6.1 INTRODUCTION:

India has built up a magnificent maritime history and tradition for several decades even much before the rise of European maritime powers. In ancient period, Indian ships used to sail across many international high seas for trading purposes with other Asian and Middle East countries. But after the advent of British rule, the indigenous shipping industry was considerably discouraged due to preferential treatment given to the British ships and restrictive British navigational laws\(^1\) which for e.g., required Indian ships to be registered under *U. K. Merchant Shipping Act* which technically meant that they were British ships although registered in India.

In spite of the existence of old age maritime laws in India, the growth of the maritime sector in India over the past decades has been quite phenomenal.\(^2\) Among all Asian and African countries including other developing countries in the world, India has one of the largest and considerably well coordinated merchant shipping fleet with almost ninety

\(^1\) The British navigational laws not only barred the growth and development of Indian shipping but gradually made it to disappear from the international high seas.

\(^2\) India has maritime boundaries with five opposite States *i.e.*, Sri Lanka, the Maldives, Myanmar, Indonesia, Thailand and two adjacent States *i.e.*, Pakistan and Bangladesh. Though maritime boundary agreements with opposite States are concluded, the maritime boundary agreements for the adjacent States of Pakistan and Bangladesh are yet to be concluded.
per cent of the country's trade volume moved by sea.\(^3\) The major ports in India handle hundreds of metric tons of cargo per year. Besides, the Central and some State Governments have taken steps to construct new ports to boost this fast growing sector. It is therefore inevitable that appropriate laws, rules and regulations should be put in place to facilitate smooth movement of goods to and fro India.

In view of the above, the researcher considers it pertinent first to carry out an analysis of the old age maritime laws in India in comparison with the existing framework so as to identify the loopholes in the existing laws and to suggest appropriate measures where necessary for improvement. This would also help in comparative analysis of Indian and Iraqi maritime laws that pave way for suggesting for their further efficacy.

6.2 MARITIME LAWS IN INDIA: A GENERAL VIEW

Ordinarily, a ship, whether in the Indian waters or in the international high seas, during its voyage is a subject matter of numerous contracts and deals that may create chances for disputes. Moreover, disputes can also be due to collision, wages and allowances of crew, obligations to ports and

other governmental authorities, or even loss of life or personal injury caused by ship or occurring in connection with the voyage.\footnote{Ibid.}

Furthermore, maritime law in India\footnote{The international character of maritime law, although heavily indebted to general principles of international law is subject to local laws in India.}, as elsewhere in the world, is a wide ranging branch of the law \textit{i.e.}, it includes, ship financing, maritime liens, carriage of goods by sea; marine insurance; laws of ownership and registration of ships; ship sale and building contracts, limitation of liability, ship mortgages; manning of ships; the law of collisions, salvage, towage and pilotage; claims and priority of the same; the law of marine pollution, as well as the Customs and Port laws. All these aspects are covered by a number of legislations in India, which are utterly founded on colonial British legislations on the subjects, as made applicable in India and as amended from time to time by the Indian Parliament.

Before delving into the subject of maritime legislations in India, it is quite pertinent to trace its origins in the English statutes on admiralty jurisdiction and the power exercised by the English Courts over foreign ships.

\section*{6.3 THE GENESIS OF INDIAN MARITIME LAWS:}

The present maritime laws in India have developed from colonial times, vide the \textit{Admiralty Offences (Colonial) Act, 1849}, the \textit{Inland Steam-}
vessels Act, 1917; the Coasting Vessels Act, 1838; the Indian Registration of Ships Act, 1841; the Indian Registration of Ships Act (1841) Amendment Act, 1850; the Indian Ports Act, 1908; the Indian Merchant Shipping Act, 1923; the Merchant Seamen (Litigation) Act, 1946; the Control of Shipping Act, 1947; the Merchant Shipping Laws (Extension to Acceding States and Amendment) Act, 1949, the Territorial Waters Jurisdiction Act, 1878, etc.

In addition to the above, a series of legislative Acts of British Parliament, promulgated between 1823 and 1940, governed various aspects of Indian shipping, including ship-owners’ liability, salvage, certification of seafarers, safety and load line conventions.

For determination of disputes, the admiralty jurisdiction of Indian Courts began with Letters Patent, 1862 which vested the High Courts of Judicature at Madras, Bombay and Fort William in Bengal with jurisdiction for trial and adjudication of maritime questions arising in India, which was however, confirmed by the Colonial Courts of Admiralty (India) Act, 1891. By the Colonial Courts of Admiralty Act, 1890, the provisions of the Admiralty Court Act, 1840, and the Admiralty Court Act, 1861, were made

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6 The Indian Ports Act, 1908 deals with the administration of the ports and the jurisdiction over ships in ports.
7 See, Clause 32, the Letters Patent, 1862.
8 Clause 32, ibid, explicitly declared the High Courts of Judicature at Madras, Bombay and Fort William in Bengal as Courts of Admiralty or of Vice Admiralty.
applicable to Courts in British India, as they were Courts of law in British possession.⁹

After independence, the jurisdiction of Admiralty Courts in India were still restricted to the claims as enumerated in the aforestated British legislations, but in 1993, the SCI in *M. V. Elisabeth*¹⁰ categorically observed that High Courts in India are superior Courts of records with unlimited jurisdiction with inherent and plenary powers to decide on their own jurisdiction to redress grievances according to what is perceived to be principles of justice, equity and good conscience where statute is silent and judicial intervention is required. Accordingly, the SCI made the principles of *International Convention on Maritime Laws* applicable in India’s common law instead of the old age British legislations since there was no Indian Statute governing the Courts’ jurisdiction in regard to maritime claims.

In 2005, the Government of India [hereinafter referred to as GOI] circulated a draft Bill for an *Admiralty Act, 2005*, which intended to repeal all of the aforementioned obsolete British legislations to bring into existence a comprehensive law to regulate the claims, jurisdiction, procedure, *etc.*, in

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⁹ By S.22 of the *Supreme Court of Judicature (Consolidation) Act*, 1925, the questions or claims in relation to which the High Courts had admiralty jurisdiction, were listed out, and those were the claims for which a claimant could approach the Admiralty Courts in India for reliefs.

admiralty law in India.\textsuperscript{11} However, it was shot down rendering the continuance of application of the old age British legislations for the reasons best known to the law makers.

\textbf{6.4 ADMIROLTY LAWS IN INDIA:}

It is pertinent to point out that in addition to the above legislations, there are several other legislations applicable in India which directly or indirectly relate to maritime law, \textit{i.e.}, the \textit{Indian Merchant Shipping Act}, 1958 [hereinafter referred to \textit{MSA}]; the \textit{Indian Carriage of Goods by Sea Act}, 1925 [hereinafter referred to as \textit{CGSA}]; the \textit{Indian Bills of Lading Act}, 1856 [hereinafter referred to as \textit{IBLA}]; the \textit{Multimodal Transportation of Goods Act}, 1993 [hereinafter referred to as \textit{MTG}]; the \textit{Major Port Trusts Act}, 1963 [hereinafter referred to as \textit{MPTA}]; the \textit{Marine Insurance Act}, 1963 [hereinafter referred to as \textit{MIA}]\textsuperscript{12}; the \textit{Contract Act}, 1872; the \textit{Sale of Goods Act}, 1930; the \textit{Evidence Act}, 1872; the \textit{Indian Penal Code}, 1860; the \textit{Transfer of Property Act}, 1882; the \textit{Civil Procedure Code}, 1908; the \textit{Criminal Procedure Code}, 1973; the \textit{Limitation Act}, 1963; the \textit{Companies Act}, 1956; the \textit{Arbitration and Conciliation Act}, 1996; the \textit{Maritime Zones of India (Regulation of Fishery by Foreign Vessels) Act}, 1981 [hereinafter


\textsuperscript{12} The \textit{Major Port Trusts Act}, 1963 deals with the administration of the ports and the jurisdiction over ships in ports.
referred to as MZIA]; the Safety of Maritime Navigation and Fixed Platform on Continental Shelf Act, 2002 [hereinafter referred to as SMC Act]; the Territorial Waters Continental Shelf – Exclusive Economic Zone and Other Maritime Zones Act, 1976 [hereinafter referred to as TWCS Act], etc.

Moreover, there are certain laws in relation to employment of labour and payment of compensation to seafarers, officers and crew in cases of death or disability etc., all of which are also relevant in the context of the Indian maritime law. Apart from these legislations, there are landmark judgements of various Courts in India, which have laid down general principles of maritime law as recognized and practiced in India.

We will now critically examine some of the vital Indian statutes governing maritime law in India enacted pre as well as post independence.

