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Transport Law *de lege ferenda*: 4th Annual Young Academics' Vision on Tomorrow's Transport Law – Translawfer 2016 Seoul Conference

Presentation Abstracts

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SGEI and Transport: The Struggles of the Youngest EU Member State

Bearing in mind the EU Member states' differing legal cultures, traditions, as well as the social and historic context, it comes as no surprize their differing approach to public services and in particular to services of general economic interest (SGEI). The importance of these services is huge, both in the context of the EU integration and common market on one side and from the perspective of the intrinsic agendas of the Member States on the other. This presentation is meant to introduce and analyse the regulatory framework of the SGEI in the youngest EU Member State - the Republic of Croatia – and thereby focus on the transport sector. To that end, the presentation will address the Croatian regulatory and policy choices in respect of maritime line transport along the Croatian coast, airline routes between the islands and the mainland, regional airports, railways, etc., and in particular, address the way such services are being financed. In addition, the presentation will analyse the existing SGEIs in the field of transport in Croatia from the perspective of the EU legislation on the subject matter. Existing Croatian measures will therefore be placed within the framework of what is known as the latest EU "SGEI Package". Namely, at the beginning of 2012 the European Commission, on the basis of its administrative practice and the substantial influence the Court of the EU's case law, in particular the

famous judgment in Altmark Trans, completed the drafting of a revised "package" concerning services of general economic interest. The new "package" consists of two soft law instruments (a Communication and a Framework), a Commission Decision, and a *de minimis* Regulation. In addition, Regulation 1370/2007 of 23 October 2007 on public passenger transport services by rail and by road is also of key importance to the transport sector. This Regulation implements the provision of Article 93 of the TFEU, which represents *lex specialis* with regard to Article 106(2) TFEU, laying down the rules applicable to fees payable for the performance of public services in the land transport sector, while its application on passenger transport by inland waters remains a discretionary right of the member states. As for the maritime and air transport sector, such an across-the-board exemption is provided for by the aforementioned Commission Decision provided that the fees payable for these services are harmonised with both the special regulations for air transport and maritime cabotage, where applicable, and with Article 106(2) TFEU, provided that they are within the limits based on the average annual number of passengers, seeing as this calculation more precisely reflects economic reality of these activities and their significance as services of general economic interest.

Leonida Giunta

Safety in a liberalized market for marine services: European cases

Objectives

The paper will focus on the possible future developments of the regulation of technical-nautical services – namely pilotage, towage and mooring – in the European framework. In particular, the article aims at investigating whether and to what extent it is possible a progressive liberalization of the provision of such services.

The issue is to analyze what is the best legal framework to balance the demand of compliance with the safety standards, which are becoming higher and higher, as well as the need to ensure a universal service, with the principles of competition and liberalization. Such a legal framework should be able to give the guidelines to make the most efficient use of the (limited) available resources, both structural, human, financial and technological for the safety-related port services.

Data & Methodology

In recent times, there has been a progressive increase in the levels of safety and security, which could be seen as an obstacle to a wide liberalization of the provision of technical-nautical services, and also to the recognition of the right of self-handling for the shipping companies which demonstrate appropriate technical and organizational capacity.

The fear that the introduction of the right of self-handling of the technical-nautical services can lead to a race to the bottom in relation to the safety standards, collides with the need to increase competitiveness of ports and with the tendency to minimize costs for port users and final consumers.

In order to achieve the above-mentioned objectives of the research, it is essential to answer three main questions, namely who decides on safety standards, how should be structured the organization of technical-nautical services and who decides the prices of those services.

Expected results

The research will show that is essential to ensure, both at European and international level, an effective uniformity of safety standards through regulation by transnational bodies, such as the IMO.
Then the paper will explain the reasons is considered appropriate to liberalize the market and allow, where possible, the right to self-handling by shipowners.
Finally, with regard to the price fixing of the services, the importance to adopt a tariff system structured on a "price-cap" method, which establishes the maximum annual variation in the rates allowed, will be shown, even if with a flexible approach.

