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International Transportation Law

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AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

International Transportation Law

ANDREW M. DANAS AND PHILIP PENG*

This article summarizes important developments in 2015 in international transportation law.

I. U.S. Ocean Shipping Legal Developments

A. ANTITRUST VIOLATIONS IN OCEAN TRANSPORT OF VEHICLES

In 2015, the Antitrust Division of the U.S. Department of Justice continued its investigation into price fixing in the ocean shipping industry, securing guilty pleas from four individual executives of non-U.S. shipping companies¹ and filing criminal felony indictments against three other executives.² Three corporations had previously agreed to

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1. See generally Press Release, U.S. Department of Justice, Ocean Shipping Executive Pleads Guilty to Price Fixing on Ocean Shipping Services for Cars and Truck (Jan. 30, 2015) (on file with <http://www.justice.gov/opa/pr/ocean-shipping-executive-pleads-guilty-price-fixing-ocean-shipping-services-cars-and-trucks>); Press Release, U.S. Department of Justice, Second Ocean Shipping Executive Pleads Guilty to Price Fixing on Ocean Shipping Services for Cars and Trucks (Feb. 6, 2015) (on file with <http://www.justice.gov/opa/pr/second-ocean-shipping-executive-pleads-guilty-price-fixing-ocean-shipping-services-cars-and>); Press Release, U.S. Department of Justice, Third Ocean Shipping Executive Pleads Guilty to Price Fixing on Ocean Shipping Services for Cars and Trucks (Mar. 10, 2015) (on file with <http://www.justice.gov/opa/pr/third-ocean-shipping-executive-pleads-guilty-price-fixing-ocean-shipping-services-cars-and>); Press Release, U.S. Department of Justice, Fourth Ocean Shipping Executive Pleads Guilty to Price Fixing on Ocean Shipping Services for Cars and Trucks, (Ma. 26, 2015) (on file with <http://www.justice.gov/opa/pr/fourth-ocean-shipping-executive-pleads-guilty-price-fixing-ocean-shipping-services-cars-and>).

2. See generally Press Release, U.S. Department of Justice, Three Ocean Shipping Executives Indicted for Fixing Prices and Rigging Bids (Oct. 6, 2015) (on file with <http://www.justice.gov/opa/pr/three-ocean-shipping-executives-indicted-fixing-prices-and-rigging-bids>); Indictment, United States v. Aoki, Criminal No. GLR-15-0524 (Oct. 6, 2015).

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plead guilty in the long-running investigation, paying criminal fines totaling more than \$136 million.³

The ongoing investigation involves an alleged conspiracy by international ocean carriers that may have commenced as early as February 1997 and continued to at least September 2012. The Department of Justice investigation focused on whether the ocean carriers and their executives engaged in a conspiracy to fix prices, allocate customers, and rig bids on international ocean shipping services for roll-on, roll-off cargo to and from the United States and elsewhere. Roll-on, roll-off cargo is non-containerized cargo that can be both rolled onto and rolled off of an ocean-going vessel. Examples of this cargo include new and used cars and trucks and construction and agricultural equipment.

Among the various allegations set forth in the separate guilty pleas secured by the U.S. Department of Justice are claims that the ocean carriers and their co-conspirators carried out the conspiracy by exchanging customer pricing information; agreeing to refrain from bidding against each other; agreeing on prices; and allocating customers and routes. The criminal complaints alleged that these actions occurred as a result of meetings, communications, and by other means. The Department of Justice stated that the companies then charged fees in accordance with those agreements for international ocean shipping services for certain roll-on, roll-off cargo to and from the United States and foreign countries.

B. PRIVATE ANTITRUST CLAIMS ARE BARRED AND PREEMPTED BY THE SHIPPING ACT

The United States District Court for the District of New Jersey ruled in August 2015 that the class action claims of purchasers of vehicles and goods affected by the alleged and admitted price-fixing conspiracy by ocean carriers could not proceed because their federal antitrust claims were barred by the Shipping Act.⁴ The court further held that the plaintiffs' state law antitrust claims were conflict preempted by the same statute.⁵

In *In Re Vehicle Carrier Services Antitrust Litigation*, the court held that the Shipping Act explicitly barred the plaintiffs' claims for damages and injunction relief under the Clayton Act⁶ for violations of the federal antitrust laws. The allegedly unlawful conduct upon which the plaintiffs' antitrust lawsuit was based involved allegations of price fixing and collusion pursuant to carrier agreements that were not filed with the Federal Maritime Commission (FMC). In essence, the court found that the plaintiffs were alleging that the defendant carriers engaged in conduct prohibited by the Shipping Act. The court noted that under 46 U.S.C. § 40307(d), "[a] person may not recover damages under section 4 of the Clayton Act (15 U.S.C. 15), or obtain injunctive relief under section 16 of that Act (15 U.S.C. 26), for conduct prohibited by [the Shipping Act]."⁷ The court thus dismissed with prejudice the plaintiffs' Clayton Act claims against the defendant carriers.

