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Navigating Antitrust Immunity: Vessel Sharing Agreement in Maritime Law

Dr. Ram Charan Meena

Assistant Professor,
Government Law College, Sikar, Rajasthan

Introduction

Unlike easily replicated land-based transportation, ocean freight relies on a limited number of large vessels and established shipping routes. This can lead to concerns about potential collusion between carriers, particularly through Vessel Sharing Agreements (VSA). These agreements allow shipping companies to cooperate on specific routes, raising questions about reduced competition and potential harm to consumers. Here, the focus is on the exemptions granted to these VSA's from the Competition Act (ended in 2021, but will soon be revived again), and how it interacts with the Hub-and-Spoke arrangements as a result of which liability can flow to wider stakeholders.

What are VSA's?

VSA's involves allocating space in order to better fulfil demand or improve maritime operations.[1] Participants commit to supplying a designated quantity of vessels for collective utilization to establish a collaborative liner service. Within each vessel, specific slots are designated for individual participants. The distribution of these slots follows the principle of "you reap what you sow", ensuring equitable allocation based on contribution. It is instructive here to note that VSA's allow members to maintain independence in crucial areas such as sales and pricing, unlike mergers where a single entity takes over sales functions. So, a VSA members employ individual pricing policies, independently setting liner tariffs, rebates, and surcharges without obligation to disclose or limit them. This preserves their market autonomy for cargo booking, service branding, and document management. Standard carriage terms, covering incidents, insurance, law, and arbitration, are also part of the VSA's.[2] While mergers often reduce competition by consolidating companies, VSA's maintain separate entities, potentially limiting their anti-competitive impact. Additionally, VSA's involve collaboration on specific aspects without complete integration of operations and assets, in contrast to mergers which unify companies. Hence, a direct competition law analysis as applied to mergers cannot, and should not be applied to VSA's.

VSA's commonly stipulate that that "each party shall operate its own vessels deployed in the VSA services and pay for the fixed and variable costs associated therewith."[3] While VSA's offer potential

[1] Hyunwoo Park, Christian Blanco & Elliot Bendoly, *Vessel Sharing and Its Impact on Maritime Operations and Carbon Emissions*, 31 PRDUCTION AND OPERATIONS MANAGEMENT 2925, 2925.
[2] Anneta Varbanova, *Evaluation of Vessel Sharing Agreements Effetcs on Container Lines Transportation Efficiency*, 3 SCIENCE BUSINESS. SOCIETY 66, 67 (2018).
[3] CSCL/UASC/YMUK/CMA CGM/PIL Vessel Sharing and Slot Exchange Agreement: F M C Agreemen t No. : 012233-0024, file:///Users/harshalbaviskar/Downloads/Agreement-MK%20012233-002%20(1).pdf.

benefits such as cost efficiency, concerns have often been raised from the shippers' side about their potential anti-competitive effects.[4] Section 3 of the Competition Act, 2002 prohibits anti-competitive agreements, encompassing price fixing, distribution control, capacity limitations, and market allocation, potentially challenging VSA's engaging in such practices. Additionally, Section 4 comes into play if companies within a VSA collectively attain dominance and exploit it to harm competition. Reduced price competition is a significant concern, as VSA's may enable coordination between shipping lines, fostering tacit collusion on pricing through shared information and operational schedules to avoid aggressive competition on covered routes. Capacity manipulation is another worry, with members potentially agreeing to limit sailings despite demand, leading to higher freight rates due to artificial capacity restrictions. Moreover, extensive information exchange within VSA's also transparency concerns, facilitating coordinated decision-making on pricing and service offerings, thus diminishing competition.

The Need for VSA exemption in the Maritime Sector

The rationale behind exempting VSA's from competition laws is tied to the shipping industry's inherent characteristics. The industry demands substantial capital investment, and by allowing companies to share container space on vessels, VSA's enhance operational efficiencies. Econometric studies such as those by Federico Quartieri (by assuming an oligopolistic model) have found that consortia formation doesn't change carriers' average variable costs but spreads them, decreasing marginal costs for each carrier.[5] This leads to increased marginal profits, shifting carriers' strategic choices upward. Consequently, aggregate quantity rises, lowering freight rates and increasing consumer welfare in equilibrium. Thereby, these VSA's generate a pro-competitive *effect* (perhaps not necessarily in the sense of increasing the number of players, but in its *effects* in the sense of reducing prices and increasing quantiy) because of the very manner in which the cost of the joint liner service is implicitly redistributed among members. Further, there is a very high likelihood that existence of VSA exemptions will give a positive incentive to opt for larger vessels, which can then have further positive benefits. Studies have found out that emissions can get reduced by as much as 30% at a negative abatement cost by replacing the existing fleet with larger vessels.[6] These also let carriers benefit from economies of scale or scope, and improve vessel capacity utilization.[7] The scale benefit arise as operating costs per unit (TEU) decrease with the use of larger container ships. This is due to savings in bunker costs, crew expenses, maintenance, lubricants, etc., where total costs increase at a slower rate compared to vessel size. The scope benefit arise as they help increase market coverage and connecting services with cross-ocean and feeder route.[8] Understanding the total demand across a trade route and collaboratively planning capacity decreases the required deployment of vessels for each alliance member, thus reducing

