# THE ORIGINS AND LEGITIMACY OF ATLANTIC SHIPPING CLAUSES

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## Introduction

In the modern day where commercial transactions take place every second of everyday, it is quiet pertinent that all parties that enter into such commercial transactions devise a speedy dispute resolution mechanism. Litigation is the most obvious choice but it is not the one most suitable for commercial transaction where huge sums of money are at stake. The reason why it is ill suited is pretty obvious as it is very time taking and costly process. The obvious choice for dispute resolution is commercial arbitration as it is one of the most expeditious and fruitful ways to settle a dispute. The reason why commercial arbitration has been so globally successful is because it caters to every need of the parties. Party autonomy is the most enticing feature of commercial arbitration as it allows for the parties to dictate how if in case a dispute arises the matter would be adjudicated upon. The parties get to select:

- The law governing the contract
- The law governing the Arbitration Agreement within the contract.
- The seat of Arbitration, which effectively means the choice as the Law of the Seat of Arbitration
- The law governing the arbitration proceeding.

It is very important that in order to progress with this paper we understand the basic underlying notion of arbitration. The notion of arbitration revolves around the idea that we are providing a platform for parties who are entering into commercial transactions to settle any discrepancies as they want to. Thus the onus is upon the parties to decide how they decide to design the framework of the dispute resolution mechanism. Once they have designed the framework of such dispute resolution mechanism then the parties are bound to follow it by virtue of the principle of estoppels which means that once a person has represented something to be true, he cannot go back on it.[3][4] While designing the framework the only limitation placed on

[1] 5th Year, RMNLU .
[2] 2nd Year, RMNLU.
[3] Indian Evidence Act 1872, § 115.
[4] Superintendent of Taxes v. Onkarmal Nathmal Trust, (1976) 1 S.C.C. 766.

the parties is that the designed framework should be within the parameters of the chosen laws. The choice of law as to 1), 2), 3) and 4) is not a whimsical choice or a mere formality which the parties have to cover. These choices of law lay down the canvas on which the framework for the entire process can be designed by the parties. In this paper we are going to discuss one such issue within the realm of arbitration and see whether the canvas of laws allows for the same to be incorporated by the parties in the framework of arbitration.

Such commercial contracts may contain "Atlantic Shipping" clauses, the name which has been popularised by the case *Atlantic Shipping and Trading Company Limited v. Louis Dreyfus and Company.*[5]The nature of such clauses is to make the reference to arbitration a time bound practice i.e. if one of the parties feels there is a dispute which requires the aid of arbitration then he has to do it within a specific period of time. If the party fails to refer such matter to the arbitrator within the specified period of time then he loses any claim over the same.Parties put these clauses in contracts so that unless and until the other party has referred the matter to the arbitrator, they will be deemed to have waived their right and thus will not be able to bring the dispute into adjudication. The purpose of this paper is to trace the origins of these clauses in the common law and then look at the Jurisprudence regarding the same in India. We will also try and take a look at the various corners of the law in India and see whether Atlantic Shipping Clauses pass the test of statutory laws in India. One of the major outlooks of this paper is trying to see whether the law of contracts as it stands today in India should allow for such clauses to exist in contracts because what they are doing in effect is reducing the limitation period from the one that is statutorily recognised under the Limitation Act to a much narrower time frame.

## The Common Law On Atlantic Shipping Clause

The first instance that we find of a court adjudicating on the idea of such a clause which bars the time period for arbitration is in the case of *Atlantic Shipping And Trading Company Limited v. Louis Dreyfus And Company*[6]. In this case a contract had been entered into by the appellants and the respondents, the appellants chartered a

5Atlantic Shipping and Trading Company Limited v. Louis Dreyfus and Company, [1922] 2 A.C. 250.

6Id.

