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International Transportation Law

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International transportation encompasses a variety of modes of transport and industries, including passenger and cargo transportation by air, ocean, motor, and rail. Ocean shipping saw an increase of liability for those moving cargo through California ports, and a significant deregulation with respect to the Non-Vessel Owning Common Carriers. The FAA Reauthorization Act of 2018 was signed along with updates to free trade agreements among the United States, Korea, Canada, and Mexico. Autonomous transportation is quickly proliferating both domestically and abroad. Lastly, interesting updates in Canada, Italy, and China have far reaching implications for the United States.

I. Ocean Shipping

This year has seen some significant changes that will have a profound effect throughout the ocean shipping industry. These changes include the addition of new drayage laws in California, and revised contracting requirements for Non-Vessel Owning Common Carriers (“NVOCC”).

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

A. CALIFORNIA PORT DRAYAGE REGULATION

As of 2019, beneficial cargo owners (“BCOs”), shippers, and any entity using port drayage services will be exposed to additional liability when moving maritime cargo through California ports.¹ California Senate Bill (SB)-1402 provides for joint and several liability for those using port drayage services from motor carriers that are listed on a blacklist.² The creation of such a blacklist falls to the California Division of Labor Standards Enforcement.³ The list will comprise of motor carriers that have an unsatisfied judgment for a host of employment related reasons, including failure to provide workers compensation insurance, or pay employment taxes or wages.⁴ The hope of this legislation is to provide an economic incentive to utilize reputable motor carriers. It also shifts the burden over to the entities seeking drayage to review and keep thoroughly apprised of motor carriers’ activities. Its aim is also to dissuade motor carriers from not performing their duties because their customers will be ensuring their compliance.

B. NEW CONTRACTING REGULATIONS FOR NON-VESSEL OWNING COMMON CARRIERS

United States federal regulation of maritime activities continued to have a profound presence despite other transportation modes seeing significant strides toward deregulation. Much of that regulation has been centered on contracting among shippers and transportation providers. While not completely deregulated, NVOCCs will benefit from new regulations that permit NVOCC to forgo filing their service and rate agreements with the Federal Maritime Commission (“FMC”), the regulating body for maritime shipping.⁵ This means that NVOCC service agreements will be effective the moment the parties sign, and rate agreements will be active through either signing, electronic acceptance, or by booking a load with an NVOCC.⁶ Rate agreements are now amendable permitting more flexibility.⁷ While NVOCCs will still have to keep their published tariffs up to date and disclose that service and rate agreements are being used, this change should be welcome in an industry already looking to improve efficiency.⁸ Forgoing the filing requirement reduces the regulatory load of the FMC and allows government resources to be directed elsewhere.

1. Cal. 1402, 2018 Leg., Reg. Sess. (Cal. 2018).

2. *Id.*

3. *Id.*

4. *Id.*

5. 46 C.F.R. 531, 532 (2018).

6. *Id.*

7. *Id.*

8. *Id.*

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

TRANSPORTATION LAW 247

II. Aviation

Aviation had significant updates in 2018. On October 5, 2018, the FAA Reauthorization Act of 2018 was signed into law reauthorizing the US Federal Aviation Administration (“FAA”) for fiscal years 2019 through 2023 at a cost of \$97 billion.⁹ Advance cargo manifest requirements have also come into effect for various countries regarding air cargo.

A. FAA REAUTHORIZATION ACT OF 2018

The FAA Reauthorization Act of 2018 contains 1994 sections addressing a variety of subject areas within the jurisdiction of the FAA and Department of Transportation. The wide-ranging details of this comprehensive law are too numerous to include in this report. Some of the issues addressed by the law include airport and aviation infrastructure; air safety issues; international aviation; unmanned aerial systems (“UAS” or drones); transportation security; airline passenger protections and air service improvements; and the promotion of Spaceports.¹⁰ A copy of the law can be found on the Congress.gov website.¹¹

1. *Safety Issues*

The Reauthorization Act has a number of provisions directed at aviation safety. Most are contained in Titles II and III of the law.¹² In addition to mandating numerous safety studies and equipment safety standards, the Act’s new safety provisions also include provisions addressing the transportation of lithium batteries and the safety of flight crews, including their working hours and rest periods.

The Act addresses safe air transportation of lithium cells and batteries by seeking to clarify the legal status of when and how lithium batteries can be transported on airplanes. Within ninety days of October 5, 2018, Section 333 of the Act requires the FAA to conform its regulation of lithium batteries and cells to the regulations adopted by the International Civil Aviation Organization (ICA) 2015-2016 technical requirements for the transport of such batteries.¹³

With respect to flight crews, within thirty days of October 5, 2018, Section 335 of the Act requires the FAA to modify its HOS, or hours-of-service, regulations for flight attendants to provide that such attendants will have a scheduled rest period for at least 10 consecutive hours for every duty

9. H.R.4, 115th Cong. (2018).

10. *Id.*

11. H.R. 302, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/302/text?q=%7B%22search%3A%5B%22FAA+Reauthorization%22%7D&r=3> (last visited Mar. 12, 2019).

12. H.R.4 Title II, III.

13. *Id.* § 509(b)(5)(B).