[4] P. Manoj, *Shippers Wary as India Exempts Vessel Sharing Pacts from Anti-Trust Law*, MINT, Dec. 27, 2013, https://www.livemint.com/Opinion/d5qWrgwTzOKlKMdF0b7rjM/Shippers-wary-as-India-exempts-vessel- sharing-pacts-from-ant.html.
[5] Federico Quartieri, *Are Vessel Sharing Agreements Pro-Competitive?*, 11–12 ECONOMICS OF TRANSPORTATION 33 (2017).
[6] Elizabeth Lindstand, Bjørn Egil Asbjørnslett & Anders Hammer Strømman, *The Importance of Economies of Scale for Reductions in Greenhouse Gas Emissions from Shipping*, 39 ENERGY POLICY 386, 396 (2012).
[7] Mohammad Ghorbani et al., *Strategic Alliances in Container Shipping: A Review of the Literature and Future Research Agenda*, 24 MARITIME ECONOMICS & LOGISTICS 439, 440 (2022).
[8] *Id.* at 445.

associated costs.[9]

Further, Indian shippers and freight forwarders are increasingly concerned about vessel space availability for trades to Europe and the US. Forwarders report a "sold-out window" for spot bookings on most services through much of July.[10] The capacity pressures are particularly severe on trades to North Europe and the US West Coast due to widespread schedule disruptions caused by Red Sea diversions and congestion at transshipment hubs. This makes it all the more necessary that we utilise all the existing space available on all the vessels that go out from India. VSA's precisely help with these.

Ambiguity in Indian Maritime Sector

VSA exemptions had been regularly granted in the sector until 2021. But, none of these notifications have given a positive definition of a VSA (in the sense of what a VSA is supposed to contain), and have only given out a negative definition saying that the exemption will not cover arrangements involving price fixation, limitation of capacity or sales and allocation of markets or customers.[11] This is unlike countries such as Malaysia,[12] Hong Kong[13] and Singapore,[14] which give out a positively worded definition of what a VSA will contain, thereby giving out a clarity as to what actions are actually exempt. For example, the Malaysian exemption, in addition to a negative definition (*inter alia* excluding price fixing, price recommendation or tariff imposition), provides that "(a) the Vessel Sharing Agreement shall (i) *only be* for the sharing of vessels, joint operation of vessel services, or exchange or charter of vessel space, between liner shipping operators; (ii) be for a reasonable period of time; (iii) allow each liner shipping operator to enter into any confidential contract and to offer any arrangement and pricing of its liner shipping services through transportation by sea; and (iv) ensure that each liner shipping operator allocates sufficient vessel space capacity in response to fluctuations in supply and demand, which may be necessary for the operation of a joint service in any port in Malaysia."[15]

However, such clarity in India results in ambiguity. For instance, in the *Shipping Line Cartel Case*, the Competition Commission of India (CCI) fined three ship liners (apart from the one who applied for leniency and received a full reduction) and their implicated individuals for breaking Section 3(3) of the Competition Act, 2002 (Act). This was due to their collusion in bidding, coordinating to fix prices, dividing markets, and showing favoritism toward certain incumbents while providing services to Original Equipment Manufacturers (OEMs). Here, reliance was sought to be placed on the VSA exemption that had been granted which provided that VSA's were exempted from the scope of the Act.

