**A COMPARATIVE ANALYSIS OF HOW COURTS IN DIFFERENT COUNTRIES DEAL WITH JURISDICTION AND ARBITRATION CLAUSES IN THE BILL OF LADING AND OTHER CARRIAGE DOCUMENTS**

**The Indian Position**

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INTRODUCTION

The trend of development in the antique period was introduced by the colonial rule sprouted out in India during the late fifteenth century. It was then our society dynamically churned into the whirlpool of mercantile commerce development. In the very initial stage conflicts were never reached to the platform of resolution due to the immensely strong ruling power. With the advent of independence our country has found major difficulties in mercantile business especially when the economy was opened up in 1990s with the outbreak of liberalized market. Later with the end of twentieth century, conflicts arose from the nook and corner of the country alleging different maritime claims as to demurrage and lien. By the time mercantile commerce in developed countries started regulated by documents of contract of carriage i.e. by bill of lading or by any other documents as to contract of carriage by sea.

The paper shall deal with the emergence of mercantile maritime commerce in India, its status in the post liberalization period and concepts of bill of lading, charter party and other documents related to carriage of goods by sea in India. The paper also deals with law regulating to charter party and bill of lading in India along with the array of judicial interpretation on interpreting the arbitration and jurisdiction clauses. The paper also analyses the scope of novel legislation regulating these documents in order to pile in the back bone of the mercantile marine commerce and development of national economy.

HISTORY AND BACKGROUND

The history of Indian maritime industry laid its corner stone during the third millennium BC when the inhabitants of the Indus Valley initiated maritime trading contact with Mesopotamia. By the time of Augustus up to 120 ships were set on sail every year from Myos Hormos to India.

The region around the Indus river began to show visible increase in both the length and frequency of maritime voyages by 3000BCE. Evidence exists that the Harappans were bulkshipping timber and special woods to Sumeria but during the matured Harappan period an Indus Colony was established at Shortugai near Badakstan mines and lapis stones were brought overland to Lothal in Gujarat and shipped to Oman, Bahrain and Mesopotamia. The world’s first dock at Lothal(2400) BCE was located from the main current to avoid deposition of silt. The great knowledge of Harappans enabled to select Lothal,s location in the first place as the Gulf of Khambhathas the highest tidal amplitude and the ships can be sluiced through flow tides in the river estuary. The engineers built a trapezoidal structure with north-south arms of average 21.8m and east west arms of 37m.

Indian cartography locates the pole star and the other constellations of use in navigational charts. Detailed maps describe the locations of settlement, sea shores rivers and mountains were also made. Historically, the first attempt to organize a navy in India as described by the Megasthenes (350-290 BCE) is attributed to Chandraguptha Maurya (322-298 BCE). Following the nomadic interference in Siberia one of the sources for the Indian Bullion India diverted its attention to the Malay peninsula which became its new source for gold and was soon exposed to the world via. series of maritime trade routes.

During the medival period, trading Christian missionaries such as Saint Francis Xavier were instrumental in the spread of Christianity in the east. On the orders of Manuel I of Portugal four vessels under the command of navigator Vasco Da Gama rounded the Cape of Good Hope. In 1497, continuing to the eastern coast of Africa to Malindi to sail across the Indian Ocean to Calicut. Another Dutch Convoy sailed in 1598 and returned one year later with 600,000 pounds of spices and other Indian products. The United East India Company forged alliances with the principal producers of cloves and nutmeg. Baba Makhan, a Sikh of the 17th century is known for trade in sea route to Gulf and Mediterranean region. In 1865, the Common Carriers Act was enacted to regulated the overall carriage across the Indian Colony which was repealed in 2007 by the introduction of the Carriage by Road Act 2007.

In the Contemporary era (post independence period) i.e. in 1947 the Republic of India’s Navy consisted of 33 ships and 538 officers to secure the coastline of more than 4,660 miles and 1,280 islands. The navy saw various action during of the country’s wars, including Indian integration of Junagadh, the liberation of Goa, the 1965 war, and the 1971 war. India’s Coast Guard Act was passed in August 1978 and the Coast Guard was participated in counter terrorism operation such as operation cactus. India has also participated in United Nations Peacekeeping mission. In the meanwhile with the advent of liberalization and globalization, amendments were made to the Merchant Shipping Act 1958.