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

248 THE YEAR IN REVIEW

[VOL. 53

period of fourteen hours or less.¹⁴ Section 335(b) requires airlines to produce fatigue risk management plans for their employees.¹⁵

2. *Unmanned Aircraft Systems – UAS or Drones*

Title III, Subtitle B of the Act addresses a significant number of issues regarding the regulation of drones. Section 349(a) of the law amends 49 U.S.C. § 44809 to establish rules providing for recreational operations of UAS, including a requirement that operators pass a test on aeronautical knowledge and that the UAS be flown below 400 feet above ground level ceiling.¹⁶ With respect to commercial operations, including commercial package delivery, Section 348 of the Act amends 49 U.S.C. § 44808 to require the FAA to allow such operations via an update to its existing regulations by October 5, 2019.¹⁷ In adopting regulations, the FAA is required to consider risk assessments and “performance-based requirements.”¹⁸

The Act authorizes the FAA to approve the operation of drones by government agencies for such activities as firefighting and policing.¹⁹ Section 347 of the Act adds 49 U.S.C. § 44807 authorizing the FAA to issue permits to UAS for “special authority,” including operations beyond the visual line of sight of the UAS operator.²⁰ The FAA is required to use a “risk-based approach” when issuing such permits to determine if the UAS can safely navigate.²¹ Congress also retained a program for deploying commercial and research drones in the Arctic on a permanent basis in Section 344 of the Act.²²

Given that drones are a developing technology, Congress also mandated that a number of studies and reports by the FAA include UAS and drones in their analysis and study groups. This mandate includes codification of the Safety Oversight and Certification Advisory Committee, with a requirement that at least one UAS manufacturer or operator be a member of the Committee;²³ the creation of a FAA Task Force on Flight Standards Reform, which must also include at least one member from the UAS industry;²⁴ and an update of the FAA Comprehensive plan, including details regarding UAS activity.²⁵ The FAA is also required under the Act to establish safety

14. *Id.* § 312(a)(2)(A).

15. *Id.* § 312(b).

16. H.R.4 § 34; *see also* 49 U.S.C. § 44809 (2018).

17. 49 U.S.C. §44808(a) (2018).

18. *Id.* §44808(b).

19. H.R.4 § 347.

20. 49 U.S.C. § 44807 (2018); H.R.4, § 347 (2018).

21. 49 U.S.C. § 44807; H.R.4, at § 347.

22. H.R.4 § 45502(c)(1).

23. *Id.* § 202.

24. *Id.* § 232.

25. *Id.* § 340.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

TRANSPORTATION LAW 249

standards related to the design, production, and modification of small UAS.²⁶

3. *Passenger Issues*

Although many consumer advocates expressed some disappointment in the final version of the law, Congress included a number of “consumer friendly” provisions in the FAA Reauthorization Act. These provisions include a ban on all cell phone calls while on airplanes²⁷ and the use of electronic cigarettes.²⁸ Section 425 of the Act, also known as the “Transparency Improvements and Compensation to Keep Every Ticketholder Safe Act of 2018” or the “Tickets Act,” prohibits airlines from removing paying passengers involuntarily from the plane once they have boarded or from denying them the right to board the plane once their ticket has been collected or scanned by a gate agent.²⁹

Congress also directed the FAA to examine issues regarding passengers’ comfort and safety when on an airplane. Although many consumer advocates suggested that this will simply cement current standards rather than determine whether those standards are acceptable, the law also requires the FAA to issue regulations by October 5, 2019, establishing minimum airline seat width, length, and pitch.³⁰ Congress also required the Comptroller General of the United States to submit a report to Congress within 180 days of enactment of the Act on the availability of lavatories on commercial aircraft, including the extent to which air carriers are reducing the size and number of lavatories to add more seats and whether this creates passenger lavatory access issues.³¹

4. *Foreign Regulations*

The Act allows the FAA to accept a non-US country’s airworthiness directive if the directives are from a country where the product is designed.³² It also requires the FAA to assist US companies if they are experiencing a delay in receiving a foreign airworthiness directive.³³ Congress also requires the FAA to have a foreign engagement plan within one year³⁴ and to exercise leadership on creating a global approach to improving aircraft tracking by working with the International Civil Aviation Organization (“ICAO”), other international organizations, and the private sector.³⁵

26. *Id.* § 345.

27. 49 U.S.C. 41725 (2018); H.R.4 § 402.

28. 49 U.S.C. 41706 (2018); H.R.4 § 534.

29. S. 947, 115th Cong. § 2 (2018).

30. H.R.4 § 541.

31. *Id.*

32. *Id.* § 252.

33. *Id.* § 253(a)(3).

34. *Id.* § 253(b).

35. *Id.* § 303.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

250 THE YEAR IN REVIEW

[VOL. 53]

5. *Spaceports*

The FAA Reauthorization Act addressed issues related to space transportation. Section 580(a) of the Act expresses the “Sense of Congress on State Spaceport Contributions.”³⁶ Section 580(b) of the Act adds 51 U.S.C. § 51501 to the US Code, requiring the Secretary of Transportation to establish an Office of Spaceports within the Office of Commercial Space Transportation.³⁷ Among other functions, the Office of Spaceports will support licensing activities for operation of launch and reentry sites; develop policies that promote infrastructure improvements at spaceports; provide technical assistance and guidance to spaceports; and help strengthen the US competitiveness in commercial space transportation infrastructure and “increase resilience for the Federal Government and commercial customers.”³⁸