ship of the respondents which was to deliver a full cargo of linseed from Rosario to Hull. The contract among others contained an arbitration clause by which the parties were to refer the disputes to arbitration. It was stated that in the contract that any claim should be made in writing and an arbitrator should be appointed within three months on final discharge, or else it would be completely barred. A dispute arose with respect to some damage to the cargo, caused due to unseaworthiness, however, the respondents neither claimed arbitration nor did they appoint an arbitrator within three months of final discharge of contract. Later when such an action came up, in the King's Bench division, the court said that as the procedure was not complied with, the respondents had waived their claim. The Court of Appeal subsequently overturned the judgment saying that the clause was opposed to public policy as its effect was to oust the jurisdiction of the Court. The issue to be decided in the appeal put simply was whether an Atlantic shipping clause could oust the jurisdiction of all courts when there has been a breach of the terms of the contract resulting in claim for damage to cargo, such breech being caused due to lack of seaworthiness. On appeal the court decided that under the underlying provisions of the contract, there was an implied condition to provide a seaworthy ship. As the ship-owners did not comply with it, they could not seek the benefit of any exemption clause in the contract with respect to damages that arose because of the unseaworthiness of the ship to protect themselves from any liability that arose. The Court followed the decision of *Tattersall v. National Steamship Co.*[7] where it was held that no clause could limit the liability of ship-owners if such loss happened due to unseaworthiness of the ship. The Court while upholding the decision of the Court of Appeal said that as the damage was caused due to unseaworthiness of the ship, the *Atlantic shipping clause* as was made famous by this case could not limit the liability of the ship-owners and that the charterers did not lose their claim and could take the recourse to Courts in furtherance of the same.

The implication of this judgment is rather significant in our understanding of the court's approach in such issues. The court in other words accepted in this case that such a clause can be entered into between the parties which would limit the time for referring the matter to arbitration. They decided that such a clause in this case would be inapplicable as one of the underlying provisions of the contract had not been met with i.e. the seaworthiness of a ship. But suppose for the sake of argument let us

[7] Tattersall v. National Steamship Co., 12 Q.B.D. 297.

assume that such a condition had been complied with then would the claim be lost? The approach of the court seems to suggest an answer in the affirmative because they have accepted the fact that such clauses can exist in contracts. It was merely in this case that the ship was inherently not seaworthy hence the clause was deemed to be inoperative.

Further light on this issue was thrown by the case of *Czarnikow v. Roth, Schmidt And Company*[8]. In this case the contract between the appellants and the respondents for the sale of sugar was subject to rules of the Refined Sugar Association which stipulated among others, that the disputes arising out of the contracts including any question of law should be referred to arbitration of the Council of the association and no party would ask the arbitrator to refer any question of law in the form of a special case for the opinion of the Court. Subsequently a dispute arose, the buyers requested the arbitrator to state the award in form of a special case or to seek the opinion of Courts on certain questions of law that arose or allow them to apply to the Court to allow them to state a case. The arbitrator believing that he was prohibited to do so refused to comply with that request and gave an award against the buyers. The buyers moved to set aside this award. The issue which arose before the court was whether an Atlantic shipping clause ousts the jurisdiction of the Courts. The court in determining whether the agreement ousted the Court's jurisdiction proceeded to state that as long as a clause does not exclude the claimant from such recourse to the Courts, but only requires certain conditions as precedent to a valid claim, it does not oust the jurisdiction. However, if it went on to deprive the claimant of the protection of the Arbitration Act, 1889, it would amount to oust the jurisdiction of the courts and would not be enforceable. Thus the clause which said that once cannot take the recourse to Courts was declared invalid and opposed to public policy.

Thus here we are looking at a broader issue. The issue here seems not to be with the fact that whether the arbitrator has jurisdiction after the time period has lapsed but the issue seems to be that since the party has lost the claim before the arbitrator, can the same before be said about the recourse he would take before a court of law. Thus this is a case of the extent of applicability of the Atlantic Shipping clause. Again the court has not struck down Atlantic Shipping clause's as a clause. Their position seems to be that the clause in question was against public policy as it seeks

8Czarnikow v. Roth, Schmidt and Company, [1922] 2 K.B. 478.

to ouster the jurisdiction of the court. The court in effect thus is saying that one can enter into contracts with Atlantic Shipping Clauses which oust the jurisdiction of the arbitrator and vitiate the claim for arbitration after the specified time has lapsed but the same cannot be said to vitiate the claim in totality i.e. the party can still bring the claim before a court of law.

Another interesting read is the case of *H. Ford and Company Limited v. Compagnie Furness (France)*[9].A contract was entered into by H. Ford and Co. and Compagnie Furness in which the latter as agents of the owner of the ship were to provide the former a ship. The contract among others, contained an Atlantic shipping clause which stipulated that all disputes were to be referred to an arbitrator and every claim were to be made in writing and an arbitrator appointed within three months from the final discharge, else such claim was be barred absolutely. Loss to the cargo was caused due to unseaworthiness of the ship and cargo owners could not appoint an arbitrator within three months. However, the arbitrator passed and award in favour of the cargo owners owing to the loss being caused due to unseaworthiness of the ship. The applicants pleaded that as the cargo- owners had not appointed an arbitrator within three months of final discharge, it had waived its claim and subsequently the arbitrator had passed the award without jurisdiction. The issue left to deliberate upon was whether the arbitrator has the jurisdiction to pass an award in a matter where the time-limit for appointing an arbitrator provided in the Atlantic shipping clause had elapsed and he had not been appointed. In the view of the court the parties had agreed to the time-limit within which an arbitrator had to be appointed and it had elapsed, the arbitrator had thus no jurisdiction in the matter. *Atlantic Shipping Co. v. Dreyfus & Co.*[10] had bearing with the case as the question here was whether the arbitrator could assume jurisdiction or not after the time provided in the clause had lapsed. Thus the court decided that since the cargo owners had failed to appoint an arbitrator within the stipulated time, it results in a waiver of claim and the arbitrator had no jurisdiction to pass an award and owing to such conditions, the award passed by him was to be set aside.

