/wpcontent/uploads/Alessandro_L_Celli_Amended_Swiss_Federal_Act_on_Cartel_Law_of_20_June_2003.pdf.

¹² Gaba/Elmex Case 2017 decided by Federal Supreme Court at Switzerland.

producer to produce and export Elmex from Austria to other countries. The ComCo subsequently imposed fine on Gaba due to unlawfully restricting parallel imports and also opined that such kind of a conduct remarkably bore an adverse effect on competition. The precedent set out in this judgement was later upheld by the Federal Supreme Court in the case of Engadin I, which involved an issue where a bidding agreement between many construction companies was under scrutiny. Between the years 2004 to 2012, large number of construction companies conspired and plotted on public procurement contracts which involved offers and prices being pre-agreed upon. Hence, millions of tenders were affected because of bidding cartel.¹³

TURKEY

Cartel law disputes in Turkey is dealt under “The Law on the Protection of Competition” which is their ‘Cartel Law. This forbids any kind of agreements that can even potentially to limit competition in the country. However, this law does not hinder an application on Cartel even if it has negligible or no effect as such in the market yet, the Turkish Competition Authority attaches great importance to cartels disputes and gives special attention to it than other practices which impedes healthy competition. The punishment awarded in most of these cases is more severe, exactly similar to how severely cartels cause damage to the economy. Some punishment not just include imposing administrative monetary fines on cartelists but also in case of bid rigging cartels both criminal sanctions and loaded punitive damages are available for parties who are injured under private law. In the *Yeast Cartel case*¹⁴ an investigation was launched against 4 fresh yeast producers who were allegedly colluded to set predetermined prices for fresh yeast which was anti-competitive practice. When the investigation was over, a total fine of EUR 5 million was imposed on 3 undertakings. Its a landmark decision as there were no prior exemplar where the Competition Board granted full immunity to applications made following the initiation of the preliminary investigation and the dawn raids. The Board for the first time, added importance and abundant content of Mauri Maya's application for leniency.¹⁵

EUROPEAN UNION

In 2014, CJEU set a precedent related to so-called "umbrella pricing" cartel damage suits. Such claims are basically damages that are incurred due to high surcharges applied by non-cartel participants in market who are willingly forced to adapt to rise in prices in their own as a result of a cartel operating. The ratio decidendi

¹³ <https://www.mondaq.com/anti-trustcompetition-law/918744/cartels-comparative-guide>.

¹⁴ Yeast Cartel case (14-42/783-346, October 22, 2014).

¹⁵ <https://www.mondaq.com/advicecentre/content/1552/Definition-of-Cartel-and-Recent-Cartel-Cases>.

set out by CJEU in *Kone case*¹⁶ was that, because of no EU rules governing cartel claims, the internal legal order of each Member State is mandated to lay down the rules in order to govern cartel claims when there is any violation of EU law, " which includes the ones related to application of the notion of causal link provided that the basic philosophy of effectiveness of European Union law is respected.¹⁷This particular ratio is to a large extent foggy and hardly depicts Austrian law in an accurate manner and is totally consistent with the issues raised by law on antitrust torts. The tribunal's decision in *Kone* embodies the final step in the *Courage-Manfredi*¹⁸ litigation of the tribunal, case law which has already de facto harmonized, namely the amount of damages resulting from an action in violation Article 101 TFEU¹⁹ must include that there exist certain losses were incurred instead gaining profit plus interest.²⁰

The reported cases of cartel damages claim before tribunals in Europe have seen burgeoning escalation over the years. The Damages Directive²¹ and its putting into effect in national law have washed away various hindrances faced by the alleged victims who lay claim to cartel damages before national courts.²²A very recent instance involved a precedent set forth in a German case law where validity of inclusion of a lump-sum clause in agreements was upheld.²³

UNITED STATES OF AMERICA

The current situation of cartel damage claims in the US is the result of 3 landmarks decisions which are Hanover Shoe²⁴, Illinois Brick²⁵ and ARC America.²⁶ In Hanover Shoe case, the contentions on behalf of the defendant was that the overcharged buyer, who is the plaintiff in our case does not suffer losses when overcharged price is imposed indiscriminately on purchaser's competitors. When the demand remains highly not elastic that the buyer may transfer overcharge instead of enduring agony of declined sales. However, these arguments got rejected by the Supreme Court as there were unsurmountable practical difficulties in

¹⁶ Case C-557/12.

¹⁷<https://www.gibsondunn.com/cartel-damage-claims-and-the-so-called-umbrella-pricing-under-eu-competition-law-the-kone-ruling-of-the-court-of-justice-of-the-european-union>.

¹⁸C-295/04 to C-298/04 Manfredi.

¹⁹ Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits any agreements or cartels among members who may affect internal market competition.

²⁰<https://www.gibsondunn.com/cartel-damage-claims-and-the-so-called-umbrella-pricing-under-eu-competition-law-the-kone-ruling-of-the-court-of-justice-of-the-european-union>.