6.4.1 CARRIAGE OF GOODS BY SEA ACT, 1925: AN ANALYSIS

The carriage of goods by sea from any port in India to any other port in or outside India is generally governed by the CGSA. This Act is based upon the recommendations of the International Conference on Maritime Law held in Brussels in 1922. The conference drew up a Draft Convention for adoption by the leading maritime nations of the world.\(^\text{13}\) The object was to

secure uniformity of laws as regards the rights and liabilities of carriers by sea and the rules regarding bills of lading.\textsuperscript{14}

The CGSA applies to carriage of goods by sea under bills of lading or similar documents of title from a port in India, to any other port whether in or outside India.\textsuperscript{15} Besides, the Act imposes the following duties on the carrier of goods by sea from an Indian port:

- the carrier is duty bound before the beginning of the voyage, to duly ensure that the ship is seaworthy and is properly manned and equipped;\textsuperscript{16}
- to ensure that the goods are properly and carefully handled while loading and discharge the same at the appropriate destination\textsuperscript{17} and
- after receiving the goods, the carrier or the master agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading containing the prescribed particulars.\textsuperscript{18}

Further, the CGSA lays down following rules regarding the liabilities of a carrier of goods by sea from an Indian port:

\begin{itemize}
\item \textsuperscript{14} Ibid.
\item \textsuperscript{15} S.2, the Carriage of Goods by Sea Act, 1925.
\item \textsuperscript{16} Art. III, \textit{ibid}. For e.g., the refrigerating and/or cool chambers including all other parts of the ship in which goods are carried, should be fit and safe for their reception, carriage and preservation.
\item \textsuperscript{17} See, “Law Relating to Sea Carriage”, \url{http://www.lawyersnjurists.com/resource/course-materials/business-law/a-k-sen/commercial-law-law-of-carriage-by-sea-chapter-v/}, [accessed on 13\textsuperscript{th} February 2013].
\item \textsuperscript{18} See, “Law Relating to Sea Carriage”, \textit{ibid}. The Merchant Shipping Act, 1958 and the International Convention for the Safety of Life at Sea, 1960 further provides for the adoption of various measures for the safety of life and cargo at sea.
\end{itemize}
• The ship-owner is not liable for damage arising from un-seaworthiness of the ship unless such damages are due to a failure to perform the statutory duties of the ship-owner.¹⁹

• The shipper is not responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or servants.²⁰

• The carrier is not responsible for loss or damage arising from the following causes i.e., neglect or default of the servants of the carrier in the navigation and management of the ship; fire, unless caused by the fault or privities of the carrier; perils, dangers and accidents of the sea or other navigable waters; act of GOD; act of war; act of public enemies; arrest or restraint of princes, rulers or people or seizure under legal process; quarantine restrictions; act or omission of the shipper or his agents; strikes or lockouts; riots or civil commotions; saving or attempting to save life or property at sea; inherent defect in the goods; insufficiency in packing; latent defects in the goods not discoverable by due diligence; any other cause arising without the actual fault or privity of the carrier.²¹

¹⁹ S.3, supra note 15. This provision clearly indicates that in India the liability of the owner to keep the ship seaworthy is not absolute.
²⁰ Art. IV, ibid.
²¹ Ibid.
• The carrier is not responsible for any loss or damage to goods exceeding £100 or its equivalent unless the nature and value of such goods have been declared by the shipper and inserted in the bill of lading.\textsuperscript{22}

• A carrier is at liberty to surrender in whole or in part all or any of his rights, and to increase his responsibilities and liabilities, provided such surrender or increase is embodied in the bill of lading issued to the shipper.\textsuperscript{23}

• The carrier and the ship are discharged from all liability for loss or damage unless a suit is brought within one year of the delivery of the goods or the date when the goods should have been delivered.\textsuperscript{24}

In \textit{East And West Steamship}\textsuperscript{25} the SCI, whilst dealing with the one year period to bring suits in connection with loss or damage to cargo under bills of lading, has categorically held that the one year period provided by CGSA and the bill of lading is not only a period of limitation but also extinguishment of the right to sue the carrier on the expiry of one year after delivery of the goods or from the date when the goods ought to have been delivered.

\textsuperscript{22} \textit{Ibid.}
\textsuperscript{23} Art. V, \textit{ibid.}
\textsuperscript{24} \textit{Supra} note 17.
\textsuperscript{25} \textit{The East and West Steamship v. S. K. Ramalingam Chettiar}, AIR 1960 SC 1058.
It may however be noted that the substantive rights recognised by the CGSA are of equal application to foreign merchant ships as they are to Indian merchant ships.

It is evident that CGSA contains provisions which need to be relooked in order to facilitate smooth transport of goods from India to the rest of the world. By so doing, emerging forms of crimes committed in transporting goods would be significantly curtailed.

6.4.2 MERCHANT SHIPPING ACT, 1958: AN INDIGENOUS ATTEMPT

To foster the development and ensure efficient maintenance of Indian mercantile marines, the MSA was enacted and brought into effect immediately after the independence in 1958, repealing most of the earlier statutes in toto. Since 1958, MSA Act has undergone several amendments, the last one being in 2007. This Act is divided into twenty-four parts, each part dealing with specific aspects of merchant shipping.

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26 Before independence, the following legislations on merchant shipping were operational between 1938 to 1947: a) The Bombay Coasting Vessels Act, 1938, b) the Indian Registration of Ships Act, 1841 and c) the Indian Merchant Shipping Act, 1923. The Bombay Coasting Vessels Act, 1938 dealt with regulations of seagoing vessels while the Indian Registration of Ships Act, 1841 embodied in it provisions relating to registration of sailing vessels. Both these enactments had, however, been modeled as to apply only to small coasters and sailing vessels. The Indian Merchant Shipping Act, 1923 on the other hand, though fairly comprehensive, had consolidated the provisions of two acts i.e., the Seamen (Litigation) Act, 1946 and Control of Indian Shipping Act, 1947.

27 The Merchant Shipping Act, 1958 had made good the main deficiency in the earlier laws that did not provide for registration of Indian Ships.

The MSA as it stands today not only establishes a National Shipping Board\footnote{Again there are certain moves in India to enact a new \textit{Merchant Shipping Act} to substitute the \textit{Merchant Shipping Act}, 1958 in order to bring it in line with all the applicable International Conventions.} and shipping development fund\footnote{The different Parts of the Act came into force on different dates \textit{i.e.}, Parts I and II came into force on 15\textsuperscript{th} December 1958; Part IV came into force on 17\textsuperscript{th} March 1959; S.7, Part XIV (including Ss.405-414), S.436, (in so far as it relates to offences mentioned under Ss.122 to 125 (both inclusive), Ss.437-441, 458-461 and of Part I of Schedule as relates to the \textit{Control of Shipping Act}, 1947 came into force on 1\textsuperscript{st} April 1960; the remaining provisions of the original Act (except the amendments made subsequently) came into force with effect on 1\textsuperscript{st} January 1961; Part VI-A providing for obligation of certain certificate holders to serve Government or in Indian Ships was inserted by \textit{Amendment Act} of 1979 and came into force on 4\textsuperscript{th} May 1979; Part IX-A came into force on 28\textsuperscript{th} May 1966; Part X-A inserted by the \textit{Amendment Act} of 1970, came into force from 15\textsuperscript{th} September 1972; Part X-B inserted by \textit{Amendment Act} of 1983 came into force from 18\textsuperscript{th} May 1983; Part XV-A inserted by \textit{Amendment Act} of 1983 came into force from 18\textsuperscript{th} May 1983, see, “Shipping Manual”, \url{http://www.dgshipping.com/dgship/final/manual/mchapter1.htm}, [accessed on 2\textsuperscript{nd} January 2013].} but it also provides for the general administration of Indian shipping by establishing the office of the Director General of Shipping,\footnote{Part II, \textit{infra}. \textit{See also}, Hemant B. Bhattbhatt, ‘Overview of Maritime Sector in India’, paper presented at National Conclave on Shipping, organized by Deloitte, India, 2012, \textit{available at} \url{http://www.deloitte.com/assets/Dcom-India/Local%20Assets/Documents/Thoughtware/National%20Conclave%20on%20Shipping%202012-Background%20paper.pdf}.} the Mercantile Marine Department, surveyors,\footnote{S.7, \textit{ibid}.} radio inspectors,\footnote{S.9, \textit{ibid}.} seamen’s employment offices,\footnote{S.10, \textit{ibid}.} shipping offices\footnote{S.12, \textit{ibid}.} and seaman’s welfare officers.\footnote{S.11, \textit{ibid}.}

Moreover, the MSA contains provisions for the registration and procedures for Indian ships\footnote{The \textit{Merchant Shipping Act} also provided for a Shipping Development Fund, but the same was abolished in 1986.}; regulates ownership of Indian vessels, contains regulations for certifications,\footnote{S.13, \textit{ibid}.} classification and employment of
seafarers and officers as well as for vessels; regulations governing navigation and specific types of ships,\textsuperscript{41} including passenger ships,\textsuperscript{42} nuclear ships,\textsuperscript{43} sailing vessels,\textsuperscript{44} and fishing boats,\textsuperscript{45} and provisions for investigations, inquiries and penalties,\textsuperscript{46} etc.