Thus we can see the reliance that the court might have placed on the *Atlantic Shipping case*. It was obvious to them that the court had recognized such clauses previously and had upheld their veracity. The distinction was drawn between the

9H.Ford and Company Limited v. Compagnie Furness (France), [1922] 2 K.B. 797.
10Supra note at 3.

prior cases and this case because there was no question of seaworthiness involved. In the prior cases the seaworthiness of the ship was a condition precedent which had to be satisfied by either of the parties but in this case there was no such condition precedent. This case directly answers the fact that what would happen in case a party refers a matter for arbitration once the time specified in the Atlantic shipping clause. The answer seems to be that in such case the Atlantic shipping clause will be operational and that there would be no jurisdiction vested with the arbitrator.

The most recent case in this regard that we need to look at from a common law perspective is that of *Wholecrop Marketing Ltd v .Wolds Produce Ltd.*[11]In the case the parties had entered into an agreement for the supply of seed potatoes. The agreement was subject to and governed by the attached "*BPTA Terms & Conditions of May 2007"*. The British Potato Trade Association's Conditions of Sale for Seed Potatoes (English law version) contained an arbitration clause, which provided that:

"*Any dispute arising out of the Contract shall be settled by Arbitration according to the Arbitration Rules of the British Potato Trade Association in force as the date of receipt by the Secretary of the request for Arbitration referred to below, and all parties, whether members of such Association or not, shall by their respectively entering into the Contract be deemed to have full knowledge of such rules and to have elected to be bound thereby. A request for Arbitration must be addressed to the Secretary* ***within 12 months after receipt by one party of notice in writing*** *from the other party of the basis of the claim or dispute*".

A dispute subsequently arose between the parties. Correspondences took place between the parties' delays and ultimately a failed mediation before litigation finally commenced in March 2012. One of the issues that arose was that when did the dispute actually arise. Wolds applied for a stay of court proceedings. The Court after hearing the application refused the stay and commenced with the adjudication. In coming to the decision the court looked at earlier cases which would throw some light upon the matter at hand. The first was *Metalfer Corporation v Pan Ocean Shipping*[12] .A charter party contained the following arbitration clause:

*"Any dispute arising out of this charter party to be referred to the London arbitrators within 30 days of completion of the voyage and English law to apply."*

11Wholecrop Marketing Ltd. v. Wolds Produce Ltd. [2013] E.W.H.C. 2079 (Ch).
12Metalfer Corporation v. Pan Ocean Shipping, [1997] C.L.C. 1547.

The charterers in that case had failed to commence arbitration within 30 days of completion of the voyage, and came to court to seek a declaration that their claims were not time barred. The charterers argued even though it could no longer bring the claim in arbitration, the claim itself was not time barred and that they could still resort to litigation to settle the dispute. The charterers sought to argue that the claim could no longer be brought to arbitration only and that only the arbitration had been time barred.

The court did not accept this contention and held that the effect of such a clause was to bar the claim in totality and not merely the remedy of arbitration. The court relied on Mustill & Boyd "*Commercial Arbitration*"[13]and expressed their opinion that "*it is easy to understand why parties to a commercial contract should wish to bar a claim entirely that is not put forward promptly, but it is not at all easy to understand why, when they have troubled to stipulate that all claims should be referred to arbitration, they should go on to provide that a stale claim should be litigated rather than arbitrated*"[14]

Similar arguments were raised before the court in *Nanjing Tianshun Shipbuilding Co Ltd v Orchard Tankers PTE Ltd*[15]. In that case, parties had entered into a contract where the seller was entitled to dispute the buyer's cancellation of the contract by way of arbitration "*if such institution of arbitration is made within 30 days of the buyer's cancellation"*. The seller as is obvious tried to take a matter regarding cancellation of contract to court. The sellers had argued that "*any failure to institute arbitration proceedings timeously did not bar the right to dispute the cancellation but merely barred the remedy to be obtained by way of an arbitral award*".

