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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 transportation. This report highlights some of the 2016 legal developments that will affect global trends in international transportation in coming years. More specifically, the ocean shipping industry experienced significant disruption through the adoption of a global weight verification system plus the bankruptcy of Hanjin lines. Both the ocean and air industries adopted new restrictions on environmental pollution, while the ocean and automobile industries experienced record penalties and settlements for the deliberate violation of anti-pollution regulations. Automation of transportation services was also the subject of regulatory and judicial developments, with new regulations and guidelines for drones, self-driving vehicles, and ride-sharing services.

I. Ocean Shipping

A. SOLAS OPERATIONAL SAFETY THROUGH CONTAINER WEIGHT VERIFICATION (VGM)

On July 1, 2016, the International Maritime Organization's (IMO) new regulations to the Safety of Life at Sea (SOLAS) convention went into effect.¹ Originally adopted on November 21, 2014, these regulations require that the weight of a container be verified by the shipper.² The rationale for these requirements was to ensure safe handling of containers in international maritime trade. Their 2016 worldwide implementation had a direct effect on shippers, port authorities, and international carriers.

One method to determine the verified gross mass (VGM) stated in the amendment to the SOLAS convention requires that the packed container be

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1. Maritime Safety Committee Res. 94/21, annex 1, Amendment to the International Convention for the Safety of Life at Sea (SOLAS), 1974, As Amended, at 1 (Nov. 21, 2014).

2. *Id.* at 2.

weighed with calibrated and certified equipment.³ The second method allows the weight of all contents in the container, including pallets, to be added to the tare weight of the individual shipping container.⁴ But the method must be approved by the country where the container was packed. Confirmation of method two was a point of contention in many countries and was not clarified as the July 1, 2016 implementation date arrived. In the United States, confirmation was given on April 28, 2016, when the United States Coast Guard released a statement stating that the existing United States regulations in the Code of Federal Regulations, 29 CFR § 1918.85(b), satisfies the SOLAS convention.⁵ Shippers were then left to figure out how to comply with these codes and how to submit VGM to the ocean carriers.

Adding to the global confusion about the implementation of the new SOLAS regulation was the fact that each ocean carrier adopted their own methods and protocols for VGM submission, which created confusion for many shippers, especially those that utilized more than one ocean carrier. Carriers, like Maersk, tried to cut through the confusion by explaining the VGM requirement, why it was needed, and their individual procedures for submission.⁶

Further confusion occurred due to the lack of standardization between port operations. While the regulations do not require VGM submission until loading of the container, some United States ports stated that containers that have not already submitted VGM would not be allowed to enter the port.⁷ Other ports agreed to provide weighing services and electronically submit them to a carrier that has established such a connection.⁸ As shipping continues into 2017, it is expected that adoption of industry and government procedures implementing the SOLAS VGM regulations will be clarified.

B. HANJIN SHIPPING BANKRUPTCY

The most disruptive legal event in the international maritime industry in 2016 was the surprise August 31, 2016 bankruptcy filing in a South Korean court by Hanjin Shipping. The bankruptcy was not a complete surprise because the ocean carrier had already been undergoing voluntary

3. *Id.* at 2.1.

4. *Id.* at 2.2.

5. U.S. COAST GUARD, COMMANDANT, MSIB Bull. No. 009/16, U.S. DECLARES AN EQUIVALENCY TO REGULATION VI/2 OF THE INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA (SOLAS) (2016).

6. *What is Verified Gross Mass?*, MAERSK LINE, <http://www.maerskline.com/en-us/shipping-services/verified-gross-mass> (last visited Nov. 5, 2016).

7. Bill Mongelluzzo, *California terminals open door to potentially weighing containers*, JOC (June 2, 2016, 7:39 PM), http://www.joc.com/regulation-policy/transportation-regulations/international-transportation-regulations/la-long-beach-oakland-terminals-open-door-potentially-weighing-containers_20160602.html.