3. See Press Releases cited *supra* note 1.

4. See generally 46 U.S.C. §§ 40101-41309 (2012).

5. *In re Vehicle Carrier Serv. Antitrust Litig.*, MDL No. 2461, 2015 U.S. Dist. LEXIS 114691, at *49 (D.N.J. Aug. 28, 2015).

6. See *id.*; see generally 15 U.S.C. § 15 (2012).

7. *Vehicle Carrier Serv.*, 2015 U.S. Dist. LEXIS 114691, at *30.

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In a ruling of first impression, the district court also found that the plaintiffs' state law antitrust claims were conflict preempted by the Shipping Act. While recognizing that there were no prior opinions making this direct holding, and emphasizing that the plaintiffs would still have a cause of action before the Federal Maritime Commission for alleged violations of the Shipping Act by the defendant carriers, the lower court held that:

With this [legislative] history and case law in mind, the Court concludes that [plaintiffs'] proposed application of state law conflicts with the congressional purpose of minimizing government intervention and regulatory costs. 46 U.S.C. § 40101(1). Permitting private actions under a patchwork of state laws for the same exact conduct that is exempt from federal antitrust law, 46 U.S.C. § 40307(d), and within the purview of the FMC complaint process, *id.* § 41301, directly undermines the "certainty and predictability" Congress sought to achieve in passing the Shipping Act of 1984. *See* House Report at 4, 169; *see also id.* at 25, 190 ("[T]o the greatest extent possible, members of the ocean liner industry should be . . . free of . . . vague standards, or threatened penalties under changing interpretations of antitrust laws."). The state laws at issue cannot consistently stand together with the statutory scheme and Congress's stated purposes in passing the Shipping Act of 1984 and are therefore preempted.⁸

C. FMC FINES FOR ALLEGED SHIPPING ACT VIOLATIONS

In August 2015, the U.S. Federal Maritime Commission (FMC or Commission) announced eight compromise agreements for violations of provisions of the U.S. Shipping Act, resulting in the recovery of civil penalties totaling \$1,227,500. The agreements were reached with one vessel-operating common carrier, United Arab Shipping, located in Dubai, U.A.E., and seven non-vessel-operating common carriers (NVOCCs), located in China, Taiwan, New York, and California.⁹

The announced settlement agreements involved alleged violations of various provisions of the Shipping Act, which prohibits certain types of unfair or unjustly discriminatory practices in the provision of ocean transportation services in the U.S. foreign trades. For example, 46 U.S.C. 41102(a) provides that "a person may not knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means, obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply."¹⁰ A similar prohibition against common carriers allowing such activity is set forth in 46 U.S.C. §41104(1), while 46 U.S.C. §41104(2) prohibits common carriers from providing service in the liner trade that is "(A) not in accordance with the rates, charges, rules, and practices contained in a tariff published or a service contract that is entered into" under the Shipping Act and is not otherwise excepted or exempt from the Act.¹¹

8. *Id.* at *66-67.

9. Press Release, Federal Maritime Commission, FMC Collects \$1,227,500 in Penalty Payments (Aug. 4, 2015), *available at* <http://www.fmc.gov/NR15-13/?pg=4>.

10. 46 U.S.C. § 41102(a) (2012).

11. 46 U.S.C. § 41104(2) (2012).

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In announcing the compromise agreements, the FMC stated that the alleged violations involved actions such as: unlawful rebating of service contract administrative fees by a carrier to its customers that were not contained in the service contract filed with the FMC; acceptance of those fees by the shippers; allowing third parties to access service contracts to which they were not parties; misrepresenting the names of shipper accounts on a service contract to allow them to receive rates that would otherwise not be applicable; the misdescription of cargo to obtain lower rates; the failure to charge published tariff rates; and collecting forwarder compensation on shipments in which a related party had a beneficial interest.

Pursuant to the announced settlement agreements, the Commission stated that “the parties settled and agreed to penalties, but did not admit to violations of the Shipping Act or the Commission’s regulations.”¹²

D. REVISION TO OCEAN TRANSPORTATION INTERMEDIARY REGULATIONS

On November 5, 2015, the FMC published its final regulations revising its Ocean Transportation Intermediary (OTI) regulations.¹³ The new regulations govern both ocean freight forwarder and NVOCC licenses and activities. They went into effect on December 9, 2015, with the exception of new regulatory provisions requiring license renewals for OTIs, which will take effect on December 9, 2016, and be phased-in over a three year period.

