

Unintended Consequences of the Indian MTGA 1993:

By M.Jagannath, NAU Pte Ltd, Singapore

Abstract:

This paper discusses the scope of the Multimodal Transportation of Goods Act 1993 (“MTGA”) and the implications on the following:

- primacy of the Indian Carriage of Goods by Sea Act 1925 and the MTGA
- relevance of the MTGA for unimodal transportation, particularly if a multimodal transport document is issued for unimodal carriage
- application of Indian law including the Indian Marine Insurance Act 1963 (which is modelled on the UK Marine Insurance Act 1906)

While the MTGA is modelled on the basis of UNCTAD/ICC Rules for Multimodal Transport Documents, the fact remain that this convention of UNCTAD/ICC Rules for Multimodal Transport Documents is yet to gain wide acceptance such that it is not mandatorily applicable in other nations. However, the implementation in India appears primarily to be for the regulation of transportation intermediaries and who may or may not be involved in multimodal transportation. This regulation extends to the licensing of Multimodal Operators, the wordings of the Multimodal Documents to be issued, the Liability Insurance to be effected and the law and jurisdiction of the MTO document and the Liability Insurance.

This paper will argue that the implementation of the MTGA has created more confusion than otherwise. The paper will also suggest ways and means to resolve the ambiguity created by the MGTA and the implementation of the Registration of Multimodal Transport Operators by DG Shipping. Further, the paper would also suggest that it is not always desirable to regulate and it is best for the market to self-regulate as far as possible.

Keywords: Multimodal Transportation, MTGA 1993, international transportation, carriage of goods by sea, transport regulation.

The views and opinions together with all errors expressed in this article are those of the author only. The purpose of submitting this article is to debate on the issues arising from the MTGA and to consider ways to improve the implementation / deregulation, if any, for the Indian Transport Industry.

Main Paper:

1. India implemented The Multimodal Transportation of Goods Act, 1993 (hereinafter referred to as “MTGA”ⁱ) which came into effect from 16th Oct 1992 to govern multimodal transportation (carriage of goods by at least two different modes of transport – sec 2(k) of the MTGA) for International shipments effected out of India only (again sec 2(k) of the MTGA). The purpose of this paper is to study its application and issues related to it.
2. Prior to the enactment of the MTGA and the corresponding Ordinance (Multimodal Transportation of Goods Ordinance, 1992), the relevant acts for International Transport by Sea and Air were The Indian Carriage of Goods by Sea Act, 1925ⁱⁱ (hereinafter known as “Indian COGSA”) and The Indian Carriage by Air Act, 1972ⁱⁱⁱ (hereinafter known as “Indian Carriage by Air Act”). With respect to road and rail transport, India is not a signatory to any International convention such as the Convention on the Contract for the International Carriage of Goods by Road^{iv} commonly known as the CMR Convention or the Convention concerning International Carriage by Rail^v commonly known as COTIF. This article will mainly focus on the impact of the MGTA with respect to International Sea Transport (as it is estimated that 90% of International Trade is mainly through sea).
3. With respect to International Sea Carriage, Independent India is not a signatory to either the International Convention for the Unification of Certain Rules of Law relating to the Bill of Lading in 1924 colloquially known as the Hague Rules or the Protocol to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading in 1968^{vi} colloquially known as the Hague – Visby Rules. However, it has incorporated substantially the Hague – Visby Rules^{vii} with some of the provisions of the Hague Rules^{viii} in The Indian Carriage of Goods by Sea Act 1925 (hereinafter known as “Indian COGSA”) by way of domestic legislation. Importantly, the Indian COGSA provides in its act that an express statement as to the application of rules is to be included in bills of lading issued in India to be governed by this act (Section 4 of the Indian COGSA).
4. Provisions of the MTGA: While the intention of legislating the MTGA was to provide the advantage to Indian traders/shippers that they deal with one party for the complete transportation (as a substantial portion of cargo emanates from the hinterland and has to be transported to the gateway ports) given that sea carriage may have some land / rail carriage depending on the location where the cargo emanates. However, the MTGA has been legislated very restrictively such that, in the author’s view, it creates more confusion than benefit. The salient points of the MTGA are as follows:
 - i. “Multimodal Transportation” means carriage of goods, by at least two different modes of transport under a multimodal transport contract, from