B. ENFORCEMENT BEGINS FOR AIR CARGO MANIFEST REGULATIONS

Some key cargo manifest regulations moved into their enforcement stage. Both China and the United States have taken two air cargo manifest regulations and moved them into enforcement meaning that non-compliance by air carriers could lead to delays or penalties or both. China’s regulation, commonly known as the China 24 Hour Advance Manifest Regulation, went into effect June 1, 2018.³⁹ Primary to the regulation is for air carriers to report, for international shipments, the full cargo description of what is being carried, the container load plan and full contact details of the shipper and the consignee, including the enterprise code such as the Employer Identification Number (“EIN”) for US companies.⁴⁰ All of this information must be available twenty-four hours prior to aircraft loading, which means that air carriers need to be actively capturing, or have readily on file, shipper and consignee information, in particular the enterprise codes.⁴¹ The regulation itself was established back in 2015, but with only sporadic enforcement up until this year.⁴²

The United States government moved its Air Cargo Advance Screening (“ACAS”) regulation into enforcement in the same month, on June 12,

36. *Id.* § 599(D).

37. 51 U.S.C. § 51501; H.R.4 § 599(D).

38. 51 U.S.C. § 51501; H.R.4 § 599(D).

39. *General Administration of Customs China (GACC)*, Announcement No.56 [2017], <http://www.customs.gov.cn/customs/302249/302266/302267/747313/index.html> (last visited Mar. 13, 2019).

40. Greg Knowler, *China Shippers Risk Delays if they Lack Advance Customs Filing*, JOURNAL OF COMMERCE (May 31, 2018), https://www.joc.com/regulation-policy/customs-regulations/china-shippers-risk-delays-if-they-lack-advance-customs-filing_20180531.html.

41. *Id.*

42. *Id.*

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

TRANSPORTATION LAW 251

2018.⁴³ ACAS requires the advanced submission of air cargo information for shipments arriving in the United States from a foreign location.⁴⁴ The ACAS program was initially set up as a voluntary public/private cooperation with air carriers to use advance information to identify and intercept high risk shipments in advance of them being loaded on planes.⁴⁵ Now that it is mandatory, it is intended to enhance aircraft and passenger safety alike by identifying and preventing the loading of any high risk air shipments destined for the United States.⁴⁶

III. Developments in Free Trade Agreements

Free Trade Agreements (“FTAs”) in North America saw a turbulent year in 2018 with the re-opening of the North American Free Trade Agreement (“NAFTA”) negotiations, withdrawal of the US from the Trans-Pacific Partnership, implementation of the Canada-EU Comprehensive Economic and Trade Agreement, and the collapse of negotiations for the US-EU Transatlantic Trade and Investment Partnership. This section reviews developments of note to the transportation community resulting from FTA changes this year with a focus on North America.

A. THE US-MEXICO-CANADA FREE TRADE AGREEMENT

The principal (and obvious) update for NAFTA in 2018 is the US-Mexico-Canada Free Trade Agreement (“USMCA”) that, once ratified, will supersede and supplant it, as reached in principle by all three parties in September.⁴⁷ If the USMCA is ratified, it would cause, among other things, a replacement of Chapter 12 of NAFTA (on cross-border trade) with a more comprehensive and liberal Chapter 15.⁴⁸ The proposed text would, among other things, remove *all* the quantitative restrictions that the three parties had been allowed to implement under NAFTA, relating to the quantity and/or value of services and service providers in the market.⁴⁹ In addition, Chapter 20 “Intellectual Property Rights” of the USMCA will establish stricter controls against counterfeit goods, and give customs officials the

43. See 83 C.F.R. § 122.48b (2018).

44. *Air Cargo Advance Screening (ACAS)*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/border-security/ports-entry/cargo-security/acas> (last visited Mar. 13, 2019).

45. *Air Cargo Advance Screening (ACAS) Fact Sheet*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/sites/default/files/assets/documents/2018-Jun/ACAS%20Fact%20Sheet%20060518A%20FINAL.pdf>. (last visited Mar. 13, 2019).

46. *Id.*

47. See *A New Canada-United States- Mexico Agreement*, GOVERNMENT OF CANADA, <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/usmca-aeumc/index.aspx?lang=eng> (last visited Mar. 13, 2019); United States-Mexico-Canada Agreement, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> (last visited Mar. 13, 2019).

48. United States-Mexico-Canada Agreement, Can-Mex.-U.S., art. 15.2, Nov. 30, 2018.

49. *Id.*

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

252 THE YEAR IN REVIEW

[VOL. 53

discretion to inspect, detain, and destroy suspected counterfeit goods at the border.⁵⁰ Both of these provisions would have an important general spill-over effect on cross-border transport activity and in particular with respect to flow (and delays, as in the case of counterfeit goods) of commercial carriers.⁵¹

B. UPDATES TO THE UNITED STATES – KOREA FREE TRADE AGREEMENT

President Trump made history by signing off on the revision to the Free Trade Agreement between the United States of America and the Republic of Korea (“US Korea FTA”), which will amend the original US Korea FTA (“Amendment”), on September 24, 2018.⁵² Both nations agreed to effectuate the Amendment by January 1, 2019.⁵³ Although the Republic of Korea needs its legislative approval, the Amendment has a good chance of going into effect without any further modification. It was a significant agreement for the Trump administration especially given its timing in September, ahead of the upcoming trade negotiations with different regional and individual bilateral parties, including North American Trade Agreement renegotiation, China tariff negotiation, and potentially joining in the ASEAN Free Trade Agreement. The Amendment consists of the following four provisions: (1) Modification of the General Notes of the US Tariff Schedule,⁵⁴ (2) Modification of the US Tariff Schedule Annex 2-B,⁵⁵ (3) Modification of trade remedies in Chapter 10,⁵⁶ and (4) Modification of investor treatment in Chapter 11.⁵⁷

As for the transportation industry’s impact, the Amendment will increase the US truck quota by one hundred percent, from 25,000 to 50,000 units per year, allowing more US truck sale.⁵⁸ Potential US quota on Korean steel products and US tariff on Korean aluminum products may affect the US manufacturing industry, and other heavy equipment and infrastructure industries.⁵⁹ Furthermore, although it is not a part of the Amendment, the US Treasury has been discussing the foreign currency exchange rate policy

50. *Id.* art. 20.82(12).