Further, the MSA incorporates safety and load line provisions\textsuperscript{47}; fixes liability for collisions and accidents at sea\textsuperscript{48}; provides for limitation of liability,\textsuperscript{49} liability for and preventive measures against marine pollution; provisions for wreck and salvage\textsuperscript{50}; provisions governing the coasting trade,\textsuperscript{51} and other miscellaneous provisions.\textsuperscript{52}

Though from the above account it appears that MSA is comprehensive and up-to-date statute, it is far from being so. Problems arise out of some of the provisions having been carried verbatim from the older Acts\textsuperscript{53} as well as

\textsuperscript{41} Part XI, \textit{ibid}.  
\textsuperscript{42} Part VIII, \textit{ibid}.  
\textsuperscript{43} Part IXA, \textit{ibid}.  
\textsuperscript{44} Part XV, \textit{ibid}.  
\textsuperscript{45} Part XV, \textit{ibid}.  
\textsuperscript{46} Part XII, \textit{ibid}.  
\textsuperscript{47} Part IX, \textit{ibid}.  
\textsuperscript{48} Part X, \textit{ibid}.  
\textsuperscript{49} Part X-A, \textit{ibid}. The purpose of limitation of liability which, \textit{inter alia}, was included by the \textit{Merchant Shipping (Amendment) Act}, 2002 is founded on providing protection to an owner of a ship against large claims, far exceeding the value of the ship and cargo, which can be made against him all over the world in case his ship meets with an accident causing damage to cargo, property, to another vessel or loss of personal life or personal injury.  
\textsuperscript{50} Part XIII, \textit{supra} note 48.  
\textsuperscript{51} Part XIV, \textit{ibid}.  
\textsuperscript{52} Part XVII, \textit{ibid}.  
\textsuperscript{53} Like for \textit{e.g.}, Part VII, S.114, \textit{ibid} that deals with seafarers and apprentices require the master of a ship other than an Indian ship who engages a seaman at any port in India that proceeds to any port out of India to enter into an agreement with such seaman. Such agreement shall however, be entered into only before a shipping master who shall read over and clearly explain to the seaman either in a language understood by the seaman or in such other manner as to ascertain that he has understands it. The shipping master shall
being outdated as compared with the position of law in other developed
countries as on today. The other problem with the Act is that it is extremely
inclusive.

Moreover, the MSA has come under attack on its applicability like for
*e.g.*, in the case of *Shanmughavilas Cashew Industries*,\(^{54}\) the SCI whilst
considering the applicability of the MSA with reference to foreign vessels
and foreign owners of such vessels had held:

In general, a statute extends territorially, unless the contrary is stated,
throughout the country and will extend to the territorial waters and
such places as intention to that effect is shown. A statute extends to all
persons within the country if that intention is shown. The Indian
Parliament therefore, has no authority to legislate for foreign vessels
or foreigners in them on the high seas. Thus, a foreign ship on the
high seas, or her foreign owners or their agents in a foreign country
are not deprived of rights by our statutory enactment expressed in
general terms unless it provides that a foreign ship entering an Indian
port or territorial waters and thus coming within the territorial
jurisdiction is to be covered….. Without anything more, Indian

\(^{54}\) *British India Steam Navigation Company Co. Ltd. v. Shanmughavilas Cashew Industries*, (1990) 3 SCC 481.
Part X-A of the MSA is coincidentally *para materia* to the *Limitation of Liability Convention*, 1976. However, there is one significant omission in the MSA as compared to the 1976 Convention, *i.e.*, Art.4 of the Convention emphatically provides that a person liable for omission cannot be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. This provision does not find a place in the amended Part X-A of the Indian MSA, which may lead one to believe that under Indian law, the right to limit liability is absolute and therefore, difficult to break limitation in India.56

The SCI, in *World Tanker Carrier Corporation*57 had an opportunity to deal with the issue of limitation of liability and the jurisdiction of Indian Courts to entertain acts of omission or commission. The Court, *inter alia* held:

55 This principle is explicitly reflected in S.2(2), *supra* note 48.
56 It may be remarkably be noted that prior to the amendment, it was even fairly easy, depending upon the facts and circumstances of the case, to break limitation, if it could be demonstrated that the owner’s actual fault and privities led to the incident in connection with which the owner seeks to limit liability.
57 *World Tanker Carrier Corporation v.SNP Shipping Services Pvt. Ltd. and Others*, AIR 1998 SC 2330. It may be noted that this instant case was heard and decided under the old limitation regime, prior to the 2002 amendment to the *Merchant Shipping Act*, 1958.
Limitation action, though it is normally filed in the admiralty jurisdiction of a Court, is slightly different from an ordinary admiralty action which normally begins with the arrest of the defaulting vessel. The vessel itself, through its master, is a party in the admiralty suit, and the plaintiff must have claims provable in admiralty against the vessel. In the case of an action for limitation of liability, it is the personal right of the owner of the vessel to file a limitation action or to use it as a defence to an action against him for liability. It is a “defensive” action against claims in admiralty filed by various claimants against the owner of the vessel and the vessel. A limitation action need not be filed in the same forum as a liability action. However, it must be a forum having jurisdiction to limit the extent of such claims and whose decree in the form of a limitation fund will bind all the claimants.

After recording the history of limitation actions and the applicable provisions in relation to jurisdiction under Indian procedural laws, the SCI further held that:

Limitation action in admiralty jurisdiction cannot be filed in a Court where a part of the cause of action arises when all claimants who are defendants to the action are foreigners who reside outside India, who
do not carry on business in India and who have not submitted to the jurisdiction of any Court in India, and have not filed a liability action in India and are not likely to do so. Therefore, the concerned Indian High Court did not have jurisdiction to receive, entertain and try limitation action, *inter alia*, on the ground that there was no likelihood of any claims being filed before the Courts in India.

To further highlight the problems associated with MSA, the SCI has recently in *Sabeeha Faikage and Others v. Union of India and Others*[^58^] pointed out the loopholes in the Act and recommended to the authorities concerned to take immediate steps for amending the MSA and rules made thereafter in 2005[^59^]. The Bench comprising Justice A. K. Patnaik and Justice Swatanter Kumar however, absolved the Union Government of any responsibility towards the mysterious disappearance of ten Indians who were on board Tugboat ‘Jupiter-6’ which was carrying the flag of Saint Vincent and


[^59^] As per the Supreme Court of India, the amendments should be made in a manner deemed proper to ensure that the lives of seafarers employed in different ships in high seas are made more secure and safe and in case of loss of life, their kith and kin are paid adequate amount of compensation.
Grenadines but directed the Center to expedite payment of compensation to the legal heirs of the Indian nationals.

6.4.3 MULTIMODAL TRANSPORTATION OF GOODS ACT, 1993: A CRITIQUE

In India multimodal transportation of goods is generally regulated by MTG which stands amended by the *Multimodal Transportation of Goods (Amendment) Act*, 2000. The MTG was introduced in India in 1993 as a result of the increasing technological advancements in transportation systems, the rampant advent of containerisation in maritime transport and the use of more than one mode of transport for the carriage of goods within the country as well as to various international destinations worldwide. Besides, the MTG was introduced with a view to reducing and eliminating interruptions in the continuous movement of goods from their origin to their destination.

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61 The *Multimodal Transportation of Goods Act*, 1993 was enacted after the Government of India had set up a working group to examine the relevant situation and to recommend a law on multimodal transportation of goods that was to clearly determine the responsibilities and liabilities of multimodal transport operators for loss of or damage to goods in their custody. To formulate such a law, the working group took note of the rules framed by the International Chamber of Commerce on multimodal transport of goods and the provisions of the *United Nations Convention on Multimodal Transport of Goods Act*, 1980.

62 Multimodal transport system generally involves the coordination of rail and road networks to ensure good connectivity between port and hinterland.

63 Multimodal transportation of goods is mainly intended to ensure speed, safety, reliability, availability, flexibility, efficiency and continuous movement of goods from the place of their origin to that of their destination.