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DO AIRPORTS HOLD A DOMINANT POSITION IN THE MARKET? RECENT DEVELOPMENTS UNDER EU COMPETITION LAW *

An airport is a "complex of runways and buildings for the take-off, landing and maintenance of civil aircraft, with facilities for passengers", the access to which is a market different from that for the provision of air transport services. However, both markets are mutually dependent on one another, since the (upstream) market of access to the airport infrastructure is a precondition for the functioning of the (downstream) market for the provision of air transport services. Moreover, airports are considered bottleneck facilities because, even though no "tracks" are required during the flight, a specific infrastructure for take-off and landing is imperative; and such infrastructure generally does not —due to the difficulty to duplicate the resource— face competition in a given geographical area. In the light of the aforementioned considerations, authors and courts have traditionally claimed that airport managers enjoy a dominant position in the market for the access to the infrastructure, both by airlines and other users (e.g. handling, off airport parking or land transport service providers), the abuse of which is sanctionable under article 102 of the Treaty of Functioning of the European Union. However, recent developments on the air transport market require a more differentiated approach. On the one hand, a certain duplication of take-off and landing facilities is commonplace today where "regional" airports compete with former dominant metropolitan airports, and major airport hubs compete with each other although they are thousands of kilometres away. On the other hand, existing competition between airports has increased the market power of airlines to such a degree that the latter's decision to abandon a minor airport may lead to its collapse.
The paper aims at analysing to what extent airports hold a dominant position in the market and which have been the most frequent forms of abuse in the past. Attention is also paid to whether the application of antitrust law to airports is still an issue today or whether it has been replaced entirely by sector specific regulation, in particular, the EU-directives on airport charges and ground handling.

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Upcoming UAV Regulations: Global Way Forward

The presentation and the follow-up paper will examine a number of up-coming or already enacted regulations with regard the operation of unmanned aerial systems (UAS). With a galloping technological progress in unmanned aerial vehicles (UAV) development, a different variety of interested stakeholders (various types of industries, governments, individuals) have expressed a keen interest in utilizing the UAV and UAS in their daily (non-military) operations. The lack of concrete regulation of such operations has rendered governments around the Globe vary, having in mind a significant lack of information with regard the use of UAV and UAS, and possible legal implication with regard the responsibility and liability – in particular with regard the safety and security issues. Thus far, a number of countries around the Globe, particularly within the EU, have enacted full or provisional acts that have filled the legal gap, thus allowing a sound legal framework for the start of entrepreneurial UAS operations. Currently, the United States and the European Union are developing an enhanced legal framework, parallel to the industry derived efforts in developing safety and security standards. The presentation will particularly focus on the issues of responsibility and liability, insurance (hull and liability), registration and identification.

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Current Trends in Information Security and their Impact on Transport Information Systems

Integration and convergence of information systems across the transportation industry increases the ability to communicate effectively and efficiently. As ICT is increasingly used to control essential transport operations, from navigation to propulsion, freight management, traffic control and communications, at the same time cyber threats have become an important issue, creating problems in all industry sectors that progressively rely on ICT systems.
At the same time, information security threats continuously evolve and become ever more sophisticated and the number of successful attacks is also on the rise with wide spread availability of malicious programs and other hacking tools.
This paper will present an overview of research so far conducted into the matter of identifying relevant threats and trends in information security as well as proposals for curbing information security threats in the transport industry.

M. Bob Kao
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Cyber Risks and the Implied Warranty of Seaworthiness

Cyber risks are a growing concern in the shipping industry. Many commentators have observed the seriousness of cyber threats to ports, ships, and other important maritime infrastructures, and the problem has also entered mainstream consciousness through the media. Insurers, governments, and the International Maritime Organization have all paid greater attention to it recently. However, the risk is difficult to quantify due to the lack of reliable data on system vulnerabilities and actual attacks and the possibility that victims may not want to report their losses to prevent reputational damage or increases in insurance premiums. Although it is important for firms to develop holistic strategies to address cyber security and not solely rely on insurance for loss mitigation, insurance nevertheless still plays a vital role in the overall plan. This paper analyses one particular concept in marine insurance law – the implied warranty of seaworthiness – and explores the issues that may arise in the face of cyber attacks.
Seaworthiness is the concept that ships need to be 'reasonably fit in all respects to encounter the ordinary perils of the sea of the adventure insured' per Marine Insurance Act 1906. In voyage policies, ships must be seaworthy at the commencement of the voyage, while in time policies, it serves as a defence against liability. Seaworthiness in the context of cyber attacks has not been considered by the courts; however this paper discusses potential cyber attack scenarios and how the implied warranty of seaworthiness – including adequate training of the master and crew, documentation, and fitness of the equipment – would be analysed in these situations so as to introduce some predictability for both insurers and the shipping industry.