DOCUMENTS RELATING TO CARRIAGE OF GOODS BY SEA IN INDIA

BILLS OF LADING

The bills of lading is a document in writing signed by the owner of the ship in which the goods are embarked acknowledging the receipt thereof the condition of carriage and undertaking to deliver at the end of the voyage. In E & B Steamship Co v. Bhagojee Sommul[[1]](#footnote-1) states that bill of lading is a document of title and a mere assignment thereof would pass the title of the assignor to the goods and also the amount to a constructive delivery of the same. Further a bill can be bearer bill or order bill. The bills of lading are regulated by the Indian Bills of Lading Act 1856. S.1 of the Act vest right to sue only on the consignee of the goods named in the bill of lading or the endorsee. The endorsement of the bill is effected either by the shippers or the consignee writing his name on the back of the bill which is commonly known as the endorsement in blank. The interpretation in Amoco Oil Co v. Parpada Shipping Co Ltd asserting the burden of proof on claimants with regard to short delivery is accepted as a precedent. As per Indian law the bill of lading is considered as a negotiable instrument as it has the following feature resemblance with negotiable instrument:

1. The contract contained in the instrument is transferred by the delivery with or without indorsement. No distinct contract of assignment is necessary.
2. No notice of transfer need be given to the person liable under the instrument.
3. In some cases by virtue of the transfer the transferee may acquire rights greater than those of the transferor.
4. The transferee may sue and be sued in his own name
5. The transferee even if his title is defective may give a good discharge to the person liable to under the instrument
6. The consideration may be past consideration.

Further in Home Insurance Co. v. Ramanath & Co[[2]](#footnote-2), it was held that s. 3 of the Act is limited to the master or person signing the bill of lading. The bill of lading is sufficient evidence to establish that the goods were actually put on board and were received by the master of the ship. In the Great India Trading Co v. Angus Co Ltd[[3]](#footnote-3) it was held that the bill is a prima facie evidence against the ship owner of the shipment on board of the goods acknowledged under the bill of lading to have been shipped.

CHARTER PARTY

Where a ship is booked to the exclusive use of one shipper either for a particular voyage or voyages or for a certain time, that is a charter party. In the landmark judgment of Union of India v. Gosalia Shipping (P) Ltd. it was held that

*“It is wrong to assume that charter party has to be an agreement for carriage of something like goods, passengers, livestock or mail. It is a contract by which an entire ship or some principal part thereof is let to a merchant who is called a charterer, for conveyance of goods on a determined voyage to one or more places or until the expiration of a specific period, in the former case it is called the voyage charter party and in the latter a time charter party”*.

Therefore under the Indian Law the voyage charter party, berth charter party and the time charter party has gained a special chamber of vitality. The general clauses in a charter party as recognized by the Indian law include speed and consumption clause, delivery clause, safe port clause, cancelling clause, maintenance clause, cargo responsibility clause, off- hire clause, domestic fuel clause, redelivery clause, lien clauses, demurrage clause, arbitration clause and jurisdiction clause, deviation clause, cesser clause and almost all clauses ingrained under the English law.

ARBITRATION AND JURISDICTION CLAUSE

Most charter parties contain an arbitration clause providing for any disputes arising under the charter party to be referred to arbitration. There are, however, charter party forms which do not include such a clause. Thus, has been directed to those standard charter forms, such as for example the Gencon and the C (Ore) 7 charters which do not contain an arbitration clause at all. This may result in the inclusion of an arbitration clause in the addendum to the charter which is inappropriate. Not all printed arbitration clauses in standard form charters are sufficiently clear in their meaning.

