

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary
Peer Reviewed

www.ijlra.com

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

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TACKLING OF ANTI-COMPETITIVE AGREEMENT **UNDER MARITIME INDUSTRY**

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Abstract -

Maritime Industry is one of the pivotal industries to make contribution to growth and development of the country. In Maritime Industry, vessel sharing agreement and shipping liners agreement are exempted from the competition policy with main objective to increase the economy and maintain the price stability. In India Ministry of Corporate Affairs (MCA) gives the authority under the Competition Act, 2002 to exempt the Vessel Sharing Agreement (VSAs) under the view of anti-competitive agreement. Which is further modified and notified in 2018 by government notification. The shipping industry in other country is much better established than in India. Their comparison with India and what is loop hole between them. This paper aims to criticised the merits and demerits of exemption of maritime industry under the act. This paper also deals with the comparison of maritime industry with other countries. This paper will also deal with what is the main problem with exemption of maritime industry.

Key Words – Maritime Industry, Anti – Competitive Agreement, Exemption,

1.1 Introduction –

The maritime industry is a cornerstone of global trade, facilitating the movement of goods across vast distances. As globalization has intensified, the complexity of shipping operations has increased, leading to heightened competition among shipping companies. However, this competition is sometimes undermined by anti-competitive agreements, which can manifest in various forms, such as price-fixing, market sharing, and collusion. These practices not only disrupt fair market conditions but also inflate shipping costs, ultimately impacting consumers and businesses reliant on maritime transport. Despite the existence of international and national regulations aimed at curbing such behaviours, enforcement remains challenging. The intricate web of international laws, differing national regulations, and the often-opaque nature of shipping operations complicate the detection and prosecution of anti-competitive agreements.

This paper seeks to explore the prevalence and implications of these practices in the maritime sector, assess current regulatory frameworks, and propose effective measures to enhance compliance and enforcement.

Maritime industry is one of the major industries which contributes more in the Gross Domestic Product (GDP). This industry contributes around 5 to 6 percent to GDP. The main objective of the competition act is to maintain and increase the efficiency of the competition and to remove the anti – competitive practises in India. However, this provision is not applicable to maritime industry as per Section 54(a)¹ of competition act, 2002. Maritime Industry contain the Co-operative agreement, which further means that it includes both anti-competitive and pro-competitive agreement. The competition act, 2002 regulates the anti-competitive agreement in country though these industries is exempted but certain provisions are still valid on the maritime industry. In this paper the main focus to understand that why the maritime industry is exempted and the comparison of this exemption with other countries.

1.2 Research Questions:

1. What are the most prevalent forms of anti-competitive agreements in the maritime industry?
2. How do these agreements impact market dynamics, pricing, and consumer choice?
3. What are the current regulatory frameworks addressing anti-competitive practices in the maritime sector?
4. What challenges do enforcement agencies face in regulating anti-competitive behaviour in the maritime industry?
5. What recommendations can be made to improve regulatory effectiveness?

1.3 Research Objectives:

- 1) To identify Anti-Competitive Practices with regard to maritime industry.
- 2) To evaluate economic impacts and it's fluctuations.
- 3) To examine regulatory effectiveness
- 4) To identify enforcement challenges
- 5) To propose certain policy recommendations

¹ Competition Act, 2002, Sec 54(a), Act of Parliament,2002 (India)

2.1 Need for an exemption of maritime industry under Competition Act, 2002.

In 2013 the Ministry of Corporate Affairs first time exercises its power under section 54(a) to exempt the vessel sharing agreement from the ambit of section 3 of competition act, 2002. Under this notification² it stated that the vessel sharing agreement shall be exempted with respect to any nationality. This notification will be in force up to 2017. In 2018 again notification³ was passed which states that the exemption to maritime industry under the competition act should be extended till three years i.e. up to 2021. One of the major reasons behind exemption should be that it gives immense support to the country's economy. These agreements are exempted from the competition law on the basis of balancing of high cost, overcapacity, large capital investment, unpredictable demand and supply of the goods, etc. In this industry the vessel sharing agreements and fixing of freight rates are the common anti – competitive practises.