[9] Frans Cruijssen, *Horizontal Cooperation in Transport and Logistics: A Literature Review*, 46 TRANSPORTATION JOURNAL 22 (2007).
[10] Bency Mathew, *Carriers Halt India Bookings to Europe, US amid Capacity Crunch: Forwarders*, JOURNAL OF COMMERCE (Jun. 25, 2024).
[11] Ministry of Corporate Affairs notification dated 4th July, 2018; S.O. 3250(E)., https://www.mca.gov.in/Ministry/pdf/VSAExemption_16072019.pdf.
[12] Competition (Block Exemption for Vessel Sharing Agreements in Respect of Liner Shipping Services through Transportation by Sea) Order 2024.
[13] Competition (Block Exemption for Vessel Sharing Agreements) Order 2022, https://www.compcomm.hk/en/enforcement/registers/block_exemption/files/BE0004_2022_Varied_2017_order_EN.pdf.
[14] Competition (Block Exemption for Liner Shipping Agreements) Order 2006, https://sso.agc.gov.sg/SL/CA2004-OR1?DocDate=20211115.
[15] n 12 Clause 4.

However the exemption was not to include fixing of prices, limitation of capacity or sale and allocation of markets or customers.[16] The CCI deemed the discussion on 'Guideline rates' as exchange of 'commercially sensitive information', which is not permitted at all.[17] However, CCI ignores the fundamental fact that the exemptions which have been provided act as an incentive for the players to come together and come to an agreement with respect to the strategic choices to make. As part of this, it is but natural for them to discuss information which is going to be different (and perhaps they might venture into those areas which a normal application of the Act might not permit) as they will have to be completely aware of the other party with which it is going to collaborate. However, in such instances, the CCI should not borrow the 'commercially sensitive information' jurisprudence[18] directly as that is in context of direct application of the Act, as opposed to an exemption. The latter has to necessarily be analysed in a different light. The current CCI analysis around these VSA's implies that even when certain exemptions exist, they may not cover all forms of anti-competitive conduct, with the ball being in the CCI's park as it is the one who will decide the boundaries of 'commercially sensitive information', resulting in an ad-hoc application of the rules. A lack of defined positive definition of a VSA, hence, indeed raises issues.

Recently, the Directorate General of Shipping opened a public consultation[19] on a Draft Notification on Regulations for Vessel Sharing Agreements (VSA's). The notification lays out space allocation requirements and monitoring provisions but again fails to offer a clear, positive definition of what constitutes a VSA. This lack of definition leaves ambiguity, as noted already, about which agreements are protected and which may be subject to scrutiny, creating room for varying interpretations. Additionally, while the draft notification empowers the Director General to investigate anti-competitive behaviour, it does not provide specific guidelines or parameters for what constitutes permissible collaboration under a VSA.

Hub and Spoke Arrangements and expanded liability

While the progress on a clearer definition is yet to be seen, the interaction of the Hub-and- Spoke arrangement (H&S arrangement) as introduced by the 2023 amendment[20] to the Competition Act, with the VSA regime implies that multiple stakeholders are also at the risk of being dragged into CCI's radar, if the activities fall out of the *perceived* VSA exemption. A H&S arrangement is one in which an entity (the 'hub'), facilitates coordination relating to prices, market or customer allocation, production, distribution, or any form of bid rigging, amongst competing entities operating at a different level of the supply chain (the 'spokes'). The 2023 amendment deems these to be illegal. Two scenarios are possible, under which other stakeholders can also be held liable:

[16] In Re: Cartelisation by Shipping Lines in the matter of provision of Maritime Motor Vehicle Transport Services to the Original Equipment Manufacturers (20.01.2022 - CCI) : MANU/CO/0005/2022.
[17] *Id.* at 56.
[18] Cartelisation in respect of zinc carbon dry cell batteries market in India vs. Eveready Industries India Ltd. and Ors. (19.04.2018 - CCI) : MANU/CO/0019/2018, 9.2.
[19] 'Invitation for Public Comments and Stakeholder Consultation on the Draft Notification on Regulations for Vessel Sharing Agreements (VSA's): File No. E: 6752: 15-14011/1/2021-MSL – DGS' <https://www.dgshipping.gov.in/writereaddata/News/20241008040241379409920241001052912499 7937InvitationforPublicCommentsandStakeholderConsultationontheDraftNotificationonRegulationforVSA's(1).pdf>.
[20] Competition (Amendment) Act, 2023, No.9 of 2023.

a) where the carrier is the hub, and other carriers and stakeholders form the spokes, and

b) where a shipper acts as the hub, with the carriers serving as spokes. (Shipper is the person or company who is usually the supplier or owner of commodities shipped. Carrier is the one who actually transports those goods).

Arrangement a: When a carrier acts as the hub and engages in practices like price-fixing or market allocation, the various stakeholders in the shipping industry - other carriers, logistics companies, freight forwarders, port operators, and service providers - can all be implicated. The hub facilitates coordination among these parties (the spokes), and if any of them use the sensitive information provided by the hub, they are likely to face liability under competition law.