The court while deciding the matter expressed their opinion that *"It is difficult to discern any commercial purpose in granting the sellers an option either to be able to institute a private arbitration within 30 days or, whether by choice or indolence, be able to institute public litigation after 30 days but within 6 years"*. The court thus held it was not necessary for there to be express and unambiguous wording in the arbitration clause in order that the shorter time bar applied.

13MICHEAL J. MUSTILL & STEWART C. BOYD, COMMERCIAL ARBITRATION, (2nd ed. LexisNexis Butterworths1989).

14MICHEAL J. MUSTILL & STEWART C. BOYD, COMMERCIAL ARBITRATION, 203(2nd ed. LexisNexis Butterworths1989).

15Nanjing Tianshun Shipbuilding Co.Ltd.v. Orchard Tankers P.T.E. Ltd. [2011] E.W.H.C. 164 (Comm.)

After the discussion the court turned to the case at hand. In their opinion the arbitration rules of the BPTA themselves make it "*crystal clear*" that the expiration of the 12-month period time barred the claim itself. Thus once the parties had agreed to submit themselves to the BPTA rules it could no longer be questioned by either of time. Putting into perspective the previously decided cases as well the court saw no reason to change the position in law that had been arrived at and thus stated that since the stipulated time period had not been complied therefore the party had lost recourse to arbitration. The significant change that is observable from this case is that the court is saying that the parties have not only lost recourse to arbitration but cannot approach the court as well. That is to say not only the remedy of arbitration but all remedies get barred once the parties decide to fix a time limit on availing such remedies and the party seeking such remedy does not comply with the same. The logic seems to be that the courts in England are giving significant emphasis on the concept of party autonomy which is the crux of arbitration. They seem to think that because the parties had decided amongst themselves to fix arbitration as a remedy within a specified amount of time therefore it is the duty of the court to respect and extend the same obligation on the party with regard to litigation. In the eye of the court the effect an Atlantic Shipping Clause would have on a contract is not only restrict the limitation period with regard to arbitration but also reduce the limitation period with regard to litigation i.e. the clause would supersede the legislation regarding the limitation.

## Indian Scenario

Let us start off firstly with the legislative recognition of such clauses in Section 28[16] of the Indian Contract Act, 1872 which is as follows:

*Agreements in restraint of legal proceedings, void. — Every agreement, —*

*(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or*

*(b) Which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.]*

16Indian Contract Act 1872,§ 28.

*Exception 1.* —***Saving of contract to refer to arbitration dispute that may arise.*** ***—This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.***

*Exception 2. — Saving of contract to refer questions that have already arisen. —Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.*

***A plain reading of this provision shows us that it prohibits either of the parties from restricting the right of the other party to approach the court to enforce his rights in case any dispute arises amongst them. The reason why such a provision has been incorporated in the Act is to make sure that if either of the parties with a dominant position during the formation of the contract tries to take an unfair advantage of the other party and subsequently restrain the other from enforcing his rights so that the unfairness can never be contested, the same cannot be done as the contract would be void. Also it is the public policy of the nation that in case any dispute arises then it is the duty of courts to settle them. If one of the parties were to be barred from approaching the judicial body of the country, then we would be depriving him a right available to all citizens merely because of a contract. The doctrine of parens patriae[17], which embodies that the state's power as a sovereign to ensure the welfare of persons under disabilitythus is the basis for the legislature to deem such contracts as void.***

Apart from that, this provision also forbids parties from limiting the time within which one can enforce his rights. This means that if the terms of the contract say that the claim has to be initiated within 30 days, and the other party does not or cannot commence with it within the deadline, the other party cannot take recourse to this term and allege that such a claim cannot be enforced after the specified time. This clause is void up to the extent it limits the time for enforcement of rights as it goes against public policy. The second part of the provision Isa corollary of the first

17Black's Law Dictionary 1269 (4th ed.1971).

as it goes on to say that any provision which goes on to limit the liability of a party according to any term of the contract or upon the expiration of a stipulated time in the contract shall be void to that extent. The interesting part relevant to our discussion comes next in form of the exception. It lays down that this provision regarding the stipulation as to time shall not apply to a contract in which both the parties have mutually agreed to settle the dispute by arbitration. The rationale behind this is also fairly understandable. The parties to avoid appearance before courts and evade spending on litigation can settle the dispute via arbitration where they get to choose a framework which suits them. Thus this is not a situation of no remedy for the party but is a situation where the parties have self-elected forum which can grant them a remedy.