64 The *Multimodal Transport of Goods Act*, 1993 is divided into five Chapters under the heads: 1) preliminary aspects, 2) regulation of multimodal transportation, 3) multimodal transport document, 4) responsibilities and liabilities of the multimodal transport operator, and 5) miscellaneous aspects.
ultimate destinations as also reducing costs and delays and improving the quality of transport system.\textsuperscript{65}

The MTG applies to all cases where two or more than two modes of transport are used in the course of transportation.\textsuperscript{66} It provides a legal regime to govern on a uniform basis, the liabilities and responsibilities of a multimodal transport operator\textsuperscript{67} who can provide services under a single document to shippers engaged in international trade.\textsuperscript{68} In other words, the MTG recognises multimodal transportation of goods being done under a single transport document\textsuperscript{69} which covers all the modes of transport and the

\textsuperscript{65} Supra note 13 at 402.

\textsuperscript{66} The Act has also amended the \textit{Carriage of Goods by Sea Act}, 1925. The important changes to the \textit{Carriage of Goods by Sea Act}, 1925 brought about by the \textit{Multimodal Transportation of Goods Act}, 1993 are for e.g., a) it provides for parties to agree on the extension of the one year period to bring suit for cargo claims; b) it has increased the per package limitation to bring the \textit{Carriage of Goods by Sea Act}, 1925 in line with the Hamburg Rules, \textit{i.e.}, the package limitation under Indian law is now 666.66 SDR per package or unit or 2 SDR per kilogram of gross weight of the goods lost or damaged, whichever is higher; and c) the Indian law now expressly provides that neither the carrier nor the ship shall be entitled to the benefit of the package limitation of liability if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result, \textit{see}, S.14, supra note 64.

\textsuperscript{67} S.13, \textit{ibid}, noticeably provides that a multi-modal transport operator is liable for any loss resulting from damage to the consignment or any delay in delivery of consignment or any consequential loss or damage arising from such delay. However, a multimodal transporter is liable only in instances where such loss, damage or delay in delivery of consignment takes place at a time when the consignment is in the charge of such multimodal transport operator. But the operator cannot be liable if he successfully proves that no fault or neglect on his or his servant or agents had caused or contributed to such loss or damage. Moreover, an operator cannot be liable for any loss or damage which is consequential to delay of delivery unless the consignor had initially made a declaration highlighting his interest in timely delivery which the multimodal transport operator duly accepted.

\textsuperscript{68} Supra note 65 at 403.

\textsuperscript{69} S.9 of the Act provides explicit details required to be specified in every multi-modal transport document, for e.g., a) details of general nature of goods, \textit{i.e.}, leading marks meant for identification of goods, character of goods (including dangerous goods), number of packages or units of goods, gross weight and quantity of goods as declared by consignor; b) information on apparent condition of the goods; c) details of the name and principal place of business of the multimodal transport operator; d) name of consignor; e) name of consignee (it must be mentioned in instances where it has been specified by the consignor); f) place and date of taking charge of goods by the multimodal transporter; g) place of delivery of goods; h) details of the date or period of delivery of goods by multimodal transport operator as have been expressly agreed upon.
multimodal transport operator remains liable and responsible to the cargo owner. However, a multimodal transport operator is not liable under the Act unless action against him is brought within nine months from the date of delivery of the goods; or from the date when the goods should have been delivered; or from the date on which the party entitled to delivery of the goods has the right to treat the goods as lost.

Moreover, the MTG provides for following criteria to be fulfilled for being registered as a multimodal transport operator:

- the applicant should be a company, firm or proprietary concern;
- the applicant should be engaged either in the business of shipping or freight forwarding in India or abroad;
- the applicant must have a minimum annual turnover of Rs.50 Lakh, during the immediately preceding financial year or must have an annual average turnover of Rs.50 Lakh, during the preceding three years.

between the consignor and the multimodal transport operator; i) details as to whether it is a negotiable or a non-negotiable document; j) the place and date of issue of document; k) terms of shipment accompanied with a statement that the multimodal transport document has been issued subject to or in accordance with the Multimodal Transportation of Goods Act, 1993. However, information regarding freight payable by the consignor and the consignee shall be mentioned only if expressly agreed by the consignor and the consignee. But instances where the intended route of journey, modes of transport and places of transshipment if known at the time of issue, must be mentioned in the multimodal transport document.

The responsibility of a multi-modal transport operator exists for a period of time, commencing from the moment he has taken the goods in his charge, and ceases only after delivery of such goods has been duly completed.

S.24, supra note 64.

As per the Multimodal Transportation of Goods Act, three categories of companies are eligible to be registered as multimodal transport operators i.e., i) shipping companies, ii) freight forwarding companies, and iii) Companies which do not fall in either of the above two categories.

An applicant who is not a resident of India and one, who is not engaged in the business of shipping, cannot be granted registration, unless he has established a place of business in India.
financial years. However the same needs to be certified by a chartered accountant;

- the applicant must have offices, agents or representatives in not less than two other countries.\textsuperscript{74}

The competent authority on being satisfied about the existence of the above mentioned credentials is mandated to register the applicant as a multimodal transport operator and will grant him a certificate that is valid for one year to carry on or commence the business of multi-modal transportation. However, the competent authority may for reasons to be recorded in writing, refuse to grant registration, where it is satisfied that the applicant does not fulfill the aforesaid conditions.\textsuperscript{75} Besides, the authority may cancel the registration of the operator where it is satisfied that:

- any statement in or in relation to any application for registration as a multimodal transport operator or for the purpose of renewal of the application for the registration of a multimodal transport agreement, is incorrect or is false in any material particulars; or

- in instances where any provisions of MTG have been contravened by such multimodal transport operator; or

\textsuperscript{74} S.4, supra note 71.
\textsuperscript{75} Ibid.
• where the multimodal transport operator has not entered into any multimodal transport contract during the preceding two years after his registration.\textsuperscript{76}

However, a multimodal transport operator must be afforded all reasonable opportunity for showing cause as to why his registration should not be cancelled before the actual cancellation.\textsuperscript{77} Besides, the Act provides that an appeal against refusal by the competent authority to grant, renew or cancel registration may lie with the Central Government.\textsuperscript{78} However, the appeal must be made in the prescribed form and on the payment of the prescribed fee as per the provisions of the Act.\textsuperscript{79}

The MTG further provides for the determination of jurisdiction for initiation of action against the multimodal transport operator. Any party to the multimodal transport contract may institute an action in a Court which is competent and within the jurisdiction of which is situated one of the following places, \textit{namely}:

a) the principal place of business, or, in the absence thereof, the habitual residence, of the defendant; or

\begin{flushright}
\textsuperscript{76} S.5, \textit{ibid.}  \\
\textsuperscript{77} \textit{Ibid.}  \\
\textsuperscript{78} S.6, \textit{ibid.} Generally an appeal preferred after the expiry of the prescribed period cannot be admitted, but where the appellant satisfies the Central Government that he has sufficient cause, for not preferring the appeal within the prescribed period, the appeal may be preferred even after the expiry of such prescribed period.  \\
\textsuperscript{79} \textit{Ibid.} For \textit{e.g.}, all appeals must be accompanied by a copy of order, against which such an appeal has been preferred.
\end{flushright}
b) the place where the multimodal transport contract was made, provided that the defendant has a place of business, branch or agency at such place; or

c) the place of taking charge of the goods for multimodal transportation or the place of delivery thereof; and/or

d) any other place specified in the multimodal transport contract and evidenced in the multimodal transport document.\(^{80}\)

It may however, be noted that this provision suffers from many loopholes \(i.e.,\) given the fact that there are various modes of transportations involved domestically and internationally and various technical documents are issued, it becomes very cumbersome and nuisance value for a multimodal transport operator or the consignee to litigate in forums and lower Courts with inadequacy or no knowledge or experiences to deal with these subjects. This dissuades the multimodal transport operator from entering this segment, hence, creating monopolistic trade practice because only big players who can afford litigation costs can enter this segment. Hence, institutions of suits should be limited to the procedures set out strictly under \textit{Code of Civil Procedure} to avoid any ambiguity.\(^{81}\)

\(^{80}\) S.25, \textit{ibid}.