the place of acceptance of the goods in India to a place of delivery of the goods outside India (S 2(K)). It therefore appears that the MTGA is only for outward shipments and may not apply to inward shipments i.e. where a multimodal operator accepts cargo from outside India for delivery inside India and for which he would be using two or more modes of transport. However, in *Carborandum Universal Ltd. vs M.G. International Transport GmbH*^{ix} the High Court of Madras applied the MTGA 1993 for inward shipments. We would respectfully state that the court has erred in the interpretation and perhaps a judgment from the Supreme Court of India would go to making this issue rest in that it would be not only binding on all Indian Courts but also a proper interpretation on the application of S 2K would be provided.

- ii. “Multimodal Transport Contract” means a contract under which a multimodal transport operator undertakes to perform or procure the performance of multimodal transportation against payment of freight (S 2(l)). By definition, the transportation must necessarily be by two (2) or more modes of transport failing which it will not be considered a Multimodal Transport Contract. Further, the definition of the Multimodal Transport Contract is not restricted to outward shipments from India only and therefore it could be applicable for inward shipments into India^x.
- iii. “Multimodal Transport Operator” means any person who is registered under sub-section (3) of section 4 (S 2(m)(iii)). Sub-section (3) of section 4 deals with the formalities for registration of MTO’s (both Indian and foreign based). This means that parties who wish to act as MTO’s must necessarily be registered with the relevant authority. Moreover S 3 of the MTGA states “**No person to carry on business without registration**” and therefore it is incumbent for any party acting as a MTO in India to be properly registered. However, this act does not specify any penalties or sanctions which may be imposed on companies which are not properly registered as provided under the MTGA.
- iv. With respect to issue of multimodal transport documents, it is a requirement under S 7(1) that the “MTO issue the multimodal transport document only after obtaining, and during the subsistence of a valid insurance cover”. However, the act has not defined as to what is a valid Insurance cover except that the cover should be in place at the time the MTD is issued. We see two sub-issues arising out of this:
 - a) Validity of insurance cover ceasing during transit covered by the MTD: As requirement of cover is one of the pre-requisites of registering as a MTO, would absence of cover due to policy lapse mean that the MTO be personally liable?
 - b) Limit of cover being inadequate to cover the liabilities of the MTO and in which case, would the MTO Officers / Directors have a concurrent liability under the act to be liable for the difference up to the liability provided under the MTGA? While

it would be difficult for cargo interests to pursue the MTO officers / Directors on the basis of inadequate / improper insurance, given that the requirement of Insurance is provided in the MTGA, arguably, there should concurrent liability on the statutory body for its failure to properly regulate the industry.

From our check with various MTO's, we understand that DG Shipping require applicants to provide copies of the Insurance cover in place to ascertain that they are covered for the following:

- 1) Liability for cargo
- 2) Third Party Liability
- 3) Errors & Omissions
- 4) Liability to Authorities:

If the Insurers are already in the list of Insurers "approved" by DG Shipping, then the cover provided is accepted for the purposes of the application. If the cover is placed with a "new" Insurer, then DG Shipping would ask for the Insurer to introduce themselves so that they can consider their inclusion in the "approved" list. Basis of approval of a "new" insurer for becoming an "approved" insurer is not known or provided in DG Shipping's website. We also understand that DG Shipping has no particular requirements on the limits of liability to be provided by the Insurers to the MTO. Hence, policies issued may be with low limits such as USD 50,000 any one incident or occurrence commonly known as aoioo and which may be not enough to cater to exposures which may arise.

- v. We also understand that DG Shipping requires the Insurance policies issued for MTO's to expressly state that the :
- a) Insurance cover is for liabilities under standard conditions of Multimodal Transport Documents ^{xi} (MTD) issued under the Mutlitmodal Transportation Goods Act (MTGA) 1993 and any statutory amendments.
 - b) Law of the Insurance contract is Indian law and that any dispute would be resolved by the exclusive jurisdiction of the Indian Courts.