While going through the case-laws discussed above, it can be fairly established that in England, in a case if an Atlantic Shipping clause exists in the contract and the reference to arbitration has not been sought within the stipulated time, it can have a twofold meaning:

- The first by virtue of which in which only arbitration claim is barred and
- The second by virtue of which both the arbitration and the litigation claim is barred.

However, if we were to compare this position to that of India, it can be seen that the exception in the Indian Contract Act, 1872 suggests that such a bar of claim can only be applied to an arbitration proceeding. One can reach this conclusion owing to the fact that the provision expressly declares that any agreement which limits the time for enforcement of any claim in ordinary legal proceedings and tribunals for that matter is void up to that extent save a proceeding for arbitration. One cannot read into the lines here to suggest that what the legislature intends to mean here is arbitration as well as litigation. Also in India, there is a Limitation Act. 1963 which expressly stipulates a time-limit before which a suit can be filed with respect to a claim is reminiscent that one cannot further limit the time by which the claim has to be filed. These two factors seem significant in determining what would be the effect of such clauses in the Indian Scenario.

When we look at the cases decided in India we only have a scant number to choose from. The first being *Planters Airways Pvt. Ltd. v. Sterling General Insurance Co. Ltd*[18]

[18]Planters Airways Pvt. Ltd. v. Sterling General Insurance Co. Ltd., A.I.R. 1974 Cal. 193.

where the appellant was a common carrier of goods and the respondents were an insuring company with whom, the appellant had time and again entered into insurance contracts for goods being carried. Among other things, the contract contained an Atlantic shipping clause which stipulated that in case the company disclaims liability, the other party had to start the arbitration proceedings within 3 months of receiving the same; else, its claim was to be assumed to have been waived and subsequently barred. In the course of another similar insurance policy, the appellant after paying the requisite amount of premium insured its goods against any loss and sent it for transportation. However, the truck carrying the goods was reportedly attacked and the goods were taken away by a vehicle which is presently untraceable. Accordingly, the appellant submitted its claim to the respondents for the loss of goods and filed a police complaint regarding the same. The respondent, on scrutinizing the final investigation report of the Barasat Police Station, thought that the claim had been declared by the police as false. On, 16th February 1973, the respondent disclaimed liability for the loss of goods. On 30th March 1973, the appellant asked for the grounds on which the same has been done. The respondent subsequently took 2 months to reply to this query and said that it could not add anything to its previous intimation. Meanwhile, the time to commence the arbitration proceedings had elapsed. The appellant aggrieved asked the court for extension of time period for the same. In broad terms the issue before the court was whether the time specified in the Atlantic shipping clause can be extended if the reason for the delay of commencing with the arbitration proceedings can be attributed to one the party against whom arbitration is sought.

The Court said that whether a case was fit for extension of time depended on facts and circumstances of the case. On the respondent's claim saying that the claim was false, the Court replied that such a question was to be decided by the arbitrator. With regards to the exhaustion of time in the arbitration clause, the Court said that one cannot take a benefit of one's own wrong doing. The respondent took a time of two months to reply as to under what grounds it had disclaimed liability thereby exhausting the time stipulated in the arbitration clause. Under such circumstances, it was not possible for the appellant to go into arbitration without knowing the grounds under which the respondents have disclaimed liability.

The Court while holding that the insurance company were themselves guilty in delaying the commencement proceedings extended the time to commence with the arbitration proceedings by a fortnight from the date of the judgment. The approach of the court is quiet simple enough to understand in this case. The court has not denied the fact that Atlantic Shipping Clauses have application and validity in India they have merely laid down that if the delay resulting in the invocation of such clause is the fault of the party against who arbitration is sought then it cannot be invoked. Just like the judgment in *Atlantic Shipping Case* the Indian Judiciary has also laid down one of the grounds in which such clauses will have no effect. The implication of the judgment thus is if there is no fault of the opposing part in the delay regarding reference to arbitration and the complete onus for the same is on the one seeking such reference, then the clause will have effect and arbitration cannot be sought. This judgment runs along the age old logic of the duty to prevent someone from taking advantage of his own wrong. *M/s. M.K. Shah Engineers & Contractors v. State of Madhya Pradesh*[19]is also a very insightful judgment as it throws light upon what are Atlantic Shipping clauses and when can a party avoid consequences of the expiry of a limitation period in an Atlantic shipping clause?