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The Applicable Discipline to the Carriage Performed by Successive Carriers
Abstract

The lecture focuses on the comparative-contrastive analysis between the provisions of art. 1700 of the Italian Civil Code, entitled "*Trasporto cumulativo*", and the ones laid down by the Chapter VI of the *Convention relative au contrat de transport international de marchandises par route* (known as C.M.R., signed in Geneva on 19th May 1956), entitled "*Dispositions relatives au transport effectué par transporteurs successifs*".
The provisions in analysis have much in common and seem to provide a substantially similar discipline to the *factispecies* of the successive carriers. Nevertheless, they diverge significantly on an essential point. Lacking an express distinction between the "*trasporto cumulativo*" performed exclusively through road routes and the one including also non-road routes, art. 1700 is applicable even in cases of successive carriers who operate using different modes of transport other than road. On the contrary, C.M.R. Convention specifies that its Chapter VI governs only the cases in which the successive carriers are all road carriers. If carriage includes also non-road routes, in the absence of a uniform regulation,

the question arises on the possible application of national rules on multimodal transport, if any, or of the discipline of the so-called transport "*superposé*".
The different approach of the two regulatory systems leads significant consequences, especially in terms of the applicable discipline – particularly with regard to the liability of carriers, the interruption of the prescription and the determination of the delay – to cases of successive carriers who use different modes of transport for the execution of a single contract of international carriage.

Peter Uhno Lee

Is a Non-negotiable Electronic Transport Record Competitive under the Rotterdam Rules?

A bill of lading traditionally has three functions: receipt of the goods shipped; evidence of the contract of carriage; and document of title. A sea waybill, non-negotiable transport document, serves the first two functions – this means that a consignee can demand delivery of the goods without presentation of any transport document. Digitization of transport documents have been facing challenges mainly due to difficulty of creating electronic alternative that can perform the document of title function. This is not an issue with the non-negotiable transport document. The functions of receipt of the goods and evidence of the contract of carriage are mostly recognized in electronic form, and thus electronic non-negotiable transport records have been already put to practical use for many years. Rotterdam Rules regulate the right of control respectively when different types of transport documents are used. When non-negotiable transport documents (or electronic equivalents) are issued, the shipper is entitled to exercise, and even transfer the right of control by notification to the carrier. In other words, goods are controlled merely by (electronic) notification by the controlling party. The transferability of right of control as well as the record-free convenience makes more attractive to choose non-negotiable electronic transport records – mainly because they may substitute some functions of negotiable records. For example, the right of control entitles a consignee to replace himself with another by notifying the carrier; the controlling party is entitled to delivery of goods, and thus may also be entitled to claim damages against the carrier. The right of control may be used as security by transferring this right to bank. This can be achieved by transfer of exclusive control, if negotiable records were used. However, even if the right of control could fulfil most functions of traditional negotiable documents, use of non-negotiable over negotiable records may be still difficult. For a practical reason, a carrier has not set up an electronic system to manage notifications and tracking of transferable right of control. Also, carrier is required to provide such a system to the convenience of banks for the purpose of use of the right as security. Carriers and banks should establish a high level of trust to successfully furnish a reliable tracking record.

JUAN PABLO RODRIGUEZ
CARLOS III UNIVERSITY OF MADRID (SPAIN)

**The period of responsibility of the carrier under the Rotterdam Rules.
New wine into old wineskins**

The gradual loss of uniformity suffered in recent times by maritime transport law (*vid*. HR, HVR, Hamburg Rules, Multimodal Transport Convention, etc.), has brought, firstly to the CMI, and secondly, to UNCITRAL, to elaborate a new International Convention on Contracts for the International Carriage of Goods (wholly or partly) by Sea (known as Rotterdam Rules). One of the most important articles of this Convention is dedicated to the "carrier's period of responsibility" (art. 12). This prescribes the carrier's responsibility for the period from the time that the carrier or a performing party receives the goods for carriage to the time of their delivery (paragraph 1).
Additionally, paragraph (3) of the article, on the one hand, allows the parties to a contract of carriage to agree on the time and location of receipt and delivery of the goods, whereas, on the other hand, states the invalidity of any provision in the contract of carriage that provides the time of receipt of the goods subsequent to the beginning of their initial loading or the time of delivery prior to the completion of their final unloading.
The purpose of this communication is to take a wide approach to article 12 of the Convention, specially paragraph (3), unraveling its "controversial" drafting process and various important features, such as: (i) being a conservative article within the modernized legal regime of the Rules, specially in maritime contracts of carriage (*tackle to tackle*); (ii) having a clear relevance in the multimodal aspects of the Convention (*door to door contracts*), where the custody of the goods has become more and more important; and (iii) illustrating the "freedom of contract" principle adopted, regarding the period of responsibility, under this international Instrument.