While these provisions are certainly helpful, we see two issues arising out of this and which are :

- 1) Marine Insurance Policies provide cover on the basis of information provided by the Insured prior to the inception of cover i.e. details declared and provided in the proposal form. If there is a breach of good faith,

Insurers are entitled to avoid the policy (S 17 of the UK Marine Insurance Act 1906 ^{xii} and S 19 of the Indian Marine Insurance Act 1963 ^{xiii}). Would the statement that the “cover is for liabilities under standard conditions of MTD and the MTGA” mean that the cover provided by the Insurers is without any policy limits? We think this is unlikely given that the limits are mentioned in the policy (which has the above statement “*Insurance cover is for liabilities...*” being submitted to the DG Shipping and who could always direct the MTO to seek a higher limit as a pre-condition for approval.

2) Policies issued by International Insurers invariably provide for English Law to be the governing law of the Insurance. Given the developments and case law available in UK, we submit that it may be preferable for the Insured for the contract to be governed by English Law instead of Indian Law. We make this comment given that the Indian Marine Insurance Act 1963 is similar to the UK Marine Insurance Act 1906 and that recently UK has legislated Insurance Act 2015 ^{xiv} and which will come into force from Aug 2016 (the Insurance Act 2015 is particularly beneficial to the interests of the Insured). With respect to the jurisdiction clause, we have no comments except that the pace of justice in India may be certainly slower than other jurisdictions and therefore it may be helpful to consider other faster means of resolution of disputes.

vi. Sec 14 of the MTGA deals with the limitation available to the MTO and which is capped at 2 SDR per Kg or 666.67 per package, whichever is higher (if there is no carriage by sea, then the limits are higher at 8.33 SDR per Kg). The limitation figure in the MTGA also corresponds with COGSA 1925 (which incorporates the HV limitation amounts). The issue is with recovery on the domestic leg. By definition, MTO would have to engage transporters by road or rail for the movement inland to the gateway port. The acts applicable for road carriage would be The Carrier’s Act 1865 ^{xv} and for rail carriage, The Railway Act 1989 ^{xvi}. Although these acts do not appear to mention the limitation figures, we understand from the terms and conditions for carriage of cargo in containers by Container Corporation of India ^{xvii} (commonly known as “CONCOR” and which is a subsidiary of the Indian Railways) is subject to a maximum limitation of ₹50 per kg (approx 0.54 SDR per kg). The domestic carriage is carried “under bond” and therefore it is submitted that it would be incorrect to apply the domestic regulations, particularly when the charges applied for the carriage are much higher than domestic carriage. Given the differences involved, if there is a loss, the MTO would have a higher exposure and would have to cater for this higher exposure by way of additional risk premiums.

- vii. Sec 24 of the MTGA deals with limitation on action and provides for any claims against the MTO to be time barred “*unless action against him is brought within 9 months*” The issue is whether there is any conflict with respect to the Indian COGSA and which would apply for the International Sea Carriage from Indian ports. We note that S 4 of The Indian COGSA provides that a “*statement as to application of rules to be included in bills of lading*”. Further, Sec 29 of the MTGA states that the MTGA Act overrides other enactments. This being the case, it is submitted that the provisions of the MTGA would apply to MTD and therefore the MTO would have the benefit of a shorter limitation of time for claims.
- viii. With respect to International Carriage Contracts being used for sea carriage followed either before or after by inland haulage to and from India, both Multimodal Transport Documents and Combined Transport Documents (“CTD”) are used by various carriers. As mentioned in ii and iii above, if the act also applies for inward shipments, then parties issuing MTD’s would have to necessarily register with DG Shipping. Further, if it is an outward shipment, the MTGA will apply for Multimodal Transport Documents such that an operator (whether registered in India or abroad) would need to be registered with DG Shipping. However, CTD Operators have no registration requirements irrespective whether they are Indian or International companies, and therefore it appears to us that the application of MTGA to only the MTO’s is restrictive and detrimental to MTO’s. Further, as mentioned earlier, the MTGA however does not provide for any sanctions for failure to register by an operator acting as a MTO and therefore it lacks the bite for enforcement.
- ix. Effect of using the MTD for Unimodal carriage – would this mean that the MTD issued is null and void? As mentioned in i above, by definition, multimodal means two or more modes of transport and therefore if the shipment is not by two or more modes of transport, it is submitted that the MTD issued would be null and void. The issue would be then as to which act, The MTGA or the Indian COGSA, would apply for the MTD issued? It would actually turn on the wordings of the MTD issued and in this regard, we have considered the wordings of the MTD as provided on the schedule to the MTGA. The MTD wordings do not have any provision for unimodal carriage such that if the MTD document is considered null and void, then common law would apply to the contract of carriage. Our submission is made basis the Privy Council judgment of *Vita Food Products Inc v Unus Shipping Co Ltd*^{xviii} and which has been followed by the Indian Supreme Court Judgement in *National Thermal Power ... vs Singer Company and Ors*^{xix} where the bench ruled considering *Vita Food Products* and stated that “*the true intention of the parties in the absence of an express selection, has to be discovered by applying sound ideas of business, convenience and sense to the language of the contract itself*”. As the MTD does not provide for the provision of Indian COGSA, and further, as it is a requirement under the Indian COGSA that the bills of lading issued should expressly mention