The Commission’s final regulations cap a multi-year process where it initially proposed significant licensing and regulatory changes to its OTI regulations. These proposals experienced significant industry resistance and were subsequently revised by the Commission to respond to industry concerns. The final regulations, in general, modify and update the Commission’s existing OTI regulations to reflect what the FMC states has been its actual licensing and regulatory practices. However, many of these agency practices will now be official Commission regulations, and some of them, such as the requirement that OTI licenses be renewed every three years, are new. The Commission’s amended regulations will affect the licensing obligations of all OTIs, as well as their relationships with branch offices and agents.

The key changes set forth in the Commission’s final rulemaking are: (1) a new requirement that every licensed ocean freight forwarder and NVOCC renew its OTI license every three years; (2) clarification of the required experience and disqualifying experience required of individuals who are deemed “Qualifying Individuals” for purpose of obtaining and maintaining a license; (3) elimination of regulations regarding the licensing and insurance requirements for branch offices and clarifying that separately incorporated branch offices must have their own OTI license; (4) expansion of the specified material changes in a licensed OTI that will require the filing of a report to the FMC; (5) clarification of regulations requiring the licensing and registration of non-U.S. NVOCCs; (6) clarification of the responsibilities of a licensed OTI for the actions of its agents and for records in the possession of its agents; (7) new regulations creating a streamlined hearing procedure for the denial of OTI license applications and the

12. See Federal Maritime Commission Press Release *supra* note 9.

13. See *generally* Ocean Transportation Intermediary Licensing and Financial Responsibility Requirements and General Duties, 80 Fed. Reg. 68,722 (Nov. 5, 2015).

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revocation or suspension of an OTI license; (8) updates to the financial responsibility forms required of OTIs; (8) clarification of methods for common carriers to verify that NVOCCs are in compliance with FMC regulations; and (9) updates to the regulations governing forwarding fees, special contracts, and freight forwarder compensation.

E. DISMISSAL OF CONSTITUTIONAL CHALLENGE TO JONES ACT CABOTAGE RULES

The Jones Act, formally known as the Merchant Marine Act of 1920, limits the U.S. domestic shipping market to American companies. Foreign companies are excluded from competing in the market, in part to encourage the Jones Act's purpose of supporting the U.S. merchant marine and shipbuilding and repair facilities.¹⁴ The cabotage provisions of the Jones Act provide that ships carrying cargo between two points in the United States must have been "built in the United States."¹⁵ They must also be "wholly owned by citizens of the United States."¹⁶

A lower court dismissal of a constitutional law challenge to the Jones Act's cabotage rules was affirmed by the United States Court of Appeals for the Ninth Circuit in July of 2015 in the case of *Novak v. United States*.¹⁷ The plaintiffs in the case alleged that they had suffered pecuniary injury when they purchased domestic ocean cargo shipping services between the U.S. mainland West Coast and Hawaii routes. They claimed that the Hawaiian ocean shipping market suffered high prices and was effectively limited to two carriers between the U.S. mainland and Hawaii due to the allegedly restrictive U.S. cabotage laws, which they claimed were an unlawful restraint of trade and interstate commerce in violation of the Commerce Clause of the U.S. Constitution.

In affirming the lower court's dismissal of the plaintiffs' claims, the Ninth Circuit noted that while it was conceivable that the plaintiffs could amend their complaint so as to remedy certain pleading deficiencies, they would be unable to amend their complaint so as to state a claim under the Commerce Clause. The Court held that the Commerce Clause did not limit the authority of Congress to regulate interstate commerce. The Court further held that even if the cabotage laws discriminated against Hawaii, in exercising its general commerce powers Congress had plausible reasons for its actions. The plaintiffs thus lacked a viable claim to challenge the constitutionality of the laws.

II. U.S. Motor Carrier Legal Developments

A. U.S.-MEXICO TRUCKING

On January 9, 2015, the U.S. Department of Transportation (DOT) announced that Mexican motor carriers will be able to apply for authority to conduct long-haul, cross-border trucking services between Mexico and the United States.¹⁸ The announcement

14. 46 U.S.C. § 50101 (2012).

15. 46 U.S.C. § 12112(a)(2)(A) (2012).

16. *Id.*; 46 U.S.C. § 55102(b)(1) (2012).

17. See generally 795 F.3d 1012 (9th Cir. 2015).

18. Press Release, United States Department of Transportation, United States to Expand Trade Opportunities with Mexico through Safe Cross-Border Trucking (Jan. 9, 2015) (on file with <https://www.fmsca.dot.gov/newsroom/united-states-expand-trade-opportunities-mexico-through-safe-cross-border->

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followed a three-year pilot program conducted by the DOT that tested and validated the safety of Mexican trucking companies to conduct such operations.