8. *Id.*

restructuring with its creditors since May 2016.⁹ Hanjin's operations halted when it filed for bankruptcy after failing to secure support from its largest creditor, Korea Development Bank.¹⁰ Within days of Hanjin's filing of bankruptcy, Hanjin vessels were being arrested and denied berthing by port authorities throughout the world.¹¹ While creditors and port operators were immediately working to prevent their losses, Hanjin began to file for bankruptcy protection throughout the world.¹²

As a major carrier in the Transpacific trade, Hanjin sought Chapter 15 bankruptcy protection to seek recognition of the South Korean bankruptcy proceedings. In the United States, Hanjin filed for Chapter 15 bankruptcy protection in the United States Bankruptcy Court for the District of New Jersey. Hanjin sought and obtained a judicial stay to protect its ships from arrest and to facilitate the discharge of its customers' cargo from Hanjin ships. Provisional protection was granted by the New Jersey bankruptcy court on September 6, 2016, with a continued hearing scheduled for September 9, 2016.¹³ Although Hanjin was granted temporary protection, no Hanjin vessel entered United States territorial waters to discharge cargo, and it was reported that one vessel began its return to Korea.¹⁴ After hearing claims by multiple parties looking to enforce their liens against ships chartered by Hanjin, the court upheld Chapter 15 protection on September 20, 2016.¹⁵ The result of this judgment required claimants to seek relief in Korea where Hanjin originally filed for bankruptcy.

The United States Bankruptcy Court's order also authorized cargo interests and third parties to enter into commercially negotiated agreements to allow the unloading of Hanjin vessels. In other countries, where the equivalent of Chapter 15 bankruptcy procedures and protections do not exist, Hanjin ships were the subject of arrest. Cargo remained detained, and in some cases, unloaded and undelivered.

C. ASSERTION OF MARITIME LIENS TO SUBSTITUTED PROPERTY

On October 17, 2016, the United States Supreme Court denied certiorari of the decision of the United States Court of Appeals for the Third Circuit in *World Imports v. OEC Group*, which held that a Non-Vessel-Operating

9. Xiaolin Zeng, *Creditors OK Hanjin debt restructuring*, JOC (May 4, 2016, 3:25 PM), http://www.joc.com/maritime-news/container-lines/hanjin-shipping/creditors-ok-hanjin-debt-restructuring_20160504.html.

10. *Hanjin Shipping to Seek Receivership After Losing Banks' Support*, FORTUNE (Aug. 31, 2016), <http://fortune.com/2016/08/31/hanjin-shipping-receivership/>.

11. Andreas Illmer, *Hanjin Ships, cargo and sailors stranded at sea*, BBC (Sep. 1, 2016), <http://www.bbc.com/news/business-37241727>.

12. *Bankrupt Hanjin Seeks court protection for its ships*, BBC (Sep. 5, 2016), <http://www.bbc.com/news/37273067>.

13. *In re Hanjin Shipping Co., Ltd*, No. BR 16-27041, 2016 WL 6681169 (D.N.J. Sept. 16, 2016).

14. *Id.* ¶ 8.

15. *Id.* ¶ 9.

Common Carrier's (NVOCC) maritime lien remained valid despite delivery of the goods to which the lien originally applied.¹⁶

The case hinged upon whether waiver of the lien was given by OEC when delivery of the cargo was made to World Imports. The Third Circuit reversed a ruling by the lower court holding that such a waiver had occurred, and instead ruled that the trial court erred by characterizing OEC delivery of the cargo as unconditional and thus effecting waiver of a maritime lien.¹⁷ The Third Circuit cited various documents stating that OEC intended for its maritime lien to survive delivery.¹⁸ These documents included the credit agreement between the two companies and the bill of lading for the various shipments.¹⁹

The Third Circuit also rejected the main argument made by World Imports that contractual provisions stating OEC's intent to retain its lien were unenforceable. The Third Circuit noted that maritime liens do have the ability to attach to substituted property, and that the freedom to contract allows parties to agree or curtail such an occurrence.²⁰ It placed significant importance on the documentation that appeared to show World Imports' consent to the maritime liens surviving delivery. With this new ruling, carriers may have a contractual framework to impose liens and withhold a shipment if payment for previous shipments remains outstanding.