In this case the Government of Madhya Pradesh entered into two separate contracts with MK Shah Engineers & Contractors and Chabaldas & Sons, Contractors. Among others provisions in the contracts, it was mentioned that with regard to any dispute arising out of the same, the decision of the Superintending Engineer would be final and if any party was not satisfied with his decision, the same was to be communicated to him within a period to 28 days and arbitration proceedings for settling the dispute would commence. If the communication was not made within 28 days, the claim was to be barred. In the contract with MK Shah Engineers and Contractors, a dispute arose and it was referred to the Superintending Engineer for his opinion. He delayed the decision taking more than a year and when the appellant investigated into the delay, it found that the decision making process had been delegated to a sub-committee and submitted that the Superintending Engineer had rendered himself incapable of taking decision and requested arbitration. The government agreed and appointed an arbitrator. However, it contested the legality of the arbitration proceedings leaving the arbitrator to let the respondent approach the

19M/s. M.K. Shah Engineers & Contractorsv.State of Madhya Pradesh, (1999)2 S.C.C. 594.

Court to contest the same. Meanwhile, the arbitrator expired and the respondent got the application dismissed by the court as it had become infructuous. The appellant approached the High Court to appoint a new arbitrator, the Court obliged and the arbitrator made an award in favour of the MK Shah Engineers and Contractors. A similar incident happened with the other Chabaldas & Sons except for the fact that instead of the Superintending Engineer not giving any decision; this time around the Executive Engineer made a decision and the appellant unhappy with the same started the arbitration. The respondents moved to the Court to set aside these awards on the ground of lack of jurisdiction of the arbitrator as the Superintending Engineer had not made a decision.

The court while giving its decision on the merit of the claim discussed the fact that there are some arbitration clauses in a contract, which tend to limit the time after which one cannot proceed with the arbitration and thereby lose their claim. These are 'Atlantic Shipping' clauses. The consequences of expiry of time period (the claim becomes barred) after which one cannot commence with the arbitration proceedings can be avoided

(i) if the Court exercises its discretion statutorily conferred on it, to extend the period to avoid undue hardship;
(ii) if the arbitration clause confers a discretion on the arbitrator to extend the period and he exercises it;
(iii) if the conduct of the either party precludes his relying on the time bar against the claimant.

As the Superintending Engineer in this case took unreasonable amount of time and the fact that State of M.P. yielded to the appellants' demand by appointing an arbitrator, they had waived the requirement of the decision of the Superintending Engineer and could not contest the maintainability of the arbitration proceedings as no one can take the advantage of one's own wrong. Thus this is an improvement on the previous judgment and helps crystallise the notion of when Atlantic Shipping clauses won't have effect. Thus the case law which has been developed in India is on the issue of when would such a clause, not have effect. An issue such as that in England regarding the exact effect of such clauses has not been yet adjudicated

upon by the court. The Indian Courts place a significant amount of reliance of the English case when Atlantic Shipping Clauses are in question but it is difficult to see an Indian Court suggesting that once a party has not complied with the requirements of the clause all his remedies would be barred as we have discussed above.

Another interesting case worth looking at from the Indian Perspective is that of *State of Kerala and Ors. v. V.K. Natesa*[20]. In the case the respondents had entered into a contract with the appellants for work on National Highway 47 which constituted widening and strengthening of a single lane section to two lanes. The contract had an arbitration clause which provided that the in case of a dispute the same had to be referred within 90 days of the final payment or such reference to arbitration would be barred. There was a 5-month delay in the completion of work. However, payment was made and the respondents did not object. After more than 3 years, the respondents filed a petition to the Chief Engineer raising some objections regarding the payment and almost 1½ years later filed a petition before the arbitrator regarding the claim. The arbitrator taking recourse to the limitation clause passed an award rejecting the claim. The respondents appealed and the Court saying that the award being totally against the spirit the arbitration agreement set it aside and referred it to the Chief Engineer. The appellants appealed against this order. Thus the issue which cropped up before the court was whether a suit filed after the limitation period has ended in an Atlantic Shipping clause without first setting aside the arbitrator award is maintainable.

The Court holding that such a suit was not maintainable and the only remedy, if at all available to the respondents was to get the award set aside under section 30 of the Arbitration Act, 1940. It relied on *Atlantic Shipping Corporation v. Louis Dreyfus and Co.*[21], and held that such an agreement was perfectly legal. The court, reiterating the position of law that we have been discussing thus far the court recognized the fact that decision of the arbitrator was correct as it was based on the logic that the Atlantic Shipping Clause had not been complied with by the party and thus the claim to arbitration was in fact barred.