The shortness of the time limits and the variety of the periods in “amended” Centrocon arbitration clauses are a trap for the unwary. Agro Company of Canada limited v. Richmond shipping Limited (The “Simonburn”) [[4]](#footnote-4) was just such a case in which a Centrocon arbitration clause was incorporated in a consecutive voyage charter. In another case, Tradax Export S.A. v. Italcarbo Societa di Navigazione S.p.A. (The “Sandalion”) [[5]](#footnote-5) the Court had to determine what was the effect of the Centrocon arbitration clause when incorporated into a time charter on the NYPE form. Again the words “final discharge” were the cause of the confusion.

In neither case is there any stipulation as to the law which is to govern the dispute as opposed to the procedure in the arbitration. This can result in the unsatisfactory situation of arbitrators having to apply a law which is foreign to them. [[6]](#footnote-6)

We have already mentioned certain English judgments on arbitration clauses highlighting their scope overriding the original jurisdiction of a municipal authority under its judicial system. Now this is high time to analyze how the Supreme Court of India and its subordinate High Courts interpret the arbitration and jurisdiction clauses.

Supreme Court Cases

Khardah Co. Ltd v. Raymon & Co. Pvt. Ltd.[[7]](#footnote-7)- The case exclusively discusses on maintainability of arbitration and the question as to whether the respondents were stopped from questioning the validity of of award by reason of their having submitted to the arbitrators. It was held that the if the arbitration agreement was void then there was no submission which was alive that on which Arbitrators could act and proceedings before them would be wholly without jurisdiction. Moreover where there was no such agreement, there was an initial want of jurisdiction which cannot be cured by the acquiescence. The case narrates that when the contract itself is illegal and void then the arbitrators appointed by the said contract are not competent to decide any question in dispute, that dispute shall be decided by the competent court.

V.O. Tractoroexport Mosow v. Tarapore Co & Anr[[8]](#footnote-8)- In this case suit was instituted against the arbitration agreement and the contract between the Appellant and the respondent was with regard to the delivery of the machinery. The contract vitiated due to certain circumstances. The suit was filed by the respondent for permanent injunction against the appellant for taking further part in the arbitration proceedings in the appellant’s country. The Supreme Court upheld that appellant is eligible for the benefit under s.3 of the Foreign Awards (Recognition and Enforcement) Act 1961 for an order of stay of proceedings. It was further held that the suit instituted in violation of arbitration clause in the contract is not maintainable and injunction cannot be made out.

Food Corporation of India v. Thakur Shipping Co & Ors[[9]](#footnote-9)- In this case the appellant chartered a ship belonging to the respondents. The appellant made claim for damages for short delivery. Further the appellant insisted to refer matter before arbitrator of DG Shipping which was deviation from the charterparty. On failure to get response from the respondents, the appellant filed a suit before the competent court. In this scenario, the respondents applied stay of suit under s.34 of the Arbitration Act. The bill of lading contained provision that no suit to enforce such claim would be maintainable after one year from the date of arrival of the ship at the port of discharge. The respondents were not ready to go for arbitration and were waiting for claim to be barred by the lapse of time. The Hon’ble Supreme Court held that s.34 cannot be invoked.

British India Steam Navigation v. Shanmughavilas Cashew Industries & Ors.[[10]](#footnote-10)- The question arose in this case was whether appellant would be liable for the suit of claim in lieu of shortage of delivery. It was held that it cannot be said that shipper whose knowledge will be attributed to first respondent did not know of conditions of carriage printed there being no other conditions printed elsewhere in the bill of lading. The Indian Carriage of goods are applicable only if the goods are carried from any of the ports in India. In the case the Act is not applicable as it is loaded from Africa and delivered in the Indian Port.

The Owners and Parties interested in the vessel MV Baltic Confidence & anr v. State of Trading Corporation of India Ltd. & Anr.[[11]](#footnote-11)- The question was whether parties to the suit agreed that the arbitration clause in the charterparty agreement shall be applicable to disputes arising under the bill of lading. It ws held that the dispute arising between the parties come within the purview of said clause is to be decided by arbitrator or the court.

Shakti Bhag Foods Ltd v. Kola Shipping Ltd[[12]](#footnote-12)- In the present case the respondent failed to load cargo and compensate damages. The respondent did not accepted the compensation as demurrage amount is less. Interim Orders were passed by the Delhi High Court in this regard. It was held that the existence of the charter party agreement identified from the fixture note and bill of lading signed by the parties as well as the correspondence between them. It was held that the court refers the parties to arbitration except when agreement is null and void. Here it is not null and void therefore the existence of charterparty agreement is affirmed.