II. Aviation

The year of 2016 has been a defining year for Unmanned Aircraft System (UAS), also known as drones. In the U.S., in particular, new regulations of the Federal Aviation Administration governing UAS came into effect on August 2016. The new regulations, set forth in 14 CFR Part 107,²¹ apply to commercial use of small UAS (sUAS) weighing less than 55 pounds (25kg), including payload.²² In essence, Part 107 permits the commercial operation of sUAS in the National Airspace System (NSA) without a Section 333 Exemption. This means that commercial operators of sUAS do not need to acquire FAA airworthiness certification.²³

Part 107 also creates the Remote Pilot Certificate system, which sets out operational requirements and limitations, in addition to a Certificate of

16. *In re World Imports Ltd.*, 820 F.3d 576, 592 (3d Cir. 2016), *cert. denied*, *World Imports, Ltd. v. OEC Group New York*, 137 S. Ct. 340 (2016).

17. *Id.* at 584-85

18. *Id.* at 585.

19. *Id.* at 579-80.

20. *Id.* at 588.

21. Operation and Certification of Small Unmanned Aircraft Systems, 81 Fed. Reg. 42,064 (June 28, 2016) (codified at 14 C.F.R. pts. 21, 43, 61, 91, 101, 107, 119, 133, and 183).

22. Federal Aviation Administration Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 331(6), 126 Stat. 11.

23. Before Part 107, commercial operators of sUAS had to acquire a Section 333 Exemption. *See* Pub. L. No. 112-95, § 333.

Waiver process.²⁴ In particular, an operator of sUAS must obtain a Remote Pilot Certificate.²⁵ Also, a Remote Pilot in Command must maintain visual-line-of-sight of the vehicle, fly the vehicle during daytime or civil twilight with appropriate anti-collision lighting, and not operate the vehicle over non-participants.²⁶

The new regulations also provide that a single sUAS operator cannot operate multiple sUAS, and that a maximum groundspeed of 100 mph and maximum altitude of 400 feet above ground level must be observed.²⁷ To note, a foreign-registered sUAS is allowed to operate in NSA if the requirements of 14 CFR Part 375 are met, although foreign-certified UAS pilots should obtain a Remote Pilot Certificate issued by the FAA.²⁸

III. International Transportation Environmental Developments

The regulation of environmental pollution by transportation companies saw several key developments in 2016, both in the development of regulations and standards aimed at curbing pollution, and in the enforcement of criminal fines for the violation of existing regulations.

A. NEW AIR AND OCEAN EMISSIONS STANDARDS

In the area of reducing environmental pollution, both the international air and ocean transportation industry saw the adoption of new regulatory guidelines in 2016. Both of these developments were in response to the adoption of the 2015 Paris Climate Accord, which specifically carved out the air and maritime areas from its global environmental provisions.

In the aviation industry, on October 6, 2016, the 191 States of the United Nations International Civil Aviation Organization (ICAO) 39th Assembly adopted ICAO Assembly Resolution A39-3, which agreed to control CO₂ emissions from international aviation through a new global market-based measure (GMBM).²⁹ While details need to be worked out prior to implementation, the resolution reflects an effort to create a global carbon market whereby airlines will be obliged to offset their CO₂ emissions to effect carbon-neutral growth.

Rules for the GMBM will be developed over the next two years. The pilot phase of the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) will be implemented from 2021 through

24. 14 C.F.R. § 107.53, *supra* note 21.

25. *Id.* § 107.12(2)(b).

26. *Id.* § 107.29(b), § 107.31(a).

27. *Id.* § 107.51(a)-(b).

28. *Id.* § 107.12(2)(c).

29. *Historic agreement reached to mitigate international aviation emissions*, ICAO (Oct. 6, 2016), <http://www.icao.int/Newsroom/Pages/Historic-agreement-reached-to-mitigate-international-aviation-emissions.aspx>.