Under the DOT policy, Mexican motor carriers seeking to apply for long-haul operating authority are required to pass a Pre-Authorization Safety Audit to confirm that they have adequate safety management programs in place. Such programs will include systems for monitoring hours-of-service and drug testing using a U.S. Health and Human Services (HHS) certified lab. In addition, all drivers are required to possess a valid U.S. Commercial Driver's License or a Mexican Licencia Federal de Conductor. Drivers are also required to meet the U.S. DOT's English language proficiency requirements

Once approved, the vehicles of Mexican motor carriers operating in the United States are required to undergo a thirty-seven-point North American Standard Level 1 Inspection every ninety days for at least four years. Carriers and drivers from Mexico will also be required to comply with all U.S. laws and regulations, including regular border and random roadside inspections.

B. UNIFIED REGISTRATION SYSTEM

On August 13, 2013, the Federal Motor Carrier Safety Administration (FMCSA) adopted final rules to implement the Unified Registration System (URS). The URS regulations were to be implemented over a two-year time frame. They were intended to improve the registration process for motor carriers, property brokers, freight forwarders, Intermodal Equipment Providers, HMSP applicants, and cargo tank facilities that are required to register with the FMCSA. Upon full implementation, the URS will replace the registration functions of the following systems: (1) the U.S. Department of Transportation (USDOT) identification number systems; (2) the 49 U.S.C. chapter 139 commercial registration system; (3) the 49 U.S.C. 13906 financial responsibility information system; and (4) the service of process agent designation system.

Pursuant to an October 21, 2015 Federal Register Notice, the FMCSA delayed the effective and compliance dates of the URS final rule until September 29, 2016.¹⁹ The agency stated that the delay is needed to allow further refinement of the IT system that will be used to implement the new Uniform Registration System. Some portions of the URS will be implemented earlier; specifically, from December 12, 2015, through September 29, 2016. During this time period, new applicants, defined as anyone who does not have, and has never been assigned, a USDOT, Motor Carrier (MC), Mexico owned or controlled (MX), or Freight Forwarder (FF) number will be required to use a new online application when requesting registration and a USDOT number.

trucking); Acceptance of Applications for Mexican-Domiciled Long-Haul Operations, 80 Fed. Reg. 2,179 (Jan. 15, 2015).

19. FMCSA, Docket No. FMCSA-1997-2349, Unified Registration System, 80 Fed. Reg. 63,695 (Oct. 21, 2015).

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C. DRIVER COERCION REGULATIONS

In November 2015, the FMCSA adopted final regulations prohibiting the coercion of commercial motor vehicle drivers.²⁰ The new regulations were required, in part, due to provisions in the Motor Carrier Safety Act of 1984 (MCSA)²¹ and the Moving Ahead for Progress in the 21st Century Act (MAP-21)²² in which Congress enacted legislation requiring the FMCSA to adopt regulations prohibiting the coercion of drivers to violate federal laws and regulations governing the safe operation of commercial motor vehicles.

The new regulations include prohibitions on the coercion of drivers by motor carriers, shippers, receivers, or transportation intermediaries to operate commercial motor vehicles in violation of the federal motor carrier safety regulations; procedures for drivers to report incidents of coercion to the FMCSA; and rules of practice that the FMCSA will follow in response to reports of coercion.

III. U.S. Air Legal Developments

A. SEVENTH CIRCUIT CLASS ACTION DISMISSAL OF “EU 261” CLASS ACTION CLAIMS

In *Volodarskiy v. Delta Airlines, Inc.*,²³ the United States Court of Appeals for the Seventh Circuit affirmed a federal district court’s dismissal of a class action brought by several U.S. resident air travelers against U.S. airlines for alleged violations of European Union Regulation 261/2004 (EU 261).²⁴ EU 261 is a European Union regulation that applies to passengers departing from an airport located in a territory of a Member State. The regulation imposes obligations upon airlines to their passengers for the delay and/or cancellation of flights under certain circumstances. It also establishes a fixed compensation schedule for passengers who experience inconveniences due to short notice cancellations or flight delays of more than three hours from the scheduled departure time if there is no offer of a rerouted flight within a specified time frame.

Plaintiffs in the Seventh Circuit appeal did not challenge a lower court ruling holding that they could not sue the airline for breach of contract because Delta had not incorporated EU 261 into its contract of carriage. But while both the passengers and the airline agreed that EU 261 creates a private right of action, the plaintiffs sought to challenge the district court’s ruling that they could not seek to enforce EU 261 in the U.S. courts.