Another grey area in the MTG is that at present Indian corporates are increasingly switching to multimodal transportation systems for cost-effective movement of both raw material and finished goods, often outsourcing logistic requirements to third party service providers who are not covered under the Act. It is thus, fitting that the Directorate-General of Shipping should recommend the amendment of the MTG with the principal objective of streamlining multimodal transportation system to suit the present scenario. Besides, the MTG suffers from the following major drawbacks:

- air freight operators are excluded from the applicability of the MTG;
- multimodal transport operator’s license needs to be renewed on an annual basis;
- the Act provides higher liabilities for multimodal transport operators;
- even though containerization and multimodal transportation system is necessary to make Indian merchandize competitive, yet inability to develop necessary infrastructure due to lack of finance and inadequate legal and institutional environment have often proved to be a stumbling block for development of a sound system of multimodal transportation.
To plug the existing loopholes in the MTG, the researcher unequivocally suggests the following to be utterly taken into account:

- The title of the Act should be amended to remove the restriction of the Act to exports. In this context, the researcher proposes that the new Act should provide for the regulation of multimodal transportation of goods during exports and, in the case of imports, after the goods have landed in India.

- As the present Act does not clearly cover imports, many intermediaries have thrived in the absence of effective legal responsibility or liability by fleecing consignees/importers by way of various kinds of charges, particularly documentation charges. These can be overcome if the Act covers imports also.

- It should also be mandatory for a person, after being registered to carry on business of carriage of goods by sea or multimodal transportation, to quote his registration number on every bill of lading or multimodal transport document. In the light of this, the definition of `custodian' in the existing Act should be broadened to any customs notified port/airport, land customs station, inland container depot and container freight station or any other place notified by the Government. The registration should be universally visible, as this
will serve greatly the shippers, bankers and custodians who depend on the authenticity of a transport operator as recognised by law.

- In addition to financial institutions, custodians such as ports, inland container deports and container freight station also have a role to play in effective monitoring of the Act, especially as these are good checkpoints where the goods and documents are handled. Thus, the researcher envisions that every custodian who accepts goods for export on behalf of the carrier or multimodal transport operator should obtain, at the point of acceptance, proof of registration to the effect that the operator/carrier is registered.

- To remove the ambiguities existing under the Act on provisions relating to mandatory applications of operators, the researcher suggests that the provision should be applicable whenever any operator undertakes multimodal transportation, whether he chooses to enter into a contract or not.

- Every consignor, shipper or multimodal transport operator who has containerised cargo of dangerous goods should strictly ensure that they are inspected, packaged and containerised in accordance with guidelines in the *International Maritime Dangerous Goods Code,*
2010 which is a part of the *International Convention for the Safety of Life at Sea*, 1974.

- In regard to penalties to be imposed, the researcher proposes that any person who contravenes the provisions of the Act by carrying on business without registration should be punishable with fine that may extend up to the freight income. This provision is proposed as, at present, the number of multimodal transport operators registered with the Director General of Shipping under the *Multimodal Transportation of Goods Act*, 1993 is miniscule compared to the total number of transporters, including freight forwarders, shipping agents and customs agents.

### 6.4.4 MAJOR PORT TRUSTS ACT, 1963: NEED FOR ADDRESSING POWER EQUATIONS

India has an extensive coastline of 7517 km, excluding the Andaman & Nicobar Islands. Indian ports handle around ninety percent of the total volume of country’s trade and about seventy percent in terms of value.\(^82\) There are twelve major ports and two hundred minor and intermediate ports

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spread across nine (coastal) maritime States in India.\footnote{Ibid.} Ports are under the Concurrent List of the Indian Constitution.

The legal framework governing the port sector comprises the \textit{Indian Ports Act}, 1908 and the MPTA.\footnote{Sundar S., “Port Restructuring in India”, \url{http://www.teriin.org/upfiles/pub/papers/ft22.pdf}, [accessed on 14\textsuperscript{th} February 2013].} Major Ports under Central jurisdiction are governed by policy and directives of Ministry of Shipping, Government of India. Minor Ports under State’s jurisdiction are governed by policy and directives of respective State Government’s nodal departments/ agencies.\footnote{Major ports handle at least seventy five percent of the total cargo traffic while minor ports account for twenty five percent of the traffic in India.}

The MPTA, an Act that makes provision for the constitution of port authorities for certain major ports in India and to vest administration, control and management of such ports in such authorities, contains various provisions. Chapter II of the MPTA for \textit{e.g.}, contains provisions relating to the constitution of board of trustees and committees.\footnote{S.2, \textit{supra} note 12.} The staff and powers of the board are laid down in Chapter III and V of the Act. The Tariff Authority for Major Ports finds its place in Chapter V-A of the Act while the imposition and recovery of rates at ports in Chapter VI of the Act.

The board constituted under the MPTA has power to borrow for \textit{e.g.}, loans on short term bills under the Act.\footnote{Chapter VII, \textit{ibid.}} However, the board is under the
supervision and control of the Central Government. Every person employed by the authority under the MPTA is considered as a public servant and may face penalty for contravention of various provisions of the Act. The Act also imposes penalty for setting up wharves, quays, etc., without permission, penalty for evading rates, and other offences.

Moreover, Chapter XI of the MPTA contains miscellaneous provisions i.e., limitation of proceedings in respect of things done under the Act, protection of acts done in good faith, power of Central Government to make rules, general power of board to make regulations, saving of right of Central Government and municipalities to use wharves, etc., for collecting duties and of power of customs officers, application of certain provisions of the Act to aircraft, etc.

Under the MPTA, each major port is governed by a board of trustees appointed by the GOI. Their composition gives dominance to public enterprises and Government Departments. The powers of the trustees are

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88 Chapter IX, ibid.
89 S.112, ibid.
90 S.114, ibid.
91 S.115, ibid.
92 S.117, ibid.
93 S.120, ibid.
94 S.121, ibid.
95 S.122, ibid.
96 S.123, ibid.
97 S.128, ibid.
98 S.129, ibid.
limited and they are bound by directions on policy matters and orders from the GOI.\textsuperscript{99}

Though from the above elucidation it appears the MPTA is a comprehensive Act for regulating and management of ports in India, it is not free from shortcomings. Chapter VI of the MPTA provides that if goods landed into the ports’ custody are not cleared, the board is entitled to sell such goods or so much thereof as is necessary, \textit{interalia}, for recovery of the rates and rents payable to the port trusts.\textsuperscript{100} The said provision also provides for the procedure to be adopted by the port trusts for this purpose. Though the said Chapter empowers the board to sell the cargo which remains uncleared in excess of two months from the date of arrival at the port, the port trusts take their own time and follow their own procedures which are fraught with delays and laches in selling such uncleared cargo.

There are of course several reasons for such delays \textit{i.e.}, the ports list the cargo for auction sale and when the port does not receive the minimum bids, the cargo is not sold and put up for re-auction and it is eventually sold for only a minimum price. But, the ports continue to charge ground rent, demurrage, \textit{etc.}, throughout these periods and eventually, after the cargo is sold, the sale proceeds are utilised \textit{first}, to defray the cost of sale; thereafter,

\textsuperscript{99} Sundar S., “Port Restructuring in India”, \url{http://www.teriin.org/упfiles/pub/papers/fi22.pdf}. [accessed on 14\textsuperscript{th} February 2013].

\textsuperscript{100} S.61, \textit{supra} note 98.
the customs duty payable on the cargo; and the balance, if any, is used towards recovery of the port charges accrued on the cargo. In the event of any deficit therein, the ports file suits for recovery of the deficit, against the consignee/receivers as also against the agents of the line.

The legal basis of Tariff Authority for Major Ports can be found in the Chapter V-A of the MPTA. The Tariff Authority for Major Ports is the economic regulator (solely) for the major ports and is charged with fixing and revising tariffs including tariffs of privately owned terminals. It also has powers to control the efficiency of port and terminal services in the major ports. These powers, however, have been rarely used.

Besides, Tariff Authority for Major Ports does not have the power to improve efficiencies or lay down quality of service standards in port operations. Despite being a regulatory body, the Tariff Authority for Major Ports has limited autonomy. Being largely under the Central Government’s control, its lack of power to regulate performances and select private parties for contracts and other services implies regulation limitations.

The Tariff Authority for Major Ports has also not been able to enforce its own orders and call for data from port operators and it cannot compel any party to share information. It has also not been granted necessary financial autonomy. The Tariff Authority for Major Ports has no role to play in
opening up the port sector for private investment nor does it have power to enforce its own tariff rulings or penalize those found violating the terms and conditions governing tariffs.

The MPTA provides that while fixing tariffs the conditions under which the services to be rendered can be prescribed, however, owing to the fact that each port has its own tariff schedules and scales, the uniformity in prescribing the conditions of service cannot be achieved. Moreover, the Tariff Authority for Major Ports’s mandate is restricted to tariffs for port services at the major ports, but the Government retains the right to invalidate Tariff Authority for Major Ports’s tariff rulings.