2023.³⁰ The first phase will commence from 2024 through 2026. Both the pilot and first phases of CORSIA are voluntary. With certain exemptions, implementation in the phase from 2027 to 2035 would require all States on board.³¹

With respect to ocean shipping, in October 2016 the Marine Environment Protection Committee (MEPC) of the International Maritime Organization (IMO) agreed at its 70th session to implement a global sulfur cap of 0.50% m/m (mass/mass) in 2020.³² The current limit of 3.50% m/m has been in effect since 2012. The regulations governing sulfur oxide emissions from ships are set forth in the International Convention for the Prevention of Pollution from ships (MARPOL Convention), Annex VI. This Annex sets standards for controlling emissions from ships, including sulfur oxides (SO_x), through a set of progressively stricter regulations.³³

Under the standards adopted for 2020, ships will be required to use fuel on board with the lower 0.50% m/m sulfur content.³⁴ The new requirements can be met through using low-sulphur compliant fuel oil; alternative low emissions fuels, such as gas and methane; or Flag-State approved equivalent methods, such as exhaust gas cleaning systems or “scrubbers.”

The 0.10% m/m limit for the IMO SO_x Emissions Control Areas (ECAs) will remain unaffected by the new standards. Established under MARPOL Annex VI and in effect since January 1, 2015, the ECAs consist of the Baltic Sea area; the North Sea area; the North American area (covering designated areas off the coasts of Canada and the United States); and areas around the U.S. Virgin Islands and Puerto Rico.³⁵

B. TRANSPORTATION INDUSTRY ENVIRONMENTAL FINES AND PENALTIES

Record fines and penalties for violations of environmental regulations were also seen in the transportation industry in 2016. Two cases involved record fines and settlements.

30. U.N. Int’l Civil Aviation Org. [ICAO], Assembly Res. A39-3 (2016), *in* Assembly Resolutions in Force, at I-82, ICAO Doc. 10075 (2016).

31. *Id.*

32. Press Briefing, IMO, IMO sets 2020 date for ships to comply with low Sulphur fuel oil requirement (Oct. 28, 2016) (*available at* <http://www.imo.org/en/MediaCentre/PressBriefings/Pages/MEPC-70-2020sulphur.aspx>).

33. *Marpol Annex VI*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/enforcement/marpol-annex-vi> (last visited Apr. 11, 2017); *Prevention of Air Pollution from Ships*, IMO, <http://www.imo.org/en/OurWork/Environment/PollutionPrevention/AirPollution/Pages/Air-Pollution.aspx> (last visited Apr. 11, 2017).

34. Marine Environment Protection Committee Res. 70/18, annex 6, Effective Date of Implementation of the Fuel Oil Standard in Regulation 14.1.3 of MARPOL Annex VI (Oct. 28, 2016). *See* Press Briefing, *supra* note 32.

35. *See* IMO sets 2020 date for ships to comply with low Sulphur fuel oil requirement, *supra* note 32.

1. *Volkswagen Emissions Scandal*

In June, 2016, Volkswagen agreed to spend up to a record USD \$14.7 billion to settle allegations that it had cheated on emissions tests in violation of Unites States environmental laws and that it had deceived customers on its 2.0-liter diesel vehicles.³⁶ In January 2016, the United States Environmental Protection Agency (EPA) filed a civil complaint against Volkswagen, Audi, and Porsche alleging intentional violations of the United States Clean Air Act. Volkswagen was alleged to have equipped certain of its diesel vehicles with illegal software which only turned on its full emissions controls during testing for vehicle compliance with United States or California emissions standards. The use of this “defeat device” allegedly resulted in the vehicles meeting emissions standards during lab testings, but not in real world driving situations. Volkswagen was alleged to have improperly certified that these vehicles complied with the emissions requirements of the Clean Air Act.