In affirming the district court’s dismissal of their claims, the Seventh Circuit held that

[A] direct claim for compensation under EU 261 is actionable only as provided in the regulation itself, which requires that each EU Member State designate an appropriate

20. FMCSA, Docket No. FMCSA-2012-03777, Prohibiting Coercion of Commercial Motor Vehicle Drivers, 80 Fed. Reg. 74,695 (Nov. 30, 2015).

21. See generally 49 U.S.C. § 31136(a) (2012).

22. See 49 U.S.C. § 31136(a) (5) (2012).

23. *Volodarskiy v. Delta Airlines, Inc.*, 784 F.3d 349, 350 (7th Cir. 2015).

24. Regulation 261/2004, of the European Parliament and of the Council of 11 February 2004 Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights and Repealing Regulation 295/91/EEC, 2004 O.J. (L 46) 1 (EC).

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administrative body to handle enforcement responsibility and implicitly limits judicial redress to courts in Member States under the procedures of their own national law.²⁵

B. AIRLINE PRICING INVESTIGATIONS

In July, the U.S. DOJ confirmed that the Antitrust Division was looking into potential “unlawful coordination” among some major U.S. airlines, and that it had served Civil Investigative Demands (CIDs) on several airlines requesting information about their operations. The DOJ investigation sought information and documents about the airlines’ capacity from January 2010, including public statements and communications with third parties about capacity. The focus of the DOJ investigation is whether the targeted airlines have engaged in activities in violation of the antitrust laws in order to restrict capacity and pricing in the domestic U.S. airline industry.

At least ninety-two private consumer class action lawsuits were filed subsequent to the announcement of the DOJ investigation. By Orders dated October 13 and 28, 2015, the U.S. Judicial Panel on Multi-District Litigation ordered consolidation of many of these cases in the United States District Court for the District of Columbia.²⁶ As in the DOJ investigations, all of the airlines deny that they have violated any applicable laws.

Domestic airline pricing practices were also the subject of a U.S. DOT inquiry into the possibility that American, Delta, JetBlue, Southwest, and United engaged in price gouging after a May 2015 Amtrak passenger train derailment in Philadelphia, Pennsylvania.²⁷ Rail travel was disrupted and delayed in the corridor between Washington, D.C. and Boston, Massachusetts as a result of the accident.

A letter sent to each of the carriers by the U.S. DOT noted that:

Pursuant to 49 U.S.C. § 41712, the Department may investigate and decide whether an air carrier has been or is engaged in an unfair or deceptive practice in air transportation and may prohibit such conduct. Generally, a practice is unfair if it (1) causes or is likely to cause substantial injury to consumers, (2) cannot be reasonably avoided by consumers, and (3) is not outweighed by countervailing benefits to consumers or to competition.²⁸

After citing its authority to police the air carriers’ practices, the DOT letter asked each carrier for price and market information related to their routes that may have been affected by the Amtrak derailment.

25. *Volodarskiy*, 784 F.3d at 350.

26. *In re Domestic Airline Travel Antitrust Litig.*, No. 2656, 2015 U.S. Dist. LEXIS 140114, at *1 (J.P.M.L. Oct. 13, 2015); *In re Domestic Airline Travel Antitrust Litig.*, No. 2656, 2015 U.S. Dist. LEXIS 148871, at *5 (J.P.M.L. Oct. 28, 2015).

27. Press Release, U.S. Dep’t of Transp., U.S. DOT Requests Information on Airline Pricing Response to Amtrak Derailment (July 24, 2015) (on file with <https://www.transportation.gov/briefing-room/us-dot-requests-information-airline-pricing-response-amtrak-derailment>).

28. *Id.*

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C. REGULATION OF UNMANNED AIRCRAFT SYSTEMS (UAS) - DRONES

The regulation of Unmanned Aircraft Systems (UAS), or drones, was the subject of significant discussion in 2015. In February 2015, the White House issued a Presidential Memorandum for the Heads of Executive Departments and Agencies providing policy guidance on the use of drones by the Federal Government, and the promotion and use of drones in the private and commercial sectors.²⁹

The Federal Aviation Administration (FAA) issued a Notice of Proposed Rulemaking, which, if ultimately adopted, would establish regulations for all routine civil operation of small UAS in the National Air Space (NAS) and provide safety rules for those operations.³⁰ The proposed FAA regulations are, in part, a response to a Congressional directive in the FAA Modernization and Reform Act of 2012³¹ directing the Secretary of Transportation to determine whether certain UAS operations can be safely operated in the NAS.