Apart from the regulatory limitations of the Tariff Authority for Major Ports, there are problems in regulatory framework of the Act itself. There has been no attempt to encourage competition by introducing two or more service providers. Individual port trusts formulate their own policies, so there is an absence of uniformity in regulations. Under the present regulation regime of major ports, investors and users do not have recourse to an independent regulator on matters such as dispute resolution, performance standards, consumer protection and competition; and therefore the need for a comprehensive regulatory regime for major ports.
There should therefore be established an independent Major Ports Regulatory Authority with powers of a civil Court, power to call for information, investigate, and inspect the books of account or other documents of any port authority or private operator, *etc.*

Equally, in order to enhance maritime trade and competitiveness of the ports with the international ports and the emerging private ports in India, the Ministry concerned needs to come up with proper rules and regulations especially relating to the assessment of dredging requirements based on long-term planning, adequate night navigation facilities, rapid mechanization of handling facilities, proper and effective implementation of deepening and connectivity projects, correct reporting of berth occupancy as well as pre-berthing detention, *etc.*

Due to the above substantial loopholes existing in the MPTA, the Ministry of Shipping recently tried to prepare a draft of a proposed new ports Act amalgamating the existing two statutes (*i.e.*, the *Indian Ports Act*, 1908 and MPTA) governing the port sector into a single piece of legislation.\(^1\)\(^{101}\) The merger of the two Acts was mainly meant to simplify and

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\(^{101}\) The Ministry of Shipping proposed the new Act to be titled, "the *Indian Ports (Consolidated) Act*, 2010".
streamline ports regulation in India. However, the amendment is yet to be passed by Parliament.

6.4.5 MARINE INSURANCE ACT, 1963: A REPLICA OF THE UK MARINE INSURANCE ACT, 1906

Marine Insurance can be connoted to be the most vibrant branch coming under the canopy of insurance laws. This may be attributed to reasons that are far from cogency to the most coherent ones, which includes the discovery of trade routes and their role in the expansion of global trade, the insecurity faced at international levels during the course of sea trade, concerns about the heavy investments made for a successful sea trade, the generally anticipated scale of attacks that may be faced by a vessel, etc. These different facets can be summed up as contributing to the necessity of developing an encompassing law for the protection of interests of ship owners’, buyers’ and sellers’ of cargoes, that are transferred through the sea.

Marine insurance business can be considered in the broad spectrum as the business of effecting contracts of insurance upon vessels of any description, including cargoes, freights and other interests which may be legally insured in relation to such vessels, cargoes and freights, goods,

wares, merchandise and property of whatsoever description insured for any transit by land or water or air or all the three. The same may include warehouse risks or similar risks in addition or as incidental to such transit and includes any other risks which are customarily included among the risks insured against in marine insurance policies.104

The MIA is an Act that codifies the law relating to marine insurance. With a few exceptions, this Act closely follows the *UK Marine Insurance Act*, 1906.

The purpose of MIA is to primarily enable the ship owner and the buyer and seller of goods to operate their respective business while relieving themselves, at least partly, of the burdensome financial consequences of their property from being lost or damaged as a result of the various risks of the high seas. In other words, marine insurance adds the necessary element of financial security so that the risk of an accident occurring during the transport is not an inhibiting factor in the conduct of international trade.

The importance of marine insurance, both to assureds, in terms of the security it provides and its cost element in the overall economics of running a ship or transporting goods, and to countries, particularly developing

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countries, in its impact on their balance of payments position, cannot be overemphasized.

It is well known that in India, until the coming into operation of the MIA, the Courts used to follow the principles of English law and decisions based on such principles as well as the provisions of the *Marine Insurance Act*, 1906. The Indian law is a direct take-off from its English counterpart, and so, whenever it is not self evident, case law spanning over two centuries is to be looked into to arrive at the true position.

The Indian marine insurance has nine essential features which are also called as fundamental principles of marine insurance, *i.e.*, 1) features of general contract, 105 2) insurable interest, 3) utmost good faith, 106 4) doctrine of indemnity, 107 5) subrogation, 108 6) warranties, 109 7) proximate cause, 110 8) assignment and nomination of the policy 111 and 9) return of premium. 112 A brief discussion on each feature is as here under:

**a) Insurable Interest:**

According to the MIA, an insured person has, *inter alia*, an insurable interest in the subject-matter where he stands in any legal or equitable
relation to the subject-matter in such a way that he may benefit by the safety or due arrival of insurable property or may be prejudiced by its loss, or by damage thereto or by the detention thereof or may incur liability in respect thereof.\textsuperscript{113}

Since marine insurance is frequently affected before the commercial transactions to which they apply are formally completed it is not essential for the assured to have an insurable interest at the time of effecting insurance, though he should have an expectation of acquiring such an interest. If he fails to acquire insurable interest in due course, he does not become entitled for indemnification.\textsuperscript{114}

b) \textbf{Utmost Good Faith:}

The MIA incorporates the doctrine of utmost good faith.\textsuperscript{115} The doctrine of \textit{caveat emptor} (let the buyer beware) applies to commercial contracts while insurance contracts are based upon the legal principle of \textit{uberrimae fides} (utmost good faith). If this is not observed by either of the parties, the contract can be avoided by the other party. The duty of the utmost good faith applies also to the insurer.

\textsuperscript{113} Ss.7, 8, 9 to 16, \textit{ibid.}
\textsuperscript{114} The insurable interest in marine insurance can be of different forms \textit{i.e.}, according to ownership insurable interest in re-insurance and insurable interest in other cases, for \textit{e.g.}, the master or any member of the crew of a ship has insurable interest in respect of his wages.
\textsuperscript{115} See, Ss.19, 20 to 22, \textit{supra} note 113.
It is incumbent upon the insured to disclose all the material information which may influence the decision of the contract.\footnote{See, S.20 \textit{ibid}.} Any non-disclosure of a material fact enables the underwriter to avoid the contract, irrespective of whether the non-disclosure was intentional or inadvertent. The assured is expected to know every circumstance which in the ordinary course of business ought to be known by him. He cannot rely on his own inefficiency or neglect. The duty of the disclosure of all material facts also falls even more heavily on the broker.\footnote{See, S.21, \textit{ibid}.} He must disclose every material fact which the assured ought to disclose and also every material fact which he knows.\footnote{The broker is expected to know or inquire from the assured all the material facts. Failure in this respect entitles the underwriter to avoid the policy and if negligence can be held against the broker, he may be liable for damages to his client for breach of contract.}

However, the doctrine of good faith may not be adhered to in the following circumstances,\textit{ namely, i) facts of common knowledge, ii) facts which are known should be known to the insurer, iii) facts which are not required by the insurers, iv) facts which the insurer ought reasonably to have inferred from the details given to him, and v) facts of public knowledge.}\footnote{See, Steven W. Thomas, “Utmost Good Faith in Reinsurance: A Tradition in Need of Adjustment”, \url{http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3194&context=dlj}, [accessed on 15\textsuperscript{th} February 2013].}
c) **Doctrine of Indemnity:**

The contract of marine insurance is of indemnity. Under no circumstances an insured is allowed to make a profit out of a claim.\(^{120}\) It is for this reason that the MIA incorporates the doctrine of indemnity to facilitate the insurer to indemnify\(^{121}\) the assured in a manner and extent agreed upon between them.\(^{122}\) Moreover, in fixing the insured value,\(^{123}\) the cost of transportation and anticipated profits are added to original value so that in case of loss the insured can recover not only the cost of goods or properties but a certain percentage of profit also.

Having, agreed of the value or basis of valuation, the MIA provides that neither party to the contract can raise objection after loss on the ground that the value is too high or too low unless it appears that a fraudulent evaluation has been imposed on either party.\(^{124}\)

d) **Doctrine of Subrogation:**

The MIA also includes the doctrine of subrogation.\(^{125}\) The aim of the doctrine is to ensure that the insured does not get more than the actual loss or

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\(^{120}\) *R. v. British and Foreign Marine Insurance Co.*, (1921) 1 A.C. 188, 214 H.L. (per Lord Sumner); *Maurice v. Goldsborough*, (1939) A.C. 452, 466-7 P.C. (per Lord Wright).

\(^{121}\) The basis of indemnity is always a cash basis as underwriter cannot replace the lost ship and cargo.

\(^{122}\) See, S.3, *supra* note 113.

\(^{123}\) The insured value is called ‘agreed value’ because it has been agreed between the insurer and the insured at the time of making the contract and is regarded as sacrosanct and binding on both parties to the contract, *see, S.18, the Marine Insurance Act, 1963*.

\(^{124}\) S.67, *supra* note 122.