In March of 2016 the Federal Trade Commission (FTC) also sued Volkswagen for allegedly using deceptive advertising campaigns promoting “clean diesel” Volkswagens and Audi cars. On June 28, 2016, Volkswagen entered into two related settlements with the State of California and the U.S. Government to settle some of the civil complaints against it.³⁷

In its settlements, Volkswagen agreed to spend up to USD \$14.7 billion to resolve some of the civil complaints. It agreed that it would offer a buyback and lease termination for approximately 500,000 2.0-liter diesel vehicles sold or leased in the U.S. It further agreed to spend up to \$10.03 billion as compensation to consumers who participated in the buyback program, plus \$4.7 billion to mitigate pollution from the vehicles.³⁸

The settlements did not fully resolve all of the civil or criminal violations pending against the companies for the alleged intentional violations of the federal and state environmental laws. On September 9, 2016, a Volkswagen engineer pled guilty for his role in the nearly 10-year conspiracy to defraud United States regulators and United States Volkswagen customers. The engineer had a significant role in developing the software to cheat United States emissions devices and subsequent misrepresentations to government

36. Partial Consent Decree at 1, In re: Volkswagon “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation, No. 2672 CRB (JSC) (N.D. Cal. July 26, 2016); Press Release, U.S. Dept. of Justice, Volkswagen to Spend Up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles (June 28, 2016) (*available at* <https://www.justice.gov/opa/pr/volkswagen-spend-147-billion-settle-allegations-cheating-emissions-tests-and-deceiving>).

37. Partial Consent Decree, *supra* note 36 at 1-2; U.S. Dept. of Justice, Volkswagen to Spend Up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles, *supra* note 36.

38. U.S. Dept. of Justice, Volkswagen to Spend Up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles, *supra* note 36.

officials and consumers that the Volkswagen vehicles met United States emissions standards and were environmentally-friendly.³⁹

2. *United States v. Princess Cruise Lines, Ltd.*

On December 1, 2016, Princess Cruise Lines Ltd. (“Princess”) agreed to plead guilty to seven felony charges and to pay the largest-ever criminal penalty—USD \$40 million—for violation of U.S. environmental laws.⁴⁰ In its plea agreement, Princess admitted that it had deliberately polluted the seas when one of its cruise ships used a “magic pipe” to illegally dump oil-contaminated waste into the sea. Princess also admitted that the use of the magic pipe had commenced in 2005 and it had engaged in intentional acts to conceal and cover up the vessel pollution. The long-term intentional violation of environmental laws was discovered when a newly hired engineer reported the use of the magic pipe to the British Maritime and Coastguard Agency (MCA) when there was an illegal waste discharge off the coast of England. The MCA then notified the United States Coast Guard, which conducted its own investigation, during the course of which it was discovered that other Princess cruise ships had also been intentionally engaged in these illegal practices.⁴¹

Princess Cruise Lines, Ltd., is a subsidiary of Carnival Corporation, the world’s largest cruise company. As part of the criminal plea agreement with Princess, it was agreed that eight Carnival cruise ships from several Carnival Corporation cruise line companies will be under a court supervised Environmental Compliance Program (ECP) for five years. Under the terms of the ECP, there will be a court-appointed monitor and independent audits by an outside entity.

IV. Regulating Technology Developments: Autonomous Vehicles

The development and use of autonomous vehicles made significant advancements in 2016. The first death of a driver in a self-driving vehicle (a Tesla),⁴² the testing of self-driving Uber “ride sharing” services in

39. Rule 11 Plea Agreement at 5-6, *U.S. v. D-1 Liang*, No. 16-cr-20394 (E.D. Michigan) (Sept 9, 2016); Press Release, U.S. Dept. of Justice, Volkswagen Engineer Pleads Guilty for His Role in Conspiracy to Cheat U.S. Emissions Tests (Sept. 9, 2016) (*available at* <https://www.justice.gov/opa/pr/volkswagen-engineer-pleads-guilty-his-role-conspiracy-cheat-us-emissions-tests>).