**[[13]](#footnote-13)Chloro Controls (I) P Ltd. v. Severn Trent Water Purification Inc. & Anr.[ 2012(9)SCALE95]- An Example of India’s Current Position**

The present case is an ideal example of invocation of arbitral reference in multiple, multiparty agreements with intrinsically interlinked causes of action, more so, where performance of ancillary agreements is substantially dependent upon effective execution of the principal agreement. The questions raised in the cases are:

1. What is the ambit and scope of s.45 of the Arbitration Act 1996?
2. Whether the principles enunciated in the case of Sukanya Holdings Pvt. Ltd is the correct exposition of law.
3. Whether in a case where multiple agreements are signed between different parties and where some contain an arbitration clause and others don’t and further the parties are not identically common in proceedings before the court and the arbitration agreement, a reference of dispute as a whole or in part can be made to the arbitral tribunal more particularly where the parties to an action are claiming under or through a party to the arbitration agreement.
4. Whether bifurcation or splitting of parties or causes of action would be permissible in absence of any specific provision for the same in the 1996 Act.

The Hon’ble Supreme Court of India upheld that when the court satisfies that agreement is enforceable and is not null and void then it is obligatory upon the court to make reference to arbitration. This is considered to be an earmarked judgment where the vitality and scope of arbitration has widened which further supports the development of shipping industry and easy dispute resolution. In the cases of multiparty agreements then the court may have to make reference to arbitration even of the disputes existing between signatory and even non signatory parties. However the discretion of the court has to be exercised in exceptional, limiting, befitting and cases of necessity and very cautiously. It was narrated that the prayer can be made by signatories and non signatories if the pre requisites under ss.44 and 45[[14]](#footnote-14) of the 1996 Act is satisfied. It was also affirmed that s.45 override the provisions of CPC. The term “person claiming through or under” shall be construed liberally so as to settle disputes other than by judicial proceedings.

FUTURE DIRECTION OF INDIAN COURTS

Indian Courts have upheld the vitality of arbitration in smooth resolution of dispute and interpreted Arbitration and Jurisdiction clauses in such a way it ultimately encourages arbitration. Further s. 89 of the Code of Civil Procedure deals with Alternate dispute resolution which strengthens the base of arbitration. Further the Arbitration and Conciliation Act 1996 has taken up the whole responsibility of regulating Arbitration in India.

IS THERE NEW LEGISLATION THAT WILL IMPACT ON THE CURRENT POSITION

In India the Arbitration is conducted and regulated by Indian Council of Arbitration. The Major statutes with regard to Maritime trade and Arbitration are silent about its scope. But the judicial precedents interpreted so far has given weight age to arbitration even directed courts to issue orders allowing arbitration as an obligatory measure.

1. AIR 1961 Mad 442 [↑](#footnote-ref-1)
2. AIR 1955Mad 602 [↑](#footnote-ref-2)
3. AIR 1983 Cal 408 [↑](#footnote-ref-3)
4. (1972) 2 Lloyd’s Rep. 355. [↑](#footnote-ref-4)
5. (1983) 1 Lloyd’s Rep. 514. [↑](#footnote-ref-5)
6. See the English House of Lords case of Compaqnie d’Armement Maritime S.A. v. Companie Tunisienne de Navigation S.A. (1971) A.C. 572. [↑](#footnote-ref-6)
7. 1962 [↑](#footnote-ref-7)
8. 1969 [↑](#footnote-ref-8)
9. 1974 [↑](#footnote-ref-9)
10. 1990 [↑](#footnote-ref-10)
11. 2001 [↑](#footnote-ref-11)
12. 2008 [↑](#footnote-ref-12)
13. [↑](#footnote-ref-13)
14. 44.Definition.- In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960-

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

45.Power of judicial authority to refer parties to arbitration.- Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. [↑](#footnote-ref-14)