51. *See id.* art. 15.2, 20.82.

52. *Protocol Amendment Agreement*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/sites/default/files/files/agreements/FTA/KORUS/KORUS%20Protocol%20Amending%20Agreement%20-%20Signed.pdf> (last visited Mar. 13, 2019).

53. U.S.-South Korea (KORUS) FTA, CONGRESSIONAL RESEARCH SERVICE (Dec. 28, 2018) <https://fas.org/sgp/crs/row/IF10733.pdf>.

54. *Protocol Amendment Agreement*, *supra* note 43.

55. *Id.*

56. *Id.*

57. *Id.*

58. *New U.S. Trade Policy and National Security Outcomes with the Republic of Korea*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/march/new-us-trade-policy-and-national> (last visited Mar. 13, 2019).

59. *Id.*

and its ongoing macroeconomic effect on both nations.⁶⁰ Korea is the sixth largest trading partner according to 2017 trade statistics, with approximately \$120 billion goods trade, \$35 billion services trade, and \$93 billion bilateral foreign direct investments.⁶¹

IV. New Technology Developments

A. AUTONOMOUS SHIPS

In March 2017, the CMI Working Group on Unmanned Ships circulated a questionnaire among the Member Associations of the CMI with the aim to identify the nature and extent of potential obstacles in the current international legal framework to the introduction of (wholly or partly) unmanned ships.⁶² As of February 13, 2018, the Working Group has received responses from the following delegations: Argentinian, Brazilian, British, Canadian, Chinese, Croatian, Danish, Dutch, Finnish, French, German, Irish, Italian, Japanese, Maltese, Panamanian, Singaporean, Spanish, and the US⁶³

The Maritime Safety Committee (“MSC”) held its ninety-ninth Session at the London Headquarters on May 25, 2018.⁶⁴ The Committee examined answers to questionnaires from several member nations and set a framework for the regulatory scoping exercise.⁶⁵ The Committee finally agreed to focus on the regulatory scoping exercise and instructed the working group to invite submissions to MSC 100 in this respect and to maintain 2020 as the target completion year and to review it in the future, based on progress made with the work on the output.

The Baltic and International Maritime Council (“BIMCO”) will also be joining the International Maritime Organization to facilitate the harmonization of data ahead of the April 2019 deadline, when new mandatory requirements will come into force for automated ship reporting. From April 2019, new mandatory requirements for the electronic exchange of information from ships to the relevant onshore parties when approaching a port will require public authorities to have systems in place to assist ship clearance processes.

60. *Id.*

61. *Korea*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/countries-regions/japan-korea-apec/korea> (last visited Mar. 12, 2019).

62. *Summary of Responses to the CMI Questionnaire on Unmanned Ships*, CMI IWG, <https://comitemaritime.org/wp-content/uploads/2018/05/Summary-of-Responses-to-the-CMI-Questionnaire.docx> (last visited Mar. 12, 2019).

63. *Id.*

64. *Maritime Safety Committee (MSC), 99th Session 16-25 May 2018*, INTERNATIONAL MARITIME ORGANIZATION (May 25, 2018), <http://www.imo.org/en/mediacentre/meetingsummaries/msc/pages/msc-99th-session.aspx>

65. *See Summary of Responses to the CMI Questionnaire on Unmanned Ships*, *supra* note 52a.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

254 THE YEAR IN REVIEW

[VOL. 53]

B. AUTONOMOUS VEHICLES

Autonomous transportation is a technology that allows vehicles to take actions independent of human control.⁶⁶ There are six levels of independence ranging from level one, minimal human interference, to level six, no human presence and control at all.⁶⁷ The lower levels have been in use for some time throughout the transportation industry, especially in aviation.

But the use of autonomous vehicles is beginning to surge. Factories⁶⁸ and manufacturers⁶⁹ are using automated trucks commercially, while retailers are testing public reception to the use of automated vehicles for deliveries.⁷⁰ In Sweden, a fleet of driverless buses started making their way along a one and a half kilometer stretch from the science suburb Kista to central Stockholm.⁷¹ In Gothenburg, one hundred driverless Volvos were tried out as part of a project to have more driverless cars introduced.⁷² Singapore has built a mini town served only by automated vehicles. The two-hectare complex, unveiled in November, has intersections, traffic lights, bus stops, and pedestrian crossings, all built to the specifications that Singapore uses for its public roads.⁷³ China also aspires to have thirty million autonomous vehicles by the end of the next decade.⁷⁴

While technology is continuing to move along, increased regulation and new laws in this area are increasing.⁷⁵ For instance, the United States

66. *Autonomous Car*, TECHOPEDIA, <https://www.techopedia.com/definition/30056/autonomous-car> (last visited Mar. 12, 2019).