Jeoung Wook Lee
Cho & Lee

Introduction of the Carriage of Goods by Sea Law (Article 791 to Article 816 of the Korean Maritime Law)

The Korean Maritime Law was enacted on 20 January 1962 as the Fifth Chapter of the Korean Commercial Code. About 30 years later, on 31 December 1991, it was partly amended and 16 years thereafter, on 3 August 2007, it was substantially re-amended. The Amended Maritime Law Section (Book V- Maritime Commerce) is comprised of Chapter I (Marine Enterprise) and II (Carriage and Charter). The said Chapter II provides that Section I (Carriage of Individual Goods), Section II (Contract of Carriage of Passengers), Section III (Voyage Charter), Section IV (Time Charter), Section V (Bareboat Charter) and Section VI (Transport Document). While Korea has neither ratified nor acceded to the Hague Rules 1924, the Hague-Visby Rules 1968, the Hamburg Rules, or the UN Convention on Contracts for the International Carriage of Goods, Korea has adopted most provisions of the Hague-Visby Rules 1968 in the Korean Maritime Law. This presentation will mainly concentrate on the introduction of the said Section I of Carriage of Individual Goods, which stipulates the responsibility and liabilities of the shipper and the carriers, liability exemption and limitation of liability of the carriers, the carriers' liability in tort, disposal of unlawful and dangerous goods, the consignee's notice of partial loss of or damage to goods, the amount of the freight, liability of ship-owner when a voyage charterer or a time charterer has entered into the contract of carriage with a third party and the applicable time bar, etc.

CHEN Gang
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Rethinking Seafarers' Access to Jurisdictions over Labour Matters

International seafarers, as a community of geographically mobile workers, often face difficulty in accessing the ascertained jurisdiction when labour disputes arise because of the multiplicity of countries exercising authority over their employment relationships and workplaces. The Maritime Labour Convention 2006, which imposes comprehensive obligations upon shipowners toward seafarers, outlines the framework for the relevant agencies with enforcement jurisdiction for seafarer labour matters, including the flag State, port State and labour supplying State. But previous studies show that some State Parties to the Convention can fail to properly exercise their enforcement jurisdictions, leaving the adjudicative jurisdiction as the only alternative to settlement of seafarers' labour disputes. However, because the Convention does not provide any guidance for determining the relevant jurisdiction, nation states have implemented the requirements as they see fit within their domestic statutory rules. This paper firstly is to analyze the current practices and theories on enforcement jurisdiction. Secondly, this paper is to evaluate the current principles of adjudicative jurisdiction which are spelled out of rules of European civil law, English common law, and the practices toward seafarers from countries such as China and the Philippines which contribute the majority of the global seafarer labour supply. By examining the roles of member States in exercising their jurisdictions and reinforcing the importance of maritime employment relationship for seafarers' selection of a specific jurisdiction, the paper recommends amending the Maritime Labour Convention 2006 to assign more obligations and authorities to those maritime labour supplying countries, and to ensure that the Member States allow foreign seafarers to have the same access to the relevant jurisdictions in these countries on the basis of non-discrimination even though the employment relationship proves some minimum linkage only.

Adv. Lorenzo Fabro, lawyer in Genoa

EU Legal Framework for Shipagents

The aim of the presentation is to provide an overview on the shipagents role in the supply chain and analyzing the discipline of responsibility of shipagents under Italian law as well as the main principles about responsibility of shipagents in other EU countries and the relationship between shipagents and carriers/shipowners in EU legal systems.
The presentation will examine the responsibility of shipagents under the Italian Law Nr. 135/1977 as an unique case in the shipping panorama and the opportunity to reform said law in order to harmonize it with international practice.

Particular focus will be on the evolution of the role of the shipagents in the maritime industry and on some cases of responsibility of shipagents during the loading and unloading process.

Jang-Hyun Shin
Suhyup Bank

An introduction of the Korea Maritime Guarantee Insurance Company and its Role in the Korean Shipping Market

After collapsing of a shipping market, several promising shipping companies has been gone bankruptcy or well-known big players, such as STX Pan Ocean and Korea Lines had to rely on court receivership. About 8 years has been passed since a world wide credit crunch gave us terrible shock and this circumstance is still going on especially in the Korea shipping market. It seems Hanjin shipping's filing for court receivership will make Korean shipping players to face a big challenge for a while in terms of finding capital to survive in this harsh market. Fortunately, however, Korea Maritime Guarantee Insurance Company ("KMGIC") was established in year 2015 to support liquidity in financing toward Korean shipping companies. It is a key factor for the KMGIC to support indirect capital injection by providing guarantees those who extend loans as subordinated lenders under a structured shipping finance. It will be a good chance to introduce the KMGIC and consider its role in the unstable shipping market. The KMGIC has also a plan to extend the guarantee toward economical sensitive industries such as shipbuilding, aviation and so on.