On November 21, 2015, the FAA-chartered Unmanned Aircraft Systems Registration Task Force Aviation Rulemaking Committee provided its recommendations to the FAA “on registration requirements and process for small UAS, including those used for commercial purposes, and all model aircraft.”³² Among other items, the recommendations included minimum requirements for UAS that would need to be registered; a registration process with the type of information that should be collected; a training and education component to be combined with the registration process; and recommendations for a certificate of registration and the marking of each registered small UAS. The Recommendations from the Task Force may be used by the FAA at its discretion and may be incorporated by the FAA in all, some, or none of its rulemaking activities.

IV. Fixing America’s Surface Transportation (FAST) Act

On Friday, December 4, 2015, President Obama signed into law the Fixing America’s Surface Transportation (FAST) Act.³³ The Act, the first comprehensive federal infrastructure funding legislation since 1999, is five-year legislation intended to improve the U.S. surface transportation infrastructure, including roads, bridges, transit systems, and the U.S. rail transportation network.

In addition to providing for the funding of infrastructure projects, the FAST Act contains a variety of new laws affecting different modes of U.S. surface transportation. These include, among other changes, modifications in the rulemaking process for truck and bus safety; changes to the FMCSA Compliance, Safety, Accountability (CSA)

29. Memorandum on Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems, 80 Fed. Reg. 9355 (Feb. 20, 2015).

30. Operation and Certification of Small Unmanned Aircraft Systems, 80 Fed. Reg. 9544 (proposed Feb. 23, 2015) (to be codified at 14 C.F.R. pts. 21, 43, 45, 47, 61, 91, 101, 107, and 183).

31. Federal Aviation Administration (FAA) Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 333, 126 Stat. 11 (2012).

32. *Task Force Recommendations Final Report*, UNMANNED AIRCRAFT SYSTEMS REGISTRATION TASK FORCE AVIATION RULEMAKING COMMITTEE, (Nov. 21, 2015), available at http://www.faa.gov/uas/publications/media/RTFARCFinalReport_11-21-15.pdf.

33. Fixing America’s Surface Transportation (FAST) Act, Pub. L. 114-94, 129 Stat. 1312 (2015).

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program; new requirements for Class 1 railroads to provide crude oil movement information to emergency responders; and changes to the way Amtrak operates.

V. Pre-emption of State Laws and Regulations in Various U.S. Transportation Modes

Regardless of the mode of transportation, the regulation of interstate transportation services in the United States is subject to a variety of laws and regulations at the federal, state, and local levels. But, Congress has also deemed that the efficient functioning of U.S. interstate transportation system requires a uniformity of regulation. It has thus preempted the regulation of many state and local laws in several modes, including the airline, rail, and motor carrier industries.

In recent years the federal courts, including the United States Supreme Court, have ruled that various state laws and regulations affecting transportation companies are preempted by, among other statutes, the Airline Deregulation Act,³⁴ the Federal Aviation Administration Authorization Act (FAAAA)³⁵ and the Interstate Commerce Commission Termination Act of 1995 (ICCTA).³⁶ Court and agency decisions in 2015 continued this trend.

For example, in the rail industry, the Surface Transportation Board (STB) issued a guidance stating that ICCTA preempts state and local “regulation that would unreasonably interfere with railroad operations that come within the Board’s jurisdiction, without regard to whether the Board actively regulates the particular activity involved.”³⁷

In the airline industry, several federal district court decisions held that state law claims against airlines are preempted under a variety of federal statutes. In *Gleason v. United Airlines, Inc.*,³⁸ a federal district court held that state law claims alleging injuries incurred due to the air carrier’s failure to protect a passenger with severe peanut allergies from exposure to peanuts during a flight were preempted by the Airline Deregulation Act. In *Ahmadi v. United Continental Holdings, Inc.*,³⁹ a plaintiff alleging state code and negligence violations by an air carrier for injuries incurred while loading carry-on bags in a plane’s overhead storage bin were preempted by the Federal Aviation Act.

In the motor carrier industry the preemption issue has, in recent years, involved issues of whether state law claims against motor carrier brokers are preempted, and whether state laws governing the classification of motor carrier workers as employees or independent contractors are preempted. In this later context, in 2015 the United States District Court for the District of Massachusetts issued two decisions holding that the

34. See 49 U.S.C. § 41713(b) (2012).

35. See 49 U.S.C. § 14501(c) (2012).

36. See 49 U.S.C. § 10501(b) (2012).

37. CSX Transp., Inc., No. FD 35832, 2015 WL 4597223, at *4 (S.T.B July 29, 2015).

38. *Gleason v. United Airlines, Inc.*, No. 2:13-cv-01064-MCE-DAD, 2015 U.S. Dist. LEXIS 66161, at *5 (E.D. Cal. 2015).