²¹(2014/104/EU).

²²<https://www.mondaq.com/austria/cartels-monopolies/824726/cartel-damages-claims-european-commission-guidelines-to-estimate-the-passing-on-of-harm-caused-by-cartels>.

²³ Case KZR 63/18.

²⁴ Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968).

²⁵ Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); 431 U.S. 720 ;97 S. Ct. 2061; 52 L. Ed. 2d 707.

²⁶ California v. ARC America Corp., 490 U.S. 93 (1989).

demonstrating that buyer actually transferred the price overcharge together with ascertaining what would be its effect on sales. It is also taken into consideration that the direct buyers might get excessively scarce or weak to recuperate any damages due to transfer by the direct buyer implying that the malefactor might be exculpated easily. This logic continued in Illinois Brick denying purchasers right to ask for damages, as Hanover directly accused the Cartel for being liable to reimburse with full damages to direct buyers. Due to the huge uproar among the masses in protest of the decision, the Congress failed to pass any bill with the view of overturning this judgement, till a ray of hope was found in ARC America to fulfill their intent, where the SC validated indirect buyers suits in state courts. Under the prevalent situations, direct buyers have the right to claim full overcharge price in courts, at least as a matter of principle.²⁷

INDIA

Coming to India, in the *Google inc case*, even if the court fail to provide any particular observation on beyond or extra-territorial aspect of influence, the CCI imposed penalties over the sales of Google Inc and its subsidiaries in India from their functioning in India. In Cartelization cases, CCI investigates companies and their subsidiaries beyond Indian jurisdiction and impose penalties on them accordingly.²⁸ In cases like *Biocon case*²⁹, *panasonic battery cartel*³⁰ and *Mahyco Mosanto Biotech case*³¹, CCI had made parent companies parties to the proceeding before it which had its presence through subsidiaries. In *Intex Technologies vs. Telefonaktiebolaget LM Ericsson*³², CCI went on to calling foreign officials for recording of statements.³³ In 2018 judgement of *Cadila Healthcare*³⁴, relying upon the precedent set forth in *Excel corp case*³⁵, Delhi HC observed that director general is not just entrusted with powers to conduct investigations limited to the subject matter laid down by the CCI, rather, it has the liberty to investigate even third parties, if required to ascertain whether there was any conduct which resulted in affecting market competition. During the pandemic, CCI issued an advisory to businesses requesting healthy co-operation and facilitation in trade and business and refraining in engaging in misconducts like ‘cartelization and abusing dominant positions. It also waived pecuniary liability for cartels for three market sectors, namely, ‘railways procurement market’ and ‘domestic

²⁷ Verboven, Frank, and Theon Van Dijk. “Cartel Damages Claims and the Passing-on Defense.” *The Journal of Industrial Economics*, vol. 57, no. 3, 2009, pp. 457–491. JSTOR, www.jstor.org/stable/27750719.

²⁸ *Suo moto case no. 07(01) of 2014-Cartelisation in the supply of EPS against NSK Limited, Japan & Ors; Suo moto case no. 02 of 2017-Anti-competitive conduct in the dry cell batteries market in India*; <https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/india>.

²⁹ *Biocon Ltd & Ors vs. Hoffman-La Roche Ag & Ors Case No. 68 of 2016, CCI.*

³⁰ *In Re: Cartelisation in respect of zinc carbon dry cell batteries market in India Suo Motu, Case No. 02 of 2016.*

³¹ *Ajeet Seeds Pvt Ltd and Ankur Seeds Pvt Ltd vs. Mahyco Mosanto Biotech 2016, CCI.*

³² *W.P.(C) 464/2014 & CM Nos. 911/2014 & 915/2014.*

³³ <https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/india>.

³⁴ *Cadila Healthcare Limited vs Competition Commission of India, LPA 160/2018.*

³⁵ *Excel Crop Care Ltd vs. Competition Commission of India, (2017) 8 SCC 47; AIR 2017 SC 2734.*

industrial and automotive bearings markets', reason being economic slowdown due to COVID. However, it is a matter of debate how beneficial is it for the economy to let anti-competitive practices go on with total exemptions from pecuniary liability. Another greater question which arises is whether "economic slowdown" is a reason good enough to waive off certain liability arising from anti-competitive conduct.

New Zealand's HC dealt with a case pertaining to such a dispute in a very prudent way and with sound analogy. Upon investigations were concluded, the party was found guilty of anti-competitive conduct in trade. But, considering the economic downfall of businesses in the nation, the court went on to decipher what is the current financial capacity and stability of the party found guilty is. It was found that the party could not pay the penalty imposed and hence, based upon assessment of the financial condition of the person, he was absolved of any pecuniary liabilities due to lack of ability to pay.³⁶



³⁶ Commerce Commission v. International Racehorse Transport NZ, CIV-2019-404-2118 [2020] NZHC 1716.