The maritime sector has certain peculiarities, including high capital expenditures, particular regulatory requirements, and substantial infrastructural requirements. It frequently functions in oligopolistic market environments, when a small number of dominant businesses may stifle competition. International shipping lines and ports compete with the globally globalized marine industry. In locations where there is intense international competition, exemption may make it possible for domestic players to compete more successfully on a global basis. Supply chain continuity and national security depend heavily on the maritime sector. Making sure it works by exempting it could improve strategic independence. An exemption would encourage industry players to work together toward common objectives like innovation, safety, and sustainability, which could eventually benefit consumers. Although customers generally gain from competition, in some maritime circumstances, stability may be more important than competition in terms of pricing impact.

On the Global Maritime Summit 2023⁴ which was held at Mumbai the plan for maritime industry was revealed. Which is name as 'Maritime India Vision 2047' and which will increase the growth of maritime industry in India. This Maritime India Vision 2047 have given the restriction mergers and acquisition (M&A) which will leads to dominance of a company. Not

² The Gazette of India (E) No. 2753, The Ministry of Corporate Affairs, Dec 11, 2013

³ The Gazette of India (E) No. 2497, The Ministry of Corporate Affairs, July 4, 2018

⁴ shipmin.gov.in

only that it further states that the Competition Commission of India (CCI) is now tackles with the breach of the problem related to Competition law. This competition law has set for another task of monitoring of Anti-competitive practises in the maritime industry which, is up to now is largely exempted from the provision of anti – competitive agreement.

2.2 Types of anti-competitive agreement under Maritime Industry:

Due to its intricate dynamics and substantial economic influence, the maritime sector is vulnerable to a range of anti-competitive agreements. These actions may damage consumers in the long run by undermining fair competition and raising prices. The most common forms of anti-competitive agreements in the maritime industry are explained in detail in this section.

- a) **Cartels:** A legal agreement between rival businesses to coordinate their activities, usually with the intention of limiting production or setting pricing, is called a cartel. Within the maritime industry, cartels may entail agreements between shipping companies to establish fixed prices for transportation services, assign particular routes, or restrict the size of their fleets.
- b) **Bid Rigging:** Bid rigging is the practice of businesses working together to predetermine the winner of a contract by collusion during the bidding process. In public procurement or huge shipping contracts, where competition should ideally bring down prices, this behaviour is especially detrimental.
- c) **Market Sharing:** Under market sharing agreements, rival companies agree to split up the market geographically or according to consumer segments. This approach has the potential to severely restrict customer choice and competition.

2.3 Implementation of Competition law in the Maritime Sector

The Competition Act, 2002 mainly prohibits the anti-competitive agreement, abuse of dominance, etc. Under section 3⁵ of Competition Act, anti – competitive agreement such as horizontal agreement and vertical agreement are per se anti – competitive. Hence weather predatory pricing or price fixing this is closed look by the CCI. As a result, the CCI may decide to closely examine any horizontal agreements, such as rigging bid collusion amongst consortiums or vessel sharing arrangements in the liner shipping or tramp shipping sectors. The following actions could cause concern:

⁵ Competition Act, 2002, Sec 3, Act of Parliament,2002 (India)

1. Enforcement of loyalty contracts and exclusive dealing contracts granting discounted freight rates (prohibited under 3(4) of the Competition Act);
2. Predatory pricing (prohibited under 4(2)(a));
3. Disbursement of sensitive data facilitating a robust pricing strategy and capacity expansion (prohibited under section 3(1)); and
4. Agreement between ports and service providers consisting of terms relating to bundling of services, refusal to deal (prohibited under section 3(4)) .

In 2015 in case of The Dumper Owner's Association ("DOA") was penalized by the CCI in 2015 (Case No. 42 of 2012)⁶ for cartelization, setting supply prices, and managing the dumper supply at the Paradip Port. In addition to imposing a penalty of 5% of the average income of the previous three years on the people implicated, the CCI levied a penalty of 8% of the average turnover of the previous three years.

It is important to remember that the Competition Commission of India (CCI) penalized three ship lines (not including the leniency applicant who received a 100% reduction) and the individuals associated with them in the shipping cartel case⁷ for violating Section 3(3)⁸ of the Competition Act, 2002 (Act) by conspiring to price fixing, markets allocation, respect incumbents, and other offenses while providing services to Original Equipment Manufacturers (OEM). The CCI held that the Opposite Parties are not the exporters; rather, they are providing maritime transport services to OEMs who are the exporters, rejecting the argument that the services are being "exported" and are therefore excluded in terms of Section 3(5)(ii)⁹ of the Act.