that the rules have to be applied to them (S 4 of the Indian COGSA 1925), it is submitted that common law would apply for the carriage contract. This would obviously be beneficial to the cargo interests given that the only exclusions available to the Carriers would be the common law exceptions such as the act of God, Sovereign's enemies and inherent vice and that they would also not be entitled to limit liability.

- x. Merchant Haulage: The aim of MTGA is to simplify the transport transaction and allow the cargo interests to deal with one party right from the inland transport by road / rail till final destination. We understand the majority of haulage in the export leg is on the basis of "merchant haulage" i.e. the merchant directly contracts with CONCOR or other service providers for the haulage to the gate way port to take advantage of any price differential available (We do not believe that it would be correct for MTO's to price the inland transportation at "costs" given that they have higher exposure's than CONCOR). While there may be price advantages in merchant haulage, it is submitted that the aim of MTGA was to ensure efficiencies to be gained by dealing with one central party and thereby allow saving in attendant administrative and other costs which may be incurred.

- xi. Dispute Resolution:
 - a) Arbitration: S 26 of the MTGA allows parties to a Multimodal Transport Contract to refer disputes arising in relation to the multimodal transportation to arbitration. The wordings of the MTD provided under the MTGA schedule allows the document to provide for disputes to be resolved through Arbitration^{xx}.

 - b) Litigation: In the absence of Arbitration provisions, in case of disputes, parties would have to litigate the issues as provided under Cl 23 of the MTD and which allows a party to initiate action at the principal place of business, place where the contract was made, place of taking charge of the goods or any other place specified in the MTD. This being the case, a party may decide to initiate action in a forum which is most beneficial to them (forum shopping) in terms of court process, costs, and time for the matter to be heard.

 - c) Indian Consumer Protection Act 1986^{xxi} – The Indian Consumer Protection Act 1986 provides for its application for all services under S 2(c) (vi) (d) (ii) and which has also been judicially dealt by the Indian Supreme Court in *Trans Mediterranean Airways vs M/S Universal Exports & Anr*^{xxii} in which they state in Para 7 " *The definition of "consumer" in CP Act is apparently wide enough and encompasses within its fold not only the goods but also the services, bought or hired, for consideration. Such consideration may be paid or promised or partly paid or partly promised under any system of deferred payment and includes any beneficiary of such*

*person other than the person who hires the service for consideration. The Act being a beneficial legislation, aims to protect the interests of a consumer as understood in the business parlance. The important characteristics of goods and services under the Act are that they are supplied at a price to cover the costs and generate profit or income for the seller of goods or provider of services. The comprehensive definition aims at covering every man who pays money as the price or cost of goods and services. However, by virtue of the definition, the person who obtains goods for resale or for any commercial purpose is excluded, **but the services hired for consideration even for commercial purposes are not excluded**. The term “service” unambiguously indicates in the definition that the definition is not restrictive and includes within its ambit such services as well which are specified therein. However, a service hired or availed, which does not cost anything or can be said free of charge, or under a contract of personal service, is not included within the meaning of “service” for the purposes of the CP Act” (words in underline and bold by us for emphasis) ^{xxiii} .*

Hence, a cargo claimant can also consider using the CP forums to deal with their dispute (this may be advantageous to the cargo interests as the CP forums may deal with the matters more quickly). However, given that transportation is a specialised subject, there would be concerns on the “knowledge” available in the CP forum to deal with such matters.