67. Loz Blain, *Self-Driving Vehicles: What are the Six Level of Autonomy?*, NEW ATLAS (June 7, 2017), <https://newatlas.com/sae-autonomous-levels-definition-self-driving/49947/>.

68. Tamara Chuang, *Self-Driving Truck's Beer Run on Colorado's Interstate 25 Gets Guinness World Record*, DENVER POST (June 29, 2017), <https://www.denverpost.com/2017/06/29/self-driving-beer-truck-world-record/>.

69. Alex Davies, *Self-Driving Trucks are Now Delivering Refrigerators*, WIRED (Nov. 13, 2017), <https://www.wired.com/story/embark-self-driving-truck-deliveries/>.

70. The Associated Press, *Ford, Walmart Test Self-Driving Grocery Delivery in South Florida*, TAMPA BAY TIMES (Nov. 14, 2018), <http://www.tampabay.com/business/ford-walmart-test-self-driving-grocery-delivery-in-south-florida-20181114/>.

71. Emma Lofgren, *Stockholm get Scandinavia's First Driverless Buses on Public Roads*, THE LOCAL (Dec. 27, 2017), <https://www.thelocal.se/20171227/stockholm-gets-scandinavia-first-driverless-buses-on-public-road>.

72. Heather Farmbrough, *Ugly But Useful: Stockholm Introduces Driverless Buses*, FORBES (Jan. 31, 2018), <https://www.forbes.com/sites/heatherfarmbrough/2018/01/31/ugly-but-useful-stockholm-introduces-driverless-buses/#1166a60c60f4>.

73. Kyunghye Park, *Singapore Built a Dedicated Town for Self-Driving Buses*, BLOOMBERG (June 4, 2018), <https://www.bloomberg.com/news/features/2018-06-04/singapore-built-a-town-to-test-autonomous-self-driving-vehicles>.

74. Yan Zhang, *Wanted in China: Detailed Maps for 30 Million Self-Driving Cars*, BLOOMBERG (Aug. 22, 2018), <https://www.bloomberg.com/news/articles/2018-08-22/wanted-in-china-detailed-maps-for-30-million-self-driving-cars>.

75. See Brock, L., & Tropnas, L., *Survey on the regulations of autonomous vehicles*, 10 JOURNAL OF MULTIDISCIPLINARY RESEARCH No. 3, at 23-44, <http://www.jmrpublication.org/Portals/JMR/Documents/JMR%2010-3%20Fall%202018-To%20be%20indexed.pdf>.

Department of Transportation and the National Highway Traffic Safety Agency released new federal guidance for *Automated Driving Systems (ADS): A Vision for Safety 2.0*.⁷⁶ At the state level, twenty-three states have authorized operation of autonomous vehicles.⁷⁷ California leads the pack,⁷⁸ and others are following closely.⁷⁹ Some states are also working to take proactive steps to address the ways this emerging technology will be utilized beyond just the presence on the road. Mississippi issued regulations or guidance that include a form of commercial land transport called “platooning,” where a group of individual motor vehicles travel in a unified manner at electronically coordinated speeds closer than would be reasonable and prudent without such coordination.⁸⁰

New regulations are also being seen in other countries as well. China has instituted National Rules subsequent to local regulations on self-driving car road testing in Beijing, Shanghai, and Chongqing (“Local Regulations”), and took effect May 1, 2018.⁸¹ On April 11, 2018, the Ministry of Industry and Information Technology (“MIIT”), the Ministry of Public Security (“MPS”) and Ministry of Transport (“MOT”) jointly issued the Administrative Rules on Intelligent and Connected Vehicle Road Testing (Trial) (the “National Rules”).⁸² Singapore introduced Autonomous vehicle rules (“AV Rules”) in February 2017 providing rules for trials of autonomous vehicles and automated vehicle technology, and prospective use of autonomous vehicles.⁸³

V. Selected Country Updates

Some interesting updates have occurred outside of the United States this year that have the potential to affect the whole transportation sector.

76. *Autonomous Vehicles Self Driving Vehicles Enacted Legislation*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Nov. 7, 2018), <http://www.ncsl.org/research/transportation/autonomous-vehicles-self-driving-vehicles-enacted-legislation.aspx>.

77. Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Louisiana, Michigan, New York, Nevada, North Carolina, North Dakota, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Vermont and Washington D.C.

78. *Autonomous Vehicles in California*, STATE OF CALIFORNIA, <https://www.dmv.ca.gov/portal/dmv/detail/vr/autonomous/bkgd> (last visited Mar. 12, 2019).

79. S.B. 17-213, 72nd Gen. Assemb., Reg. Sess. (Colo. 2017); Comm. B. 260, Gen. Assem., 2017 Reg. Sess. (Conn. 2017); H.B. 472, 144th Gen. Assemb., Reg. Sess. (GA. 2017); S.B. 116, 2018 Reg. Sess. (Ky. 2018) (allows motor carrier to operate a platoon on Kentucky’s highways); H.B. 1343, 2018 Reg. Sess. (Miss. 2018).

80. H.B. 1343, 2018 Reg. Sess. (Miss. 2018).

81. Mark Schaub, *China Issues Self-Driving Car Road Testing Regulations*, CHINA LAW INSIGHT (Apr. 13, 2018), <https://www.chinalawinsight.com/2018/04/articles/uncategorized/china-issues-self-driving-car-road-testing-regulations/>.