20State of Kerala and ors.v. V.K. Natesa, A.I.R. 1977 Ker. 277.
21Supra note at 3.

Thus, again in this case, the Court reiterated its previous stand saying that once the claimant period has extinguished his limitation period for filing the claim, and the arbitrator has rejected his claim citing the same reasons, the courts will not interfere in the operation of the award passed until the same has been set aside for reasons provided in the Arbitration Act.

When we are discussing the extent of judicial intervention that should be allowed in cases involving an arbitration agreement, it is essential that we look at the UNCITRAL Model Law and the corresponding Indian provision in India so as to throw light upon the matters. These provisions read as follows,

***Article 5 - Extent of court intervention****-In matters governed by this Law, no court shall intervene except where so provided in this Law.*[22]

*And,*

***Section 5-Extent of judicial intervention****- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.*[23]

The Indian law clearly is in tandem to the Model Law and both of them go on to suggest the same ideology, i.e. there should be minimal judicial interference on part of the court. The courts should only come into question and assert their jurisdiction where the *Indian Arbitration and Conciliation Act, 1996* allows for it. If we try and import this idea to our understanding of Atlantic Shipping Clauses as of now there should be only one ground under which such clauses should be disallowed i.e. if there is any statutory prohibition for the same in the Act. This is very significant because there is no prohibition as such. If the Indian Legislature was opposed to the existence of such clauses, then it would have prescribed for a prohibition against the same but the fact that they have not seems to suggest that they are in fact unopposed to it. It would be incorrect on part of the Indian Judiciary if they went out of their way to suggest that such clauses are against public policy or against the legal framework of arbitration law in India as their jurisdiction (as per the Act) is limited to the extent prescribed. Thus the position adopted by the judiciary till now

22 United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006 (Vienna: United Nations, 2008), available from www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

23 Indian Arbitration and Conciliation Act 1996, § 5.

seems to be well balanced as they have tried to trace the jurisprudence of Atlantic Shipping Clauses and also in order to balance it with the statute have opted for a position of minimal interference.

As has been discussed earlier, there are certain clauses called Atlantic Shipping clauses within an arbitration agreement which limit the time within which one can enforce his rights on a claim, or else, it would be assumed to be waived and subsequently barred. Now, the question that arises here is: What could have been the intent of the Legislature while inserting the exception while talks about recourse to arbitration? When such an exception was provided for in the Indian Contract Act, 1872, the Legislature was aware of the existence of Atlantic Shipping clauses which could limit the time within which one could enforce his claim and thus made space for as an exception to contracts which would be void due to Sec 28. This goes on to show that the Legislature deemed it legal and believed that such a clause was in consonance to the regime of arbitration in India and specifically provided for them by way of this exception. An argument cannot be raised thus in courts which suggest that Atlantic Shipping clauses are invalid as the legislature of the nation has provided for the same as being completely legitimate. Thus an argument of these clauses failing the test of public policy is therefore not tenable.

## The Analysis

Looking at the cases decided by both the Indian Judiciary and the English Judiciary we can see that neither of them is negating the fact that such clauses which limit the time in which matters can be referred to arbitration are permissible in both jurisdictions. This practice in India is further highlighted by the fact that under Sec 28 of the Indian Contract Act a special exception has been created for such clauses. This obviously highlights the intention of the legislature in recognizing such clauses as valid as they have taken the effort to mention the same as not being void in accordance to Sec 28. The case laws from both the countries seem to suggest the same thing i.e. if two parties decide to incorporate an Atlantic Shipping Clause in the contract then such contract is perfectly valid and will be given effect by the courts if it meets the other necessary requirements of a contract to be valid (for e.g. public policy in India). In India, due to the saving effect of this exception which is carved out under Sec 28it seems pretty certain that no party would ever raise an argument against the same invoking public policy. Reason being, that if such argument were to

be raised before the court then the court would obviously point to the fact that there exists an exception created by the legislature for such clauses under Sec 28 of the Indian Contract Act. It is in furtherance of the public policy of India that such clauses be allowed to exist and hence the argument that arises that such a clause would be against public policy is not tenable.

The next thing that we have to look at is the issue that arises due to the English judgement in *Wholecrop Marketing Ltd*[24]. The judgment creates a complication by saying that the exhaustion of the claim is not only to the extent of the arbitration but exhausts the claim completely. What the court seem to mean hear by virtue of completely is that the party cannot seek a remedy even in front of the court if there was an arbitration clause with a time limit and the party did not refer the matter to arbitration. In a way the court is saying because you created an obligation upon yourself to have a shorter limitation period thus you are going to be bound it if you didn't approach the initial forum, the initial forum in this case being the arbitral tribunal. This might seem a very harsh approach but it is justified in some sense as the judgment seems to be based around the entire idea of party autonomy.