40. Plea Agreement, *U.S. v Princess Cruise Lines, Ltd.*, No. 16-20897-CR-Seitz, (S.D. Fla.) (Dec. 1, 2016); Press Release, U.S. Dept. of Justice, Princess Cruise Lines to Pay Largest-Ever Criminal Penalty for Deliberate Vessel Pollution (Dec. 1, 2016) (*available at* <https://www.justice.gov/opa/pr/princess-cruise-lines-pay-largest-ever-criminal-penalty-deliberate-vessel-pollution>).

41. Plea Agreement, *supra* note 40, at 2-3.

42. Brian Solomon, *Tesla Autopilot Enthusiast Killed In First Self-Driving Car Death*, FORBES (June 30, 2016, 5:08 PM), <https://www.forbes.com/sites/briansolomon/2016/06/30/the-first-self-driving-car-death-launches-tesla-investigation/#3d44fb87762e>.

Pittsburgh,⁴³ and the first commercial delivery in the United States using a self-driving tractor-trailer combination (a delivery of Budweiser beer in Colorado)⁴⁴ all pointed to both the fact that autonomous or self-driving vehicles will increasingly be on the road and the fact that uniform regulations regarding the design and use of such vehicles on roads may need to be developed, as will liability and insurance standards.

In the United States, the 2016 regulatory approach to autonomous vehicles remained piecemeal at the state and local level. But the federal government issued several sets of guidelines in 2016 which established the foundation for future federal regulation and best standards practices.

A. FEDERAL AUTOMATED VEHICLES POLICY

In September 2016, the U.S. Department of Transportation issued the United States government's federal policy for the safe testing and deployment of automated vehicles.⁴⁵ The policy established Vehicle Performance Guidance for Automated Vehicles for manufacturers, developers, and other entities which included a fifteen point "Safety Assessment" for the safe design, development, testing and deployment of automated vehicles. It further identified areas of federal and state responsibilities for regulation with suggested recommended policy areas for states to consider as well as potential new regulatory tools and statutory authorities that may aid the deployment of such technologies.

B. NHTSA BEST PRACTICES FOR VEHICLE CYBERSECURITY

In October 2016, the National Highway Traffic Safety Administration (NHTSA) released a best practices guide for vehicle cybersecurity. Although these guidelines are voluntary, the NHTSA signaled to the industry the need for cybersecurity to become a priority. The guidelines even mentioned the need for a "high-level corporate officer" with the sole task of addressing cybersecurity concerns.⁴⁶ The NHTSA release sets a serious tone for cybersecurity, and presents a comprehensive security approach.

43. Signe Brewster, *Uber starts self-driving car pickups in Pittsburgh*, TECHCRUNCH (Sept. 14, 2016), <https://techcrunch.com/2016/09/14/1386711/>.

44. Mike Isaac, *Self-Driving Truck's First Mission: A 120-Mile Beer Run*, N.Y. TIMES (Oct. 25, 2016), https://www.nytimes.com/2016/10/26/technology/self-driving-trucks-first-mission-a-beer-run.html?_r=0.

45. U.S. Department of Transportation, *Federal Automated Vehicles Policy*, <https://www.transportation.gov/av>; National Highway Traffic Safety Administration (NHTSA), Docket No. NHTSA-2016-0090, *Request for Comment on "Federal Automated Vehicles Policy"*, 81 Fed. Reg. 65703 (Sept. 23, 2016).

46. U.S. DEPT. OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 812 333, *Cybersecurity Best Practices for Modern Vehicles* at 13 (2016), available at https://acquia-dev-nhtsa.dot.gov/sites/nhtsa.dot.gov/files/documents/812333_cybersecurityformodernvehicles.pdf.

One considerable area of concern identified by NHTSA is the security of the electronic control unit (ECU). The ECU acts as the vehicle's computer and controls much of the vehicle's systems. The NHTSA guidance worked to balance the need for security with the need for accessibility. Notwithstanding a strong push for security by eliminating access to the ECU, the NHTSA acknowledged that a complete elimination of access may not be possible due to the need for developers and serviceability by third-parties.⁴⁷ Aftermarket consumer products, like insurance driving history dongles, may also need access.⁴⁸ NHTSA thus advocated a "layered approach" to create a framework with multiple levels of access to prevent full compromises in security.