\(^{125}\) *See, S.79, ibid.*
damage. After payment of the loss, the insurer gets the right to receive compensation or any sum from the third party from whom the assured is legally liable to get the amount of compensation. Unlike in other cases where the insurer has a right to pay the amount of loss after reducing the sum received by the insured from the third party, in marine insurance on the other hand, the right of subrogation arises immediately after payment has been made, and it is not customary as in fire and accident insurance, to alter this by means of a condition to provide for the exercise of subrogation rights before payment of a claim.\textsuperscript{126}

Further, the MIA also deals with the right of contribution between two or more insurers where there is over insurances by double insurance.\textsuperscript{127} It is a corollary principle of indemnity.

\textbf{e) Warranties:}

A warranty is generally a statement according to which insured person promises to do or not to do a particular thing or to fulfill or not to fulfill a certain condition. It is not merely a condition but statement of fact. Warranties are of two types \textit{i.e.}, ‘express warranties’ which are expressly included or incorporated in the policy by reference, and ‘implied warranties’

\begin{itemize}
\item \textsuperscript{126}After indemnification, the insurer gets all the rights of the insured on the third parties, but insurer cannot file suit in his own name. Therefore, the insured must assist the insurer for receiving money from the third party. But if the insured does not wish to file a suit against the third party, the insurer has a right to receive the amount of compensation from the insured.
\item \textsuperscript{127}See, S.80, supra note 125.
\end{itemize}
which are not mentioned in the policy at all but are tacitly understood by the parties to the contract and are as fully binding as express warranties.\textsuperscript{128}

In marine insurance, implied warranties are very important. They include: seaworthiness of ship,\textsuperscript{129} legality of venture\textsuperscript{130} and non-deviation.\textsuperscript{131} All these warranties must be literally complied with as otherwise the underwriter may avoid all liabilities as from the date of the breach. However, there are two exceptions to this rule when a breach of warranty does not necessarily affect the underwriter's liability \textit{i.e.}, where owing to a change of circumstances the warranty is no longer applicable and where compliance would be unlawful owing to the enactment of subsequent law.

f) \textbf{Proximate Cause:}

The MIA explicitly provides that the insurer is liable for any loss proximately caused by a peril insured against but not otherwise.\textsuperscript{132} However, there must be direct and non-intervening cause for the insurer to be liable to

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\textsuperscript{128} Warranties can also be classified as ‘affirmative’ and ‘promissory’. Affirmative warranty is the promise which insured gives to exist or not to exist certain facts while promissory warranty is the promise in which insured promises that he will do or not do a certain thing up to the period of policy.

\textsuperscript{129} The warranty implies that the ship should be seaworthy at the commencement of the voyage, or if the voyage is carried out in stages at the commencement of each stage. This warranty implies only to voyage policies, though such policies may be of ship, cargo, freight or any other interest. There is however, no implied warranty of seaworthiness in time policies.

\textsuperscript{130} Legality of venture warranty implies that the adventure insured shall be lawful and that so far as the assured can control the matter it shall be carried out in a lawful manner of the country. Violation of foreign laws does not necessarily involve breach of the warranty.

\textsuperscript{131} The liability of the insurer ends in deviation of journey. Deviation refers to removal from the common route or given path. When the ship deviates from the fixed passage without any legal reason, the insurer quits his responsibility.

\textsuperscript{132} See, S.55, \textit{supra} note 113.
pay compensation. The Act also enumerates the losses which the insurer is not liable, *i.e.*,

- any loss attributable to the willful misconduct of the assured;
- any loss proximately caused by delay; and
- any loss due to ordinary wear and tear, leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.\(^\text{133}\)

**g) Assignment:**

A marine policy is generally assignable unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss.\(^\text{134}\) It can be assigned by endorsement thereon or on other customary manner. Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name and the defendant is entitled to make any defense arising out of the contract which he would have been entitled to make if the suit had been brought in the name of the person by or on behalf of whom the policy was effected.\(^\text{135}\)

\(^{133}\) *Ibid.*

\(^{134}\) S.52, *ibid.*

\(^{135}\) *Ibid.*
Through the above discussion it is conspicuous that the MIA is considerably clear in dealing with matters relating with marine insurance. However, the Act does not provide for losses that occur while the ship is sailing in the international waters. This is practically unfavorable especially to oil tankers and heavy cargo ships.

6.4.6 MARITIME ZONES OF INDIA (REGULATION OF FISHERY BY FOREIGN VESSELS) ACT, 1981: CRAVING FOR REVISION FOR ITS EFFICACY

The MZIA is an Act that seeks to provide for the regulation of fishing by foreign vessels in certain maritime zones of India and for matters connected therewith. The Act explicitly provides that no foreign vessel can be used for fishing within any maritime zone of India unless it has been granted a licence and a permit by the Central Government under the provisions of the MZIA.136

Subsequent to the enactment of the Act, the MZIA was enacted to curb poaching activities by foreign fishing vessels in the Indian exclusive economic zones. In other words, the MZIA enacted to protect the exclusive economic zones from exploitation of living resources by Indians and/or

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136 S.3, the Maritime Zones of India (Regulation of Fishery by Foreign Vessels) Act, 1981.
foreign nationals aboard a foreign vessel, which does not hold a valid license or permit issued under the MZIA.137

Chapter II of MZIA overtly makes provision for granting of licence to owners of the foreign vessels. The chapter states that the owner of a foreign vessel or any other person not being in either case any person to whom any of the descriptions specifications in sub-items (1) to (3) of item (i) of sub-clause (II) of clause (e) of Section 2 of MZIA any maritime zone of India may, make an application to the Central Government for the grant of a licence138 in such form and to be accompanied by such fees as may be prescribed. However, no licences can be granted unless the Central Government, having regard to such matter as may be prescribed in the public interest and after making such inquiry in respect of such other matters as may be relevant139 is satisfied that the licence may be granted.140

A licence granted must be in such form as may be prescribed and shall be valid for such areas, for such period, for such method of fishing and for such purposes as may be specified therein and may be renewed from time to time subject to such conditions and restrictions as may be prescribed by the

137 S.5, *ibid.*
138 S.4, *ibid.*
140 Every order granting or rejecting an application for the issue of a licence is compulsorily required to be in writing.
Central Government and to such additional conditions and restrictions as may be specified therein.\textsuperscript{141}

Under Chapter II of the MZIA, the Central Government is empowered to suspend or cancel, after making such inquiry as is necessary, the licence granted to a foreign vessel if there is any reasonable cause to believe that the holder of any licence or permit has made any statement in, or in relation to, any application for the grant or renewal of such licence or permit which is incorrect or false in material particulars rule or order made thereunder or of the provisions of any licence or permit or any conditions of restrictions specified therein.\textsuperscript{142} Every holder of a licence or permit which is suspended or cancelled is mandated to immediately stop using the foreign fishing vessel and surrender such licence or permit, as the case may be, to the Central Government.\textsuperscript{143}

Furthermore, the MZIA specifically empowers authorized Government officials, navy and police to implement and enforce the provisions of the Act and the specific power of apprehension, arrest and seizure are vested with the local police officials in the coastal States.\textsuperscript{144}

\textsuperscript{141} A person holding a licence must ensure that every person employed by him complies in the course of such employment, with the provisions of the Act, or any rule or order made thereunder and the conditions of such licence.
\textsuperscript{142} S.6, supra note 136.
\textsuperscript{143} Ibid.
\textsuperscript{144} S.9, ibid.
Moreover, MZIA does not require prior sanction of the Government to initiate prosecutions for the various offences.

The violation of the provisions in any area within the territorial waters of India is followed by not only confiscation of the vessels involved but also a penalty of imprisonment for a maximum term of three years and a maximum fine of rupees fifteen Lakhs.\textsuperscript{145} If the contravention takes place within the exclusive economic zone of India, it shall be punishable with fine not exceeding rupees ten lakhs.\textsuperscript{146}

While offences related to poaching are dealt with under the MZIA and smuggling under the \textit{Customs Act}, there are offences such as, unauthorized research activity, acts aimed at collecting information to the prejudice of the security of India, unauthorized operation of a vessel in the offshore development area, \textit{etc.}, which have not been covered under MZIA and/or any other Statute.

Moreover, the operation of deep sea fishing vessels with foreign crew have made the Indian coastal regions vulnerable to nefarious activities, which further emphasizes the need to revise the MZIA to make it more stronger, efficient and effective.