39. *Ahmadi v. United Cont’l Holdings, Inc.*, No. 1:14-cv-00264-LJO-JLT, 2015 U.S. Dist. LEXIS 104748, at *23-24 (E.D. Cal. Aug. 10, 2015).

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Massachusetts statute governing the classification of workers as employees or independent contractors has, for motor carriers, been preempted by the FAAAA.⁴⁰

VI. Sovereign Immunity of Foreign Government Transport Providers in U.S. Courts

In one of its first published decisions of the 2015-2016 Term, a unanimous Supreme Court ruled in *OBB Personenverkehr AG v. Sachs* that a U.S. resident's personal injury claims under California law in a U.S. federal court against a European state-owned railway were barred by the Foreign Sovereign Immunities Act.⁴¹

In *Sachs*,⁴² the plaintiff, a California resident, suffered traumatic personal injuries when she fell to the tracks at a railway station in Innsbruck, Austria, and was struck by a train owned and operated by OBB Personenverkehr AG (OBB), the Austrian state-owned railway. The plaintiff brought suit against OBB in the U.S. District Court for the Northern District of California for her injuries. She asserted five causes of action, including negligence; strict liability for design defects in the train and platform; strict liability for failure to warn her about the design defects; breaches of the implied warranty of merchantability for providing a train and platform unsafe for their unintended uses; and breach of an implied warranty of fitness.

OBB sought dismissal of the plaintiff's lawsuit, claiming that, as an agency of a foreign government, it was entitled to sovereign immunity under the FSIA. Under the FSIA, a foreign state, including an agency or instrumentality of a foreign state, is presumptively immune from the jurisdiction of U.S. courts unless one of the FSIA's express exceptions to sovereign immunity applies. The plaintiff argued that her suit fell within the commercial activity exception to the FSIA under 28 U.S.C. §1605(a)(2), which provides, in part, that a foreign state is subject to suit without immunity in a U.S. court when "the action is based upon a commercial activity carried on in the United States by the foreign state."⁴³

The district court concluded that the plaintiff's lawsuit did not fall within the commercial activities exception of the FSIA and dismissed her claims against OBB. The Ninth Circuit reversed. In ruling that the FSIA did not bar the plaintiff's suit against OBB, the Ninth Circuit majority found that the plaintiff had purchased a Eurail Pass from a Massachusetts company that was acting as the agent of OBB. Using common law principles of agency, the Ninth Circuit found that the Massachusetts company was acting as an agent of OBB. The court further found that the plaintiff's claims against OBB were, in part, "based upon" the sale of the Eurail pass. It concluded that the sale of the Eurail Pass was a necessary element of each cause of action asserted by the plaintiff and was sufficient to find that OBB had engaged in commercial activity in the United States so as to permit suit against it.

In reversing the Ninth Circuit, a unanimous United States Supreme Court found that the claims against OBB were barred by the FSIA. The Court held that, based upon its

40. *Schwann v. FedEx Ground Package Sys., Inc.*, No. 11-11094-RGS, 2015 U.S. Dist. LEXIS 13826, at *7 (D. Mass. Feb. 5, 2015); *Remington v. J.B. Hunt Transp., Inc.*, No. 15-100100RGS, 2015 U.S. Dist. LEXIS 13825, at *5 (D. Mass. Feb. 5, 2015).

41. *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 398 (2015).

42. *Id.* at 391.

43. 28 U.S.C. § 1605(a)(2) (2012).

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prior precedent,⁴⁴ the mere fact that the sale of a Eurail Pass in the United States would establish a single element of a claim was insufficient for purposes of finding a commercial activities exemption from sovereign immunity under the FSIA. Instead, the Court held that the commercial activity exemption under the FSIA must be based upon the particular conduct that constitutes the gravamen of the suit. Rather than analyzing each cause of action, a court is required to focus on the core suit and determine the actions that actually injured the plaintiff.

With respect to the plaintiff's injuries, the Supreme Court held that they plainly occurred abroad: the actions that led to her injuries, and the injuries themselves, all occurred in Austria. The plaintiff claimed that some of her causes of action, for example, OBB's failure to warn about a dangerous condition, should have been made when the Eurail Pass was sold to her in the United States. However, the Supreme Court rejected this argument, finding that no matter how the plaintiff "frames her suit, the incident in Innsbruck remains at its foundation."⁴⁵ The Court did caution, however, in footnote two of its decision, that its ruling was limited

We cautioned in *Nelson* that the reach of our decision was limited, *see Saudi Arabia v. Nelson*, 507 U. S. 349, 358, n. 4 (1993), and similar caution is warranted here. Domestic conduct with respect to different types of commercial activity may play a more significant role in other suits under the first clause of §1605(a)(2). In addition, we consider here only a case in which the gravamen of each claim is found in the same place.⁴⁶

VII. China

A. CHINESE MARITIME LAW

In a July 17, 2015 decision, the Chinese Supreme Court published on its official website its decision in the case of *M/V STAR HANSA*⁴⁷, which held that the standard RETLA clause used by some ocean carriers was invalid. The Court further held that the carrier was responsible for issuing a clean bill of lading.

