

CPI's Asia Column Presents:

Arbitration Over Competition – The Strange Case of Amazon, Reliance, and Future Retail

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Strangely while the battle between Reliance Industries (“RIL”) and Amazon India (“Amazon”) for market share in the business-to-business segment of the Indian retail market should be fit for the Competition Commission of India (“CCI”) to decide, it has transmogrified into an arbitration battle instead.

When it comes to adjudicating competition in the Indian retail business, forums other than the competition regulator seem to take center stage. Amazon had earlier lost the business-to-consumer market due to the FDI policy prohibiting an inventory-based e-commerce model for foreign corporations.² Now the acquisition of Future group’s retail business by Reliance has been challenged by Amazon by virtue of the latter’s holding rights in Future group. In the process it could drag the Government of India into the fray. Yet it is *prima facie* a struggle to decide who gains primacy in the Indian retail market [estimated](#) to reach \$1.6 trillion by 2025 and especially its fastest growing segment, that of online business, currently at less than 10 percent of the market.³

On Friday, November 20, the Competition Commission of India tweeted it has approved the takeover of Future Group by two RIL entities.⁴ Yet this approval means relatively nothing to the stakes between India’s largest company by market capitalization and Amazon. The regulator’s subsequent [press note](#) said its detailed order will follow soon.⁵

A Competition Issue but not with CCI:

In January 2019, Amazon had invested a 49 percent share in Future Group company, named Future Coupons for Rs 1,431 crore. As part of the agreement, Amazon had been granted a call option. This option allows Amazon to acquire all or part of the promoters' shareholding in Future Retail and can be exercised in three or ten years. So, in August this year, when RIL’s two entities bought for Rs 25,000 crore six companies, namely Future Retail, Future Lifestyle Fashions, Future Consumer, Future Supply Chains and Future Market Networks in a slump sale, all of which will be merged into one company, Future Enterprises Limited (“FEL”), Amazon had challenged it. It has argued the sale has denied it the Rights of First Refusal for the deal with Future Group.

Yet Amazon has not challenged the *RIL/Future* deal in the competition regulator’s court, it has decided to challenge it as an arbitration issue. The competition question is therefore left simmering. The Competition Commission of India’s press release has ruled that RIL entities Reliance Retail Ventures Limited and Reliance Retail and Fashion Lifestyle Limited have its permission to acquire the retail, wholesale, logistics and warehousing businesses of Future Group. The RIL entities, in their notice to the Commission for approving the acquisition, had clearly stated the market where the combined entity shall operate is the one for business-to-business sales in India. It is the same market where Amazon also has got the license to operate. The stakes are massive as the B2B segment is [reckoned](#) to be six times bigger than the consumer facing retail stores business within the overall retail pie.⁶ “I suspect the regulator has differentiated between the brick and mortar market and the online market to draw its conclusion that there shall be no dominance by the RIL-Future Group deals,” said Mandar Kagade, Principal, Black Dot Public Policy Advisors.

In September, the Commission had cleared Amazon of charges of alleged abuse of dominance brought on behalf of apparel company Beverly Hills and Polo Club, which could be the reason the company has not tried to block the RIL deal there.⁷ The CCI order had noted both Amazon

and Flipkart have a market share of around 35 percent each in this market so there is no abuse of dominance. But at the same time, the competition regulator has launched an investigation against the Jeff Bezos owned company for an antitrust claim brought by more than one Indian sellers' organizations. Each of them has made similar charges. They allege Amazon offers preferential treatment to some sellers as well as indulges in predatory pricing. The Karnataka High Court has stayed the regulator's hands but then again, the Supreme Court in late October has asked for the stay to be decided upon either way, within six weeks.

Clearly Amazon's legal teams also feel they have more chance to block the deal through the arbitration courts. To what extent does this speak about the efficiency of the CCI is a debatable point. Amazon may have been able to argue (hypothetically) that there is a loss of competition in the economy against what RIL has claimed.

But to adjudicate better on the issue, the regulator possibly needed to examine the deal from the consumers point of view. In other words, has there been any welfare loss for the economy? But the Commission has not been often able to make this focus clear. It has instead chased market share as an evidence of anti-competitive behavior as it has done in the case of Google. Geeta Gouri, former member of the Commission says the regulator must decide from the principle of what benefits the consumer the most. "The Commission frames the questions from the point of view of market share but the centrality of the interest of the consumer is often missed. Mainly because they do not define who is the consumer."

Implications for the Government of India

The battle has therefore moved on to a challenge in arbitration forums. This has implications for the government of India and will therefore not go down just as a commercial battle between the domestic and foreign retail giants. It is because of India's uncomfortable position vis a vis such awards handed out by foreign courts. This has happened twice this year. In September, Vodafone International Holdings won an arbitration award at The Hague arbitration center against the Indian government against a retrospective taxation demand. Now, Amazon has secured an interim order from the Singapore International Arbitration Centre to block the deal between Future Retail and RIL entity Reliance Retail Ventures. Amazon has claimed it was denied the Rights of First Refusal for the deal with Future Group.