The court in this English decision seems to be respecting the fact that the parties agreed upon a shorter limitation period. Once the executed an agreement in furtherance of the same then it seems in the opinion of the court, the agreement would supersede the natural course of things. This is the most intrinsic feature of arbitration. We allow parties to create obligations and a separate legal framework for their transaction to function by allowing for such different choices of law. Thus what we are basically telling the parties is that you are free to create a legal framework as you please but once you have created the same then you are going to be bound by it. This is exactly what the courts in England did. They saw that by inserting the clause the parties had changed the approach to be adopted by them in case a dispute arises and this approach is different from the traditional method. The court respected the party's autonomous choice and thus said because you didn't comply with the unorthodox mechanism you created, you shall lose your claim. The rationale seems to be that if you go for an unconventional choice then you will be bound by it. This might seem to be a rigid approach to some but to others it might seem as an approach which is in consonance with the core of commercial arbitration.

24Supra note at 7.

The other stance is what might happen in the Indian Scenario. It looks as if in India that there might be a slightly divergent approach. Looking at the language of Sec 28 of the Indian Contract Act it seems that the extent to which the application of the Atlantic Shipping clause will have effect is that of Arbitration. It is highly unlikely that in India a similar position will be adopted to that of England, i.e. the effect of the Atlantic Shipping Clause would extend to the root of the claim and not allow the party to even approach a court of law. The reason is firstly the language that has been used in Sec 28. The language clearly seems to suggest that the operational nature of the clause can extend only to the domain of arbitration and not beyond. For imposing limitation periods on civil disputes the Indian Legislature has provided the Limitation Act. One might argue that similar statutory limitation for civil disputes is also present in England but the fact of the matter is that the courts in England seem to have adopted a position which suggests that their statute of limitation would have no application when the parties autonomously decide amongst themselves that they are going to fix a new time requirement for claims by way of the clause. No Indian court has yet provided any decision to suggest the same and thus it would be incorrect to suggest at this the court would decide in that manner. Thus it would not be a completely baseless notion to assume that in India the notion of Atlantic Shipping Clauses would extend only to the claim with regard to Arbitration and not the claim in totality.

## Conclusive Remarks

In the beginning of our discussion we talked about two possible end of the spectrum. At one end, we have a situation where the operational mechanism of Atlantic Shipping clauses is given utmost priority, so much so that the entire nature of the claim gets regulated by virtue of the clause itself. Meaning thereby that party autonomy as a concept prevails over all elements of the transaction related to the limitation period for a claim which may arise during that transaction. The party autonomy in other words supersedes the statutory limitation period which has been prescribed for by the Legislature. At this end of the spectrum if the parties decide to enter into an Atlantic Shipping clause in the arbitration agreement then an obligation is cast on both of them to bring the claim to the arbitrator in that specified period. If the parties fail to follow this stipulation requirement, then they lose their claim not only in arbitration but also in litigation. In other words, once the time-period

lapses the claim becomes exhausted as the limitation as to time has not been met with.

Moving to the other end, the only change that we have is in regards to this exhaustion of claim. Once this time period lapses, it will not be the case that the claim gets exhausted not only in the arbitral tribunal but also in the courts of law. This end of the spectrum faces an inherent flaw. The correct logical position it seems should be the exhaustion of the claim in totality. This logic can be explained with a simple example. For the purposes of our example let us consider the situation where if a party approaches any court in case of a dispute and there exists a valid arbitration agreement with an Atlantic Shipping clause. The court should always refer back such matters to arbitration and not allow it to stand for litigation in order to fulfil the purpose of the arbitration agreement. On such redirection, the arbitrator would see that the matter is non arbitrable because the time requirement of the Atlantic Shipping clause has not been met with and thus the party would have no claim. Thus indirectly the claim would stand exhausted even if the courts don't seem to agree with the opinion that the limitation imposed by virtue of party autonomy would superimpose over statutory limitation.

We can conclude thus by realising the fact that Atlantic Shipping clauses are here to stay. They have been recognised in most jurisdictions in the world and the only debate seems to be on the exhaustion of the claim. Using our analysis above, we can see that the claim should stand exhausted no matter what the courts feel in regards to party autonomy and this should be the position of law adopted in any progressive jurisdiction because at the end of the day we are trying to fulfil one simple objective of settling the disputes as the parties decide among themselves.