The Court's decision involved a significant issue regarding the liability of ocean carriers handling steel cargo shipments in Chinese trades. Such cargo can be a significant source of cargo loss and damage claims. Due to the potential liability, ocean carriers have developed a standard RETLA clause for use in their bills of lading (B/L) to protect them from such damage. Typical RETLA clauses will provide that:

[t]he term 'apparent good order and condition', when used in this bill of lading with reference to iron, steel or metal products does not mean that the goods, when received, were free of visible rust or moisture. If the shipper so requests, a substitute bill of lading will be issued omitting the above definition and setting forth any

44. *Saudi Arabia v. Nelson*, 507 U. S. 349, 363 (1993).

45. *Sachs*, 136 S. Ct. at 392.

46. *Id.* at 398 n.2.

47. The *M/V STAR HANSA* case. Case no.: Chinese Supreme Court [2014] MSZ No. 445, released to public on July 17, 2015, and available at http://www.court.gov.cn/zgcpwsw/zgrmfy/ms/201507/t20150717_9582969.htm.

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notations as to rust or moisture which may appear on the mate's or tally clerk's receipts.⁴⁸

The validity of RETLA clauses have been the subject of heated dispute in China. Whether a carrier can be relieved of its standard obligations regarding the B/L, and whether it can rely on a RETLA clause to defend cargo claims, has been the subject of much litigation.

The *M/V STAR HANSA* case involved a claim that a shipment of cold rolled steel coil from China to the United States became wet and was damaged during the voyage. After paying an insurance claim for damages in the amount of \$1,016,783.43 USD, the shipper's insurance agent brought suit for recovery of the damages against the ocean carrier in the Wuhan Maritime Court (WMC). The ocean carrier asserted a RETLA clause as a defense.

In denying recovery to the insurer, the WMC held that the RETLA clause is a special agreement between the parties to the transportation contract and that it did not violate any mandatory rule of law because it did not involve any lessening of the obligation of the carrier. Specifically, the lower court found that due to the nature of the cargo it was inevitable to have damage to the outer package of cargo and that such shipments would incur some rust during storage, loading, and discharging. Because the carrier's agent could not determine by a visual inspection that there was damage to the inner quality of cargo, the issuing of a clean B/L via use of the RETLA clause was not improper, according to the lower court.

On appeal, the Hubei High People's Court overturned the WMC's decision. This decision was subsequently affirmed by the Chinese Supreme Court in the decision it published on July 17, 2015.

In reaching its decision, the Chinese Supreme Court held that the RETLA clause contained in the ocean carrier's B/L violated Articles 75 and 76 of the Chinese Maritime Code. These provisions enlarged the scope of permitted exemptions to ocean carriers from their obligations under the law. Under the law, a carrier is required to make accurate remarks regarding the apparent condition of the cargo, and if there is no annotation on the B/L indicating the condition of the cargo, it is deemed to be in apparent good order.

The Court found that the use of the RETLA clause in this case was improper because it had been printed in advance and was not a notation of the actual condition of the cargo on the specific shipment being transported. If an ocean carrier fails to note the actual apparent condition of a shipment on a B/L at the time of tender, including the outer condition of such products as steel, it will remain liable for the loss caused to a consignee on the shipment in the event that it is damaged.

Chinese maritime law is basically modeled on the Hague-Visby Rules, and as per Article 76 of the Chinese Maritime Code (CMC), cargo should be deemed as in apparent good condition when defects are not noted on the B/L. The Chinese Supreme Court's decision

48. *Tokio Marine & Fire Ins. Co. v. Relta S.S. Co.*, 426 F.2d 1372, 1374 (9th Cir. 1970).

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in *M/V STAR HANSA* is thus similar to the courts of other jurisdictions that have also struck down the use of RETLA clauses.⁴⁹

49. See Charles Debattista, *Receipts Unknown – Retla clauses on the way out? – The Saga Explorer*, STONE & CHAMBERS (April 9, 2013), <http://www.stonechambers.com/news-pages/09.09.13—article—receipts-unknown—retla-clauses-on-the-way-out—the-saga-explorer—charles-debattista.aspx>.

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