At first blush, these do not seem to offer any common ground. The Vodafone award challenged a government's tax policy, the Amazon-RIL case is a commercial dispute. Yet it turns out, there are massive similarities.

New Delhi operates under its domestic Arbitration and Conciliation Act of 1995, which it has subsequently revised in 2015 and then last year. While India aspires to become an international arbitration venue it has not been able to reconcile the domestic act with the global architecture of arbitration under the International Centre for Settlement of Investment Disputes ("ICSID") convention to which more than 150 countries are signatories.

India is instead a member of the softer UNCITRAL (United Nations Commission on International Trade Law) convention on arbitration or what is known as the New York Convention. Here too, India has signed on with caveats. The most important of those is that arbitration awards will only apply where the disputes are plainly considered as commercial under domestic law and does not challenge India's "public policy." For instance, India does

not recognize the relationship between tax department and assesses as a commercial relation. Courts in India have also upheld this logic though of late, the Supreme Court has [tried](#) to soften this logic.⁸

As a result, companies have found this an excellent loophole to exploit. Even Bibek Debroy, the chairman of the Prime Minister's Economic Advisory Council and who has often advised the government on clearing India's legal mess, has noted this problem. "Challenging arbitral awards on grounds of public policy has become an Achilles heel for arbitration in India: a means by which losing parties can attack arbitral awards, on much broader grounds than are permitted in other countries".⁹ His observation comes in a [paper](#) he coauthored for Niti Aayog to help build India's credentials as an arbitration center.¹⁰ He also points to other problems, chief among them being the lack of clarity of the financial model on which such a centre shall operate and whether there should be one or more spread across the country.

Future Group has used this cover of public policy to buttress its proposed Rs 27,000 crore deal with the RIL entity. The brick and mortar retail group has [argued](#) in the Delhi High Court that the interim order by the Emergency Arbitration, constituted under the SIAC Rules, was passed without jurisdiction. The key word the company has used is that the award is alien to India's Arbitration and Conciliation Act of 1995. Whereas armed with the order from Singapore Amazon has also brought in the market regulator, Securities and Exchange Board of India and the Bombay Stock Exchange asking them to consider the interim order before they approve the deal between Future Retail and Reliance Retail Ventures.¹¹

Amazon has been rather astute in getting a Singapore arbitration award. The island nation is the only one with whom India has a mutually recognized arbitration route. It was signed as part of the India Singapore Comprehensive Economic Cooperation Agreement in 2005. It also helped that both the Future Group and Amazon had written in the role of Singapore as the seat to resolve any dispute. But under the way arbitration game occurs across countries, it was open for Amazon to have approached any other arbitration forums too, like those in The Hague, London, or Paris.

The single judge bench of the Delhi High Court shall soon give its judgment on the dispute. Any recognition of the emergency arbitration by the bench could end up deciding if Vodafone International, among others can claim its victory in an off-shore arbitration award shall also be recognized in India. Gouri says the questions thrown up by the arbitration case are salient to decide what sort of money India gets from the world markets.

Either way this could be one of the most profound judgments with cascading impact on India's treatment of foreign investors. Because of India's iffy legal treatment of foreign inflow most portfolio investors prefer Singapore as the seat from where to invest into India. Any move by the government to retract any aspect of this arrangement has been resisted by them. This year itself finance minister Nirmala Sitharaman had to change the tax laws to recognize that FPIs organized as trusts will pay only 15 percent tax on their dividend income against a proposed 25 to 37 percent range. Domestic investment trusts do not get this advantage. The walk back happened this year when government could use any additional money. It is the price India pays for keeping its arbitration laws disconnected from global best practices. How RIL-Amazon dispute shapes up could therefore be of far more significance than it already is.

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- ¹ The author is a journalist with Business Standard newspaper. (a shorter version of this article appeared in Business Standard newspaper <https://mybs.in/2YRuNU9>).
- ² See <https://www.reuters.com/article/us-india-ecommerce-explainer-idUSKCN1PP1Y2>.
- ³ See <https://redseer.com/reports/unlocking-the-indian-eb2b-retail-opportunity/>.
- ⁴ See https://twitter.com/CCI_India/status/1329755690412380162?s=20.
- ⁵ CCI Press Release dated November 20, 2020; See https://www.cci.gov.in/sites/default/files/Notice_order_document/PressRelease771.pdf?download=1.
- ⁶ See <https://indianonlineseller.com/>.
- ⁷ Case No. 9 of 2020; <https://www.cci.gov.in/sites/default/files/09-of-2020.pdf>.
- ⁸ See <https://www.mondaq.com/india/arbitration-dispute-resolution/917466/arbitration-update-recent-judgments-of-the-supreme-court-of-india>.
- ⁹ Bibek Debroy & Suparna Jain, Strengthening Arbitration and its enforcement in India – Resolve in India; See https://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf.
- ¹⁰ *Id.*
- ¹¹ See <https://www.bloomberquint.com/law-and-policy/future-retail-vs-amazon-delhi-high-court-reserves-judgment>.