5. Our

comments:

- i. The aim of legislating the MTGA was to simplify the process for transportation. However, the lacuna appears to be that its application is restricted to outward multimodal shipments for which a Multimodal Transport Documents is issued. It however does not apply to other Transport Documents which may have been issued for Multimodal / Combined Transport. This being the case, the legislation has not simplified the process but has put rules/barriers for only “one class of business” who have voluntarily registered with DG Shipping.
- ii. With respect to Insurance coverage of the MTO’s, we have concerns on the way the application is being met by the regulator, DG Shipping. Given the recent Tianjin fire episode where the exposure is said to exceed USD 2 Billion, we believe that Insurance cover should be on the basis of exposure which an operator may have and not a “one size fits all”. Also, a cover for a low limit say USD 25,000 / 50,000 may not be of assistance when a MTO is being faced with a claim of say USD 2.5 million for third party liabilities.

- iii. Insurance is not a mandatory requirement for other transport documents issued (Bills of Lading or Combined Transport Document). This being the case, MTO's may be outpriced as they would necessarily have to effect insurance cover and factor this in their costs whereas the CTO's may or may not necessarily take any liability cover.

6. Conclusion:

- i. The MTGA appears to have been effected without taking into consideration of the effects to MTO's vis-à-vis CTO's.
- ii. Our view is that it would always be preferable to have "less legislation than more" as any legislation may raise unintended issues. Instead, it would be preferable for professions such as Transport Operators to self-regulate themselves. In this regard, organisations such as FFFAI can play a role (FFFAI is a membership organisation for Freight Forwarders in India). If it is desired to legislate, then the effect should be the same for both domestic and international companies involved in the specific sphere of transportation i.e. it should be mandatory to all participants of the trade irrespective of their nationality.
- iii. India should consider ratifying The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea^{xxiv} (The Rotterdam Rules) and which includes the drayage of cargo either before or after the international sea movement. Ratification of The Rotterdam Rules would mean that the MTGA would have no further relevance for multimodal transport by Sea but may be relevant for International Carriage by Road/Rail or Road/Rail/Air.
- iv. With respect to the interim period, we would suggest removal of the licensing requirements of MTO under the MTGA (which we understand from the newspaper reports that it is being considered) and amend the acts / wordings of the MTGA and Carriage of Goods by Sea Act 1925 to ensure that there is no ambiguity in the wordings. Further, the wordings of the MTD should be amended to ensure that it would provide application of the Indian COGSA 1925 or the Indian Carriage by Air Act when only Unimodal International Sea or Air Transport is involved.

7. Acknowledgements:

- i. K S Mankad, Principal Officer & Director, Mankad & Associates
- ii. Rohan Janardhanan, Managing Partner, Rex Legalis
- iii. Suresh Menon, General Manager, Goodrich Maritime Pvt Ltd
- iv. T Venkataraman, Managing Director, Goodrich Maritime Pvt Ltd

8. Appendix:

- i. <http://www.dgshipping.gov.in/WriteReadData/userfiles/file/The%20Multimodal%20Transportation%20of%20Goods%20Act,%201993%20%28as%20amended%20in%20December,%202000%29.PDF>