\textsuperscript{145} S.10, \textit{ibid.}
\textsuperscript{146} \textit{Ibid.}
All in all, even though there is a legislation regulating fishing by foreign vessels, there is no such equivalent law for Indian flag vessels.\textsuperscript{147} Besides, no other cohesive national legislation relevant for fisheries has been presented in the official legislation list of the Indian Ministry of Law and Justice.\textsuperscript{148}

6.4.7 SAFETY OF MARITIME NAVIGATION AND FIXED PLATFORMS ON CONTINENTAL SHELF ACT, 2002:

The SMC Act is a legislation specifically meant to give effect to the International Maritime Organisation Convention for Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the continental shelf and for matters connected therewith.\textsuperscript{149}

The SMC Act, 2002 seeks \textit{inter alia}, to deal with offences against ships, fixed platforms, cargo of a ship and navigational facilities, \textit{etc.}, and


\textsuperscript{148} See, “Indian Code”, http://lawmin.nic.in/, [accessed on 15\textsuperscript{th} February 2013].

\textsuperscript{149} While the Convention applies to unlawful acts in relation to ships of any type not permanently attached to seabed, the Protocol applies to unlawful acts against fixed platforms. Besides, the Convention and the Protocol were adopted in view of the worldwide escalating acts of terrorism endangering the safety of life at sea and conform to the purposes and principles of the UN Charter concerning the maintenance of international peace and security and promotion of friendly relations and cooperation amongst States. India has acceded to the Convention as well as the Protocol.
penalties therefore,\textsuperscript{150} and provides for discretion to the Central Government to confer powers of investigation,\textsuperscript{151} exercisable by a police officer, on any gazetted officer of the Coast Guard or any officer of the Central Government, power of the State Governments to specify, with the concurrence of the Chief Justice of the High Court, a Court of Session to be a Designated Court to try offences,\textsuperscript{152} the application of provisions of the \textit{Code of Criminal Procedure}, 1973 in the trial of offences, the provisions as to bail\textsuperscript{153} and extradition,\textsuperscript{154} powers of the Central Government to treat certain ships to be registered in Convention States,\textsuperscript{155} presumption of commission of offences\textsuperscript{156} and protection of action taken in good faith by any person or the Central Government.\textsuperscript{157}

The SMC Act, 2002 extends to the territorial waters, the continental shelf, the exclusive economic zone and any other maritime zone of India within the meaning of the \textit{Maritime Zones Act}, 1976.\textsuperscript{158}

Following the past incidence where the Italian marines shot dead two Indian fishermen, the SMC Act, 2002 was invoked against the marines

\textsuperscript{150} S.3, the \textit{Safety of Maritime Navigation and Fixed Platform on Continental Shelf Act}, 2002.
\textsuperscript{151} S.4, \textit{ibid}.
\textsuperscript{152} S.7, \textit{ibid}.
\textsuperscript{153} S.8, \textit{ibid}.
\textsuperscript{154} S.9, \textit{ibid}.
\textsuperscript{155} S.11, \textit{ibid}.
\textsuperscript{156} S.13, \textit{ibid}.
\textsuperscript{157} S.14, \textit{ibid}.
\textsuperscript{158} S.1(2), \textit{ibid}. 

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without following the procedure as laid down under the Act. This was undertaken by the prosecution because of the ambiguity of the provisions under the Act. The competent authorities therefore need to move fast to amend the SMC Act, 2002 to align it with the emerging forms of crimes being committed in the internal and international waters.

6.4.8 TERRITORIAL WATERS, CONTINENTAL SHELF, EXCLUSIVE ECONOMIC ZONES AND MARITIME ZONES ACT, 1976: SOME IMPEDIMENTS IN ITS IMPLEMENTATIONS

For several decades, India’s territorial waters and continental shelf were governed by proclamations issued by the President of India. In 1976, consequent upon the third United Nations Convention on the Law of the Sea, held in Geneva, the TWCS Act was enacted in India. Accordingly, land, minerals and other resources, underlying the ocean, within the territorial waters, the continental shelf or the exclusive economic zone became the exclusive property of the Union of India.

The TWCS Act categorically prescribes the limits of the territorial waters, continental shelf, exclusive economic zone and other

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159 Territorial waters generally refer to the portion of sea which is adjacent to the shores of a country.
160 The territorial waters of India extend up to 12 nautical miles from the baseline on the coast of India and include any gulf, harbor, creek or tidal river.
161 At present, India’s continental shelf extends to two hundred nautical miles from the baseline. However, an application by India before the UN Commission on the Limits of the Continental Shelf under Art.76 of the United Nations Convention on the Law of the Sea to extend the continental shelf to 350 nautical miles is still pending.
maritime zones of India.\textsuperscript{163} It also provides the legal framework specifying the nature, scope and extent of India’s rights, jurisdiction and control of various maritime zones; the maritime boundaries between India and its neighboring countries; and the exploitation, exploration, conservation and management of natural resources within the maritime zones.\textsuperscript{164}

A close scrutiny of the Act also reveals that the offences mentioned therein are generalized and the Act overtly provides that whoever contravenes any provisions of the Act or of any notification there under is, without prejudice to other action which may be taken against such person under any other provision of the Act or of any other enactment, be punishable with imprisonment which may extend to three years or with fine, or with both.\textsuperscript{165}

Acting as a deterrent is the punishment awarded to persons found guilty of contravening the provisions of the TWCS Act, which is imprisonment up to three years or unlimited fine or both. However, the Act necessitates the requirement of previous sanction of Central Government before instituting prosecution against such persons\textsuperscript{166} without providing a time-line within which the approval is granted or rejected, which has led the

\textsuperscript{162} India’s exclusive economic zone extends to two hundred nautical miles from the baseline.
\textsuperscript{163} Ss.3, 5, 6 and 7, the \textit{Territorial Waters, Continental Shelf, Exclusive Economic Zones and Maritime Zones Act, 1976.}
\textsuperscript{164} S.9, \textit{ibid.}
\textsuperscript{165} S.11, \textit{ibid.}
\textsuperscript{166} S.14, \textit{ibid.}
maritime enforcement agencies and the police to book the apprehended vessels under various provisions of the Indian Penal Code, the Arms Act, the Customs Act, etc.

Further, the Act empowers the Government to make rules by notification to carry out the purposes of this Act in general and for delegating specific power for inter-alia regulating the conduct of a person in the territorial waters, contiguous zone, exclusive economic zone or any other maritime zone of India.\(^\text{167}\)

It is pertinent to note that till date no rules have been framed by the Government under the Act. Accordingly, following are the suggestions towards addressing the enforcement lacunae in the Act:

- the Government should amend Section 14 of the TWCS Act so as to provide the Indian navy and Indian coast guard the necessary legislative support by way of authorization to stop, board, search and seize vessels and bring them before a competent Court for detention and prosecution of offenders;

- extend these powers to the coastal police force for enforcing the Act to have effective coastal surveillance in the near shore waters; and

\(^{167}\) S.15, *ibid.*
• provide more clarity and understanding of the types of offences that affect the security of India, especially with respect to the use of territorial waters by foreign ships and the exclusive economic zone.

Recent developments in Kerala owing to killing of Indian fishermen by armed marines boarded on Italian Vessel *Enrica Lexie* has left open multiple legal questions.\(^{168}\) The primary question was whether the marines accused of murder, be tried in Indian Courts as per Indian law, or whether Italian law be applicable being the law of flag State? Even though the question seems to be settled as the incident happened in the contiguous zone wherein Indian law is partially applicable so as to cover incidents of crimes giving Indian Courts jurisdiction over the matter, it is however visible that the domestic legal system is not fully prepared for such determination.\(^{169}\)

All in all, by carrying out the above stated suggestions and further changes necessary will not only form the backbone to effective implementation of maritime security in India but also help to curb terrorism in the country as the Indian navy and coast guard, along with the coastal

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\(^{169}\) It is a fact that this incident is first of its kind in India, but having a closer look at the existing archaic laws concerning maritime (admiralty) law in India, there are more reasons to be concerned, hence the need for codifying and reforming maritime laws in India.
police force will then have the power to search and seize vessels, without prior approval of the Government.\textsuperscript{170}

Maritime law and legislations in India have passed through different eras from the earliest time to the modern age. It started when the customs and practices of those involved in maritime trade were established as legal norms, followed with the codification of them into written expressions of law \textit{i.e.}, legislation in India. However, a detailed study on various maritime laws in force in India \textit{i.e.}, the MSA, CGSA, MTG, MPTA, MIA, MZIA, the TWCS Act, \textit{etc.}, has brought to fore some serious loopholes in the said enactments as they relate to various aspects of maritime law.

It therefore becomes inevitable for the researcher to suggest some necessary measures to be undertaken to plug such loopholes. This leads us to the next Chapter.

\textsuperscript{170} The Mumbai terror attack on 26\textsuperscript{th} November 2008 is a classic example wherein terrorists made their way transiting through the coastal route.