82. *Id.*

83. Anne L. Petterd, *Autonomous Vehicle Landscape in Singapore and China Continues to Evolve*, LEXOLOGY (Feb. 14, 2018), https://www.lexology.com/library/detail.aspx?g=05a24ec3-027d-4478-b44d-04455db71c8a&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML=email+.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

256 THE YEAR IN REVIEW

[VOL. 53]

A. CROSS BORDER UPDATES IN CANADA

In addition to the USMCA, the following seven transport-related developments affecting Canada merit mentioning. First, while it was a last-minute 2017 development (December 16, 2017), Transport Canada's amendment to the *Commercial Vehicle Drivers Hours of Service Regulations*, under the *Motor Vehicle Transport Act*, is mostly considered, in terms of its impact on carriers, a 2018 development.⁸⁴ This amendment will make it mandatory by 2020 for commercial truck and bus drivers in Canada to use electronic logging devices ("ELDs") to track their activities. ELDs, synced to the vehicles' engines, are currently mandatory in the US, yet paper logs – vulnerable to manipulation – are still relied upon in Canada.⁸⁵

Second, on April 23, 2018, the *Administrative Monetary Penalties and Notices Regulations* were amended to broaden the scope of use of administrative monetary penalties ("AMPs") to promote compliance with the requirements of the *Canada Shipping Act*.⁸⁶ The Regulations will add 572 violations to seven pieces of legislation, including to the *Safety Management Regulations*, *Vessel Pollution and Dangerous Chemicals Regulations*, and *Collision Regulations*.⁸⁷

Third, on May 19, 2018, the *Vehicle Regulations* under the *Motor Vehicle Safety Act* were amended to specify which vehicles may be imported from Mexico, and under what conditions.⁸⁸ Under the NAFTA provisions, as of January 1, 2019, Canada's ability to adopt or maintain restrictions on the importation of used vehicles from Mexico may be curtailed. The proposed amendment "would reduce trade barriers by amending the requirements related to temporary importation, vehicles imported from Mexico, and vehicles imported from the United States and Mexico for parts. . .[delivering] on specific commitments to remove barriers to the importation of used motor vehicles from Mexico."⁸⁹

Fourth, on May 23, 2018, the *Transportation Modernization Act*, which amends the *Canada Transportation Act* with respect to air and railway

84. *Regulations Amending the Commercial Vehicle Drivers Hours of Service Regulations*, GOVERNMENT OF CANADA (Dec. 16, 2017), <http://gazette.gc.ca/rp-pr/p1/2017/2017-12-16/html/reg5-eng.html>.

85. *Id.*

86. *Regulations Amending the Administrative Monetary Penalties and Notices (CSA 2001) Regulations: SOR/2018-86*, GOVERNMENT OF CANADA (Apr. 23, 2018), <http://www.gazette.gc.ca/rp-pr/p2/2018/2018-05-02/html/sor-dors86-eng.html>.

87. *Id.*

88. *Canada Gazette, Part I, Volume 152, Number 20: Regulations Amending Certain Regulations Made Under the Motor Vehicle Safety Act (National Safety Marks and Importation)*, GOVERNMENT OF CANADA (May 19, 2018), <http://www.gazette.gc.ca/rp-pr/p1/2018/2018-05-19/html/reg5-eng.html>.

89. *Id.* This amendment proposes to update the Vehicle Regulations to specify which vehicles may be imported from Mexico and to set out the conditions and the requirements under which these vehicles may be imported into Canada.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

TRANSPORTATION LAW 257

transportation, received Royal Assent.⁹⁰ For air transportation, the Act imposes higher passenger rights standards for commercial airline transportation and loosens international ownership restrictions for Canadian air carriers. It also creates a new process for the review and authorization of arrangements involving two or more transportation undertakings providing air services. For rail travel, the Act makes a series of amendments related to reporting requirements and dispute settlement.⁹¹ It also requires railways to install recording equipment in locomotives and enables shippers to obtain terms in their contracts dealing with amounts due that arise from a railway company's failure to meet service obligations. The Act also amends a constellation of additional and related legislation, including, among others, the *Railway Safety Act*, the *Coasting Trade Act* – allowing empty containers to be repositioned by ships registered in any register – and the *Canada Marine Act*.⁹²

Fifth, on June 20, 2018, *Bill C-21 – An Act to Amend the Customs Act* reached the third reading at the Canadian parliament. This bill is significant for cross-border trade because it includes the added provision that all exported goods (excluding those that end up back in Canada) must be reported.⁹³ This would naturally have varying levels of effect (depending on the carrier's mandate and involvement in freight brokerage or customs logistics) on commercial carriers engaged in cross-border activity by adding an additional layer of compliance for cargo moving across the border.⁹⁴

Sixth, on August 1, 2018, the Canada Border Services Agency (“CBSA”) amended its licensing policy for temporarily-imported vessels.⁹⁵ Now, a coasting trade license⁹⁶ will no longer be cancelled by the CBSA when a vessel leaves Canadian waters, unless the license has expired, or its purpose has been fulfilled. While temporarily-imported vessels will remain subject to any existing CBSA reporting requirements upon departure and re-entry into Canada, this amendment may reduce bureaucratic prolixity and redundancy in cross-border licensing.⁹⁷

90. Christopher Wong, *Changes En Route: Bill C-49 Becomes Law, Canadian Airlines Get New Ownership Rules*, JDSUPRA (May 29, 2018), <https://www.jdsupra.com/legalnews/changes-en-route-bill-c-49-becomes-law-47068/>.