2.4 Exemption policy in another jurisdiction –

- a) In USA:** In USA, Federal Trade Commission enforces the law related to antitrust policy. The United States Shipping Act of 1984 exempts consortia agreements among shipping carriers and end operators, with an exception of agreements that have a direct and reasonably foreseeable effect on the US commerce. In the present condition, the Ocean

⁶ Swastik Stevedores Private Limited Vs M/s Dumper Owners' Association (Case No. 42 of 2012)

⁷ CCI Vs NYK Lines and Ors. Suo Moto Case No. 10 of 2024.

⁸ Competition Act, 2002, Sec 3(3), Act of Parliament, 2002 (India)

⁹ Competition Act, 2002, Sec 3(5)(ii), Act of Parliament, 2002 (India)

Shipping Act of 2022 empowers the Federal Maritime Commission to monitor the monopolistic behaviour and anti-competitive conduct.

Consortia agreements - A consortium is an operational agreement for joint operations of two or more liner shipping carriers with the goal of concentrating on single marine services while offering a joint service on a trade.

In the case of *Federal Maritime Board v. Isbrandtsen Co., Inc.*¹⁰ in this the main issue was whether the FMB's regulatory authority over shipping those affecting rates and competition, was sufficient to exempt such agreements from antitrust scrutiny under the *Federal Maritime Board v. Isbrandtsen Co., Inc. Sherman act* respectively.

In this the supreme court ruled in Favor of the Federal Maritime Board. The court held that the FMB have complete authority to approve and regulate the shipping agreements, and this regulatory framework is able to exempt certain practices from the antitrust laws. According to this decision the maritime regulation could take precedence over antitrust concerns in specific cases where the FMB's oversight was deemed necessary for maintaining orderly and fair shipping practices.

- b) In European Union** – In the Europe union the competition law gives exemption more specifically to the vessel sharing agreements. **Vessel – sharing agreements (VSAs)**- This are the legal contract between shipping companies or the carriers with the purpose to share the resources and to collaborate in the maritime industry. These agreements are also used to meet the demand on specific trade routes which includes the operational and commercial agreements. VSAs can also mention the respective prices, remuneration terms, etc. Legal provision under the European union, all the agreements that restrict the competition in the market which are banned under provisions of Article 101(1)¹¹ and Article 101(2)¹² of the Treaty on the Functioning of the European Union (TFEU). On the other side, the Consortia Block Exemption Regulation (CBER) gives relaxation and allows shipping lines with a combined market share of below 30% to get entry into the cooperation agreement to provide joint cargo transport service which is also known as consortia. The CBER grants an exemption to Article 101 (1) on the grounds that the agreement between these shipping lines should advance technological or economic advancement, enhance the production or

¹⁰ *Federal Maritime Board v. Isbrandtsen Co., Inc* 356 U.S. 481 (1958)

¹¹ Treaty on the Functioning of the European Union, Article 101(1)

¹² Treaty on the Functioning of the European Union, Article 101(2)

distribution of goods, and give consumers a fair share of the benefits without stifling competition. By European Commission, it investigated different cases related to several shipping company for breaches of European Union Competition law. For instance, in 2014, the P3 Alliance¹³ of Maersk line, Mediterranean Shipping Company (MSC) and CMA CGM is get rejected by law of European Commission because it will harm to the competition . Similar instance was happening in 2013, where the G6 Alliance¹⁴ of APL, Hapag-Lloyd, Hyundai Merchant Marine, Mitsui O.S.K. Lines, Nippon Yusen Kaisha and Orient Oversea Container Line was investigated by the European Commission for the adequate breaches of the competition law. On the other side, certain alliance of shipping industry was get accepted by the European Commission. For instance, in the year 2016 ONEAN Alliance¹⁵ of CMA CGM, China Cosco Shipping, Evergreen Line and Orient Overseas Container Line was approved by the commission but with respect to certain condition which includes the commitments by the companies to offer some extra or additional services on some routes to regulate the market competition .

- c) **Singapore** – The Minister for Trade and Industry may issue an order exempting a certain class of agreements from the ban on anti-competitive agreements, decisions, and practices under Section 36¹⁶ of Singapore's Competition Act, 2004 (SC Act). Section 34¹⁷ of the Act has given the advice of the Competition and Consumer Commission of Singapore (CCCS) to allow and how this to be done.