- ii. <http://www.dgshipping.gov.in/WriteReadData/userfiles/file/The%20Indian%20Carriage%20of%20Goods%20by%20Sea%20Act,%201925%20%5B%20as%20amended%20in%20the%20year%202000%5D.PDF>
- iii. http://dgca.nic.in/nat_conv/The%20Carriage%20by%20Air%20Act%20and%20Amendment%202009.pdf
- iv. https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-B-11&chapter=11&lang=en
- v. <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?redirect=true&treatyId=5041>
- vi. <http://www.informare.it/dbase/convuk.htm>
- vii. <http://www.jus.uio.no/lm/sea.carriage.hague.visby.rules.1968/doc.html>
- viii. <http://www.admiraltylawguide.com/conven/haguerules1924.html>
- ix. <http://indiankanoon.org/doc/103663962/>
- x. *See Caravel Shipping Services Pvt Ltd vs Premier Sea Foods Exim Pvt Ltd* - MANU/KE/1617/2015 & <http://indiankanoon.org/doc/104366427/> – a judgement of the Kerala High Court provided in 08th Sep 2015; *Bharat Earth Movers Ltd. and another*, MANU/SC/8168/2007, the issue before the Supreme Court was the Application of the Indian Carriage of Goods by Sea Act, 1925 vis-à-vis the Japanese Carriage of Goods by Sea Act.1992. In the said case, the Supreme Court held that the Multimodal Transport of Goods Act was not applicable to the transaction in question as the mode of transport was by sea only and did not involve multimodal transport; *Shipping Corporation of India Ltd vs Bharat Earth Movers Ltd. and Anr*, an appeal held by the Supreme Court of India MANU/SC/8168/2007 – and which gave effect to the requirement for the application of the MTGA , it required two or more modes of transport. However, this was with respect to an import shipment.
- xi. http://www.dgshipping.gov.in/WriteReadData/userfiles/file/rules_mmtgact_020311.pdf
- xii. <http://www.legislation.gov.uk/ukpga/Edw7/6/41/contents>
- xiii. <http://www.fortunes-de-mer.com/documents%20pdf/legislation/Etrangere/India%20Marine%20Insurance%20Act%201963.pdf>
- xiv. <http://www.legislation.gov.uk/ukpga/2015/4/contents/enacted>
- xv. http://www.prsindia.org/uploads/media/1167470092/bill62_2007010262_The_Carriers_Act_1865.pdf
- xvi. http://www.indianrailways.gov.in/railwayboard/uploads/codesmanual/Railway_Act.PDF
- xvii. <http://www.concorindia.com/Terms-And-Conditions-For-CargoCarriage-In-Containers.pdf>
- xviii. <http://www.uniset.ca/other/cs3/1939AC277.html>
- xix. <http://indiankanoon.org/doc/633347/>
- xx. *See Sanco Trans Ltd v Addison and Co. Ltd., Hawera Probest GmbH, Schueizenstu & United India Insurance Company Ltd* MANU/TN/4039/2009 - a decision of the Madras High Court where the court held the applicability of the Arbitration provisions on the basis clause 25 of the Bill of Lading and which stated “The contract evidenced hereby or contained herein shall be governed by and construed according to Indian laws. Any difference of opinion or dispute

thereunder can be settled by arbitration in India or a place mutually agreed with each party appointing an Arbitrator” (underlined by us for emphasis). However, it is respectfully submitted that the court did not consider whether this clause was a mandatory provision and therefore it is submitted that as the clause in the Bill of Lading was not specific, the arbitration should not have been enforceable.

- xxi. http://www.ncdrc.nic.in/1_1.html
- xxii. <http://indiankanoon.org/doc/791637/>
- xxiii. See Sai International (Exports) India vs Ami India Logistics Pvt. Ltd - MANU/CF/0277/2005 decided by the National Consumer Disputes Redressal Commission which states “that the Consumer Protection Act provides an additional remedy for consumer grievances arising out of deficiency of service and unless their jurisdiction is expressly barred or special Tribunals or procedures are prescribed under special enactments to deal with such cases, the jurisdiction of Consumer Fora would remain. Since there are no such provisions in the MTOG Act; we hold that this Commission is competent to adjudicate the complaint.
- xxiv. <http://www.rotterdamrules.com/>

9. Reference:

- i. Vita Foods revisited - <http://lawjournal.mcgill.ca/userfiles/other/3392797-Tetley.pdf>