91. Transportation Modernization Act, S.C. 2018, C 10 (Can.), https://laws-lois.justice.gc.ca/eng/AnnualStatutes/2018_10/page-1.html.

92. *Id.*

93. An Act to Amend the Customs Act, B. C-21, 42nd Parl. (2018) (Can.).

94. *Id.*

95. *Coasting Trade Vessels Leaving Canadian Waters*, CANADA BORDER SERVICES AGENCY (Aug. 1, 2018), <https://www.cbsa-asfc.gc.ca/publications/cn-ad/cn18-12-eng.html>.

96. Coasting trade (or sometimes referred to as “cabotage”, meaning point-to-point movements within a sovereign territory by a foreign conveyance) refers to any commercial marine activity within Canadian waters. These activities are regulated and ordinarily reserved in Canada to Canadian registered duty paid vessels, with limited exemptions. Under relevant Canadian legislation, there is a process to temporarily import a foreign or non-duty paid vessel under a coasting trade license when a suitable Canadian-registered duty paid vessel is not available.

97. *Coasting Trade Vessels Leaving Canadian Waters*, *supra* note 95.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

258 THE YEAR IN REVIEW

[VOL. 53]

Seventh, Canada launched a pilot project in early October, regarding the clearing of commercial cargo and conveyances for certain vessels operating in the Arctic. Currently, under the *Reporting of Imported Goods Regulations*, marine carriers must report all cargo and conveyances to the nearest CBSA office, which can prove logistically challenging. Under this pilot project, vessels bound for the Arctic can report and clear their conveyances, crew, and cargo *virtually*. The project could prove especially beneficial in areas where there is a lower CBSA presence.⁹⁸

B. PUNITIVE DAMAGES IN ITALY

In July 2017 and June 2018 respectively, the Italian Supreme Court and the British Court of Appeal issued two important judgments allowing awards of punitive damages. While the British judgment⁹⁹ is just a confirmation of the category of exemplary damages already existing at British common law,¹⁰⁰ the Italian judgment¹⁰¹ brings a striking innovation to the civil law landscape, making American punitive damages awards enforceable in Italy.

A Buyer of Italian-made helmets for motorcycles sued the Florida seller (importer and dealer) for serious injuries allegedly caused by helmet defects. The seller reached a million and a half settlement that included punitive damages, then sued the Italian manufacturer for indemnity.¹⁰² The 17th Judicial Circuit for Broward County (Florida) awarded plaintiff all the requested damages and plaintiff then filed for recognition and enforcement of the award in Italy. The court of Venice allowed recognition and defendant appealed to the Supreme Court, arguing, among other grounds, that punitive damages are not allowed under Italian law and public policy. The Italian Supreme Court affirmed. The Florida award was found not to be contrary to Italian law on tort damages or to Italian “public policy.”¹⁰³

The opinion overrules precedents holding that tort damages have the function only of compensating victims and that punishment of tortfeasors is outside the scope of civil law torts. The Court cites a long list of statutes allowing awards that can be given in addition to pure monetary compensation, like in cases of patents and trademarks,¹⁰⁴ consumer protection,¹⁰⁵ child maintenance,¹⁰⁶ labor and discrimination,¹⁰⁷ and illicit

98. *Arctic Shipping Electronic Commercial Clearances Program*, CANADA BORDER SERVICES AGENCY (Oct. 9, 2018), <https://www.cbsa-asfc.gc.ca/publications/cn-ad/cn18-14-eng.html>.

99. *AXA Insurance UK PLC v. Financial Claims Solutions Ltd.*, [2018] EWCA Civ. 1330 (Eng.).

100. *Rookes v Barnard* [1964] AC 1129 (HL) 34 (Lord Devlin) (appeal taken from Ct. of App.) (UK).

101. Cass. sez. un., 5 luglio 2017, n. 16601, 2017 (It.).

102. *Id.*

103. *Id.* § 2.

104. *Id.* (citing D.Lgs. 10 February 2005, n. 30).

105. *Id.* (citing D.Lgs. 6 September 2005, n. 206, art. 140).

106. *Id.* (citing L. 8 February 2006, n. 54).

107. *Id.* (citing Art. 28 of d.lgs n. 150/2011).

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

TRANSPORTATION LAW 259

eavesdropping.¹⁰⁸ The Court concluded that in the Italian tort system, damages are not limited to achieve mere compensation but have also a “polyfunctional” component of punitive damages.¹⁰⁹ It must be noted, however, that the Court made a specific note that punitive damages must have a “normative foundation” as required by the Italian Constitution.¹¹⁰ Strictly interpreted, this seems to mean that punitive damages would be awarded only where allowed by a statute. But, in its conclusion, the Court solemnly announced this broad principle:

In the current legal system, civil responsibility is not limited to the only task of restoring the assets of the subject who has suffered the injury; the deterrence and the sanctioning of civil liability are also functional components of the system.¹¹¹

The Court found that the Florida award was premised on a “normative foundation” in its own (American) legal system, and thus it was meritorious of recognition.¹¹² The Court cited the evolution of punitive damages in America, from extremes like the famous *BMW* case¹¹³ to the corrections by the *Philip Morris*¹¹⁴ and the *Exxon v. Baker*¹¹⁵ cases (the latter cited with approval and satisfaction for its “one to one” approach).