Exempted agreements must contain certain characteristics they are as follows –

- a) Those agreement which are made and practised must lead to an increase in production and distribution of same.
- b) The agreement must lead to promotion of technical as well as economic progress.
- c) No undertakings included should be subject to restrictions as a result of the agreements.
- d) It shouldn't permit the endeavours to end service-related competition.

¹³ P3 Alliance Case (2014)

¹⁴ P6 Alliance Case (2013)

¹⁵ ONEAN Alliance Case (2016)

¹⁶ Singapore Competition Act, 2004, Section 36 (2004)

¹⁷ Singapore Competition Act, 2004, Section 34 (2004)

In order to reduce the possibility of anti-competitive action, the CCCS has also mandated that participants to a liner shipping conference file their agreement and any modifications to it to the organization if the total market share surpasses 50%.

3.1 Comparison with Indian Exemption Policy

These comparison of Indian Exemption Policy with the other jurisdiction policy which helps in overcoming the loopholes in the policy. The main prospective which taken by the above-mentioned countries are providing particular outlines which denotes that what are the content and condition of the policy, which makes it clear to what should be exempted or what should not be exempted.

For example, Singapore finds it easy to monitor the agreements where condition is laid for the purpose of availing of exemption because of which the effectiveness is increased. On the other side, other jurisdiction prefers to refer that agreement which are submitted to government for closed verification before execution. In contrast to the aforementioned countries, the Ministry of Corporate Affairs notification may be interpreted as having created a broad exception and being insufficient to regulate the sector's behaviour. The aforementioned policies in other nations also suggest that these states have carefully designed their mechanisms and have been effective in preserving a healthy level of competition within their own borders.

Critics of India's exemption from vessel sharing agreements vigorously contend that this exception permits liner ships to share their container space, resulting in increased connectivity and frequency of ships between ports. It is also asserted that, in addition to improving service efficiency, vessel sharing agreements encourage more small and medium-sized maritime firms to participate, which boosts industry competition. Unfortunately, the current system of exemptions for vessel sharing agreements in India is highly unclear, raising a number of significant problems that remain unaddressed. The relevant notifications of the MCA from time to time have never defined and still do not define what a Vessel Sharing Agreement or Line Agreement or Consortium Shipping Agreements means with respect to the exemption that is granted under the Competition Act, in contrast to the European Union, Hong Kong, and Singapore. Therefore, it is challenging to determine what kinds of agreements and what components pertaining to the sharing of boats are excluded from the requirements of Section 3 of the Competition Act, 2002 in the lack of such a definition.

4.1 Certain Suggestions-

In Indian jurisdiction this policy has recently comes into the highlight on which it gives certain powers to CCI, before this, this industry is completely exempted from the view of practices of anti – competitive agreement under the competition act, 2002.

It is very much evident that this industry has been gain much relaxation, it should be scrutinised and gives certain rules which regulates this industry.

It is crucial that the relevant state adopt two requirements in order to successfully apply the exemptions: first, it must provide guidelines to be followed, and second, it must give the authorities the authority to investigate and determine if an exception has been misused.

5.1 Conclusion –

The Ministry of Corporate Affairs through its shipping notification is attempted to promote the economic activities but it has been fails to the extent of perfection. After considering other international jurisdiction which the follows the strict scrutiny mechanism before giving permission to the shipping companies to enjoy exemption privileges. The law should make a successful implementation of the exemptions rule which should be followed and also gives the power to authority to examine and decide the misuse of such exception. It is necessary that before allowing the execution any shipping agreement, it is necessary that the ministry should take a guidance form CCI for the implementation of the shipping agreement on the market.

Anti-competitive agreements in the maritime industry threaten the foundations of fair competition, leading to detrimental effects on pricing, service quality, and overall market health. This paper has explored the various forms of these agreements, assessed their impacts, and examined the existing regulatory frameworks designed to combat them. While some progress has been made, significant challenges remain in enforcement and compliance. To effectively tackle these anti-competitive practices, a concerted effort is needed from international and national regulatory bodies to strengthen legal frameworks, enhance transparency, and improve collaboration across jurisdictions. By implementing the proposed recommendations, stakeholders can work towards a more equitable maritime industry that benefits both businesses and consumers.