For instance, other carriers that participate in VSA's could be liable if they use pricing information shared by the hub to align their prices. Even if they do not explicitly agree to fix prices, simply maintaining parallel pricing based on the information provided could attract scrutiny for price-fixing. This is more plausible in light of the lowered standard of evidence,[21] where, for establishing an 'agreement' between competitors, a mere exchange of competitively sensitive information between competitors is enough for establishing an anti-competitive 'agreement'. Hence, any information (*deemed* sensitive, for instance see para 56,93 and 103 of the *Shipping Line Cartel* case[22]) shared might be concluded to constitute an agreement. Furthermore, if the hub facilitates market allocation, whereby competing shipping lines agree to divide routes or territories, they too will be liable for anti-competitive conduct. In addition, output restrictions - where the hub coordinates capacity limits to artificially inflate prices - can implicate all participating carriers for reducing competition and increasing costs for consumers.

Similarly, logistics companies can also be held liable if they engage in anti-competitive practices such as bid-rigging, price-fixing, or collusive tendering under the influence or coordination of the hub. Freight forwarders arrange for the transportation of goods on behalf of shippers and often interact with both carriers and logistics companies. They interact closely with both carriers and logistics companies, and hence are also at risk. If the hub shares sensitive information about shipping rates or routes, and the forwarders use this information to align their pricing or allocate customers, they may be found guilty of price coordination or market allocation. Similarly, port operators, who provide essential services to shipping lines can be implicated if they participate in bid-rigging schemes or coordinate capacity to manipulate pricing in favor of certain carriers.

Arrangement b: Under the 2023 amendment, it is possible[23] that simply knowing of an arrangement to, for example, fix prices, is sufficient, without anything further, to attribute liability to the hub. This effectively means that anything short of the hub taking active steps to stop coordinated conduct by its business partners, could attribute cartel liability to the hub. Liability can flow in two ways. *First*,

[21] Hub and Spokes Cartels – Codification and Challenges, AZB & PARTNERS (Feb. 12, 2024), https://www.azbpartners.com/bank/hub-and-spokes-cartels-codification-and-challenges/#:~:text=An%20H%26S%20arrangement%20is%20one,(the%20%27spokes%27).
[22] In Re: Cartelisation by Shipping Lines in the matter of provision of Maritime Motor Vehicle Transport Services to the Original Equipment Manufacturers (20.01.2022 - CCI) : MANU/CO/0005/2022, *supra* note 17.
[23] Hub and Spokes Cartels – Codification and Challenges, *supra* note 22.

through knowledge and inaction: Here, if the hub knows about an agreement between the carriers (spokes) to engage in proscribed activities like price- fixing or market sharing, and does not take steps to prevent or stop it, the hub may be presumed to have *intended* to participate in the cartel. This shifts the burden onto the hub to prove that it did not facilitate the arrangement. *Second*, it can flow through the nature of vertical relationship itself: Although the carriers (spokes) are typically in competition with each other, their agreements and coordination can implicate the hub if it is seen as facilitating or enabling their actions. The hub's role as an intermediary and its influence over the spokes (for example, by sharing pricing information or coordinating routes) may deepen its liability if the carriers are found to be colluding. Hence, the coverage of hub and spoke relationship under the Act places a significant burden on hubs to proactively ensure that they are not facilitating or condoning illegal coordination. They must take active steps to prevent collusion, such as monitoring their vertical relationships, limiting the flow of competitive information, and implementing compliance programs. If they fail to do so, they risk being held complicit in anti-competitive conduct.

This expanded liability under the H&S arrangement necessitates that a clearer positive definition of VSA is put in place, so that clarity is imparted in this sector.

Conclusion

While VSA's aim to optimize operations and ensure efficiency without fully integrating the operations of participating entities, the absence of a clear, positive definition in India creates regulatory ambiguity. This lack of clarity not only hampers the ability of shipping companies to operate confidently but also increases the risk of misinterpretation and liability under the Competition Act, particularly with the expanded scope of Hub-and-Spoke (H&S) arrangements introduced by the 2023 amendment. Defining VSA's positively, akin to international practices, and establishing clear guidelines on permissible collaboration would enhance transparency and mitigate anti-competitive risks. As the revival of VSA exemptions approaches, aligning regulatory frameworks with international best practices and addressing ambiguities in collaboration standards will be critical. This will not only help build a competitive maritime sector but also ensure that exemptions serve their intended purpose of promoting operational efficiency without compromising market integrity.