Thus, on one side, the Court appears to limit punitive damages to statutory sanction (in Italy) and to “legal foundation” in a foreign jurisdiction.¹¹⁶ On the other side, the solemn pronouncement that punitive damages, far from being contrary to public policy, are a functional component of torts and the long list of statutory rules cited in support of this conclusion, may be read as though “the Congress has spoken” and may be the foundation for future straight awards of punitive damages in Italy.¹¹⁷

C. LEGAL INTERPRETATIONS IN CHINA

On May 15, 2018, the Chinese Supreme Court published a judgment clarifying the difference between “voyage” and “underway” in a vessel insurance case.¹¹⁸

108. *Id.* (citing L. 20 November 2006, n. 281).

109. *Id.* (citing to dicta in precedents of the Italian Constitutional Court).

110. *Id.* §§ 7, 8.

111. *Id.* §§ 8.

112. *Id.* § 7.

113. *Id.* (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)).

114. *Id.* (citing *Philip Morris USA v. Williams*, 549 U.S. 346 (2007)).

115. *Id.* (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008)).

116. *See id.* § 8.

117. *Id.*

118. *M/V Lu Rong Yu 1813 and M/V Lu Rong Yu 1814*, 2018 SUP. CT. 413 (Sup. Ct. 2018) (China), <http://wenshu.court.gov.cn/content/content?DocID=1076ca01-1b2c-4548-b581-a93b00ccb0ae>.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

260 THE YEAR IN REVIEW

[VOL. 53]

On June 25, 2011, the shipowner (the insured) attempted to shift two fishing vessels to a safer berth to avoid an upcoming typhoon.¹¹⁹ But both vessels became stranded after losing control and suffered losses. The insurers refused to undertake their insurance liability and the shipowner then filed suit. The cause of accident included the following: (1) the engine of M/V Lu Rong Yu 1813 was at the time temporarily taken out for maintenance and this vessel had no power. MV/ Lu Rong Yu 1814 only had three crew members, but regulations required fish vessels to have five crew members; (2) while MV/ Lu Rong Yu 1814 towed M/V Lu Rong Yu 1813 in, water leaked into the engine of MV/ Lu Rong Yu 1814; and (3) the tow lines between the two vessels were unstably connected. The insurers contended, *inter alia*, that as per article 244.1 of *Chinese Maritime Code*:

Unless otherwise agreed in the insurance contract, the insurer shall not be liable for the loss of or damage to the insured ship arising from any of the following causes: (1) Unseaworthiness of the ship at the time of the commencement of the voyage, unless where under a time policy the insured has no knowledge thereof.¹²⁰

As such, the insurers refused to compensate the insured because the vessels were unseaworthy at the time of the commencement of the voyage.

The Chinese Supreme Court finally held the insurers liable for 75% of the shipowner's losses because the insurance policy provided:

Clause 2 (scope of insurance)

This insurance covers total loss or partial loss of the insured vessel, as well as the salvage costs, if the loss is caused by:

1. Rainstorm, typhoon. . .grounding, collision, contact with any object. . .
2. Latent defect of hull or machinery
3. Negligence of master, chief officer, crew, pilot or ship repair engineers

Clause 3 (exclusions)

This insurance does not cover any loss, which is caused by. . .losses caused by un-seaworthiness of the insured vessel.¹²¹

Second, the shipowner, when knowing that the typhoon was coming, decided to shift the vessels to a safer place (for about four nautical miles) and such decision of the shipowner was not inappropriate. At that time, repair and maintenance of the two vessels was not completed and one of the vessels lacked power requiring it to be towed by the other vessel. But due to insufficient manning, the crew on board were not able to take care of the two vessels at the same time. As such, this accident was caused by reasons of

119. *Id.*

120. *Id.*

121. *Id.*

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

TRANSPORTATION LAW 261

typhoon, fault of ship-owner, and fault of crew jointly, with the typhoon as the main cause.¹²²

Third, seaworthiness as defined in *Chinese Maritime Code* means that the vessel should be in every aspect suitable for her intended voyage and strong enough to resist possible perils of sea that may be encountered during her sea passage.¹²³ The reason why the *Chinese Maritime Code* limits the time for seaworthiness to commencement of voyage is that the risk that the vessel may come across peril in the course of her intended voyage is much higher than staying in port. Objectively speaking, regarding when a vessel stays in port under repair, loading, or unloading, it cannot be guaranteed that the vessel would be in a state suitable for departing the port for sea passages.¹²⁴

As a result, the term “voyage” in article 244.1 of *Chinese Maritime Code* means “vessel’s departure of the port for the sea passage,” thus vessel’s shifting operation in port is not included.¹²⁵ Also, in shipping practice, vessel’s turning from status of mooring, fastening to terminal, stranding to non-mooring, non-fastening, and non-stranding is called “underway.”¹²⁶ Not all “underway” falls under the meaning of “commencement of the voyage” as stipulated in the above-mentioned law. As such, it is not correct for the insurers to be exempt from insurance liability for reason of “losses caused by un-seaworthiness of the insured vessel.”¹²⁷ In this case, the typhoon and crew’s fault are insured risks, but shipowner’s fault is not an insured risk. The court, after deliberation, exercised its judicial discretion to hold that the insurers were liable for seventy-five percent of the shipowner’s loss, and the shipowner itself shall assume the remaining twenty-five percent loss.¹²⁸

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

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