The NHTSA guidance also focused on cybersecurity throughout a product's development and life cycle by specifically citing the need to provide security for the vehicle's "conception, design, manufacture, sale, use, maintenance, resale, and decommissioning."⁴⁹ NHTSA recommended using risk assessments, vulnerability testing, and threat response protocols as ways to increase security.⁵⁰ Sharing this information within the industry was also highly stressed. NHTSA also stated that it had a goal for full industry participation in Auto ISAC, which was setup in 2015 to help facilitate the sharing of information.⁵¹ Vulnerability and disclosure policies were also seen by NHTSA as being pivotal to ensure collaboration between manufacturing and independent testers.⁵²

Lastly, NHTSA promoted the need for strong self-auditing and review of the entire cybersecurity framework that is implemented. This includes periodic threat simulation testing to ensure proper implementation of all aspects of the strategy.⁵³ It advised that retention of these documents and revision of protocols is also important to ensure that the framework stays current with the latest research and information.⁵⁴

Encompassing many areas of vehicle security, the NHTSA's release of Cybersecurity Best Practices for Modern Vehicles represents what NHTSA believes is a "solid foundation" on which to build a cybersecurity framework. Although it is up to individual companies to voluntarily implement and improve upon these practices, it remains to be seen as to whether these practices will be used to develop mandatory regulations or are adopted by the courts in litigation to establish a minimum standard requirement.

47. *Id.* at 17, 21.

48. *Id.* at 20.

49. *Id.* at 13.

50. *Id.* at 14-16.

51. *Id.* at 8.

52. U.S. DEPT. OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 812 333, *Cybersecurity Best Practices for Modern Vehicles* at 14 (2016), available at https://acquisition-dev-nhtsa.dot.gov/sites/nhtsa.dot.gov/files/documents/812333_cybersecurityformodernvehicles.pdf.

53. *Id.* at 15.

54. *Id.*

V. Transportation Network Companies

Legal issues surrounding “ride sharing” companies such as Uber and Lyft continued to be the subject of litigation and regulatory disputes in a variety of areas and jurisdictions during 2016. These companies, also known as Transportation Network Companies (TNCs) and Transportation Network Providers (TNPs) generally use a smartphone or computer app to pair drivers and their vehicles with passengers. The companies claim that they are basically software companies that help self-employed drivers and individual customers to use the companies ride-sharing apps to provide and obtain transportation services. Competitors of these companies, largely traditional taxi companies, claim that they are basically taxi companies and should be regulated as such.

Some of the legal developments around the world involving TNCs in 2016 included whether they should be regulated the same as taxi companies, including licensing and background checks; whether regulating such companies differently than traditional taxi companies violated competition and other laws insofar as they deprive taxi companies of the benefits of their investment in their licenses; and whether drivers for such companies are employees or independent contractors.

In the United States, Uber, Lyft, and other TNCs were engaged in multiple lawsuits and legislative initiatives involving these controversies, including state and local efforts to mandate certain types of driver background checks and litigation over the proper classification of drivers. There was no consistent or uniform trend in determining how such companies should be regulated. Two 2016 decisions, one in the United States and one in the United Kingdom, illustrate the different conclusions that courts and regulators are reaching over how to classify and regulate ride-sharing services such as Uber.

One approach was represented by an October 7, 2016 decision by the United States Court of Appeals for the Seventh Circuit, which dismissed arguments by taxi companies that different and less strict regulatory standards for ride sharing companies is anticompetitive and an unconstitutional taking of the property of the taxi companies, in violation of the U.S. Constitution’s guarantee of equal protection.⁵⁵ Writing for the Court, Judge Richard Posner found that taxi and ride sharing companies were not the same:

The plaintiffs argue that the City has discriminated against them by failing to subject Uber and the other TNPs to the same rules about licensing and fares (remember that taxi fares are set by the City) that the taxi ordinance subjects the plaintiffs to. That is an anticompetitive argument. Its premise is that every new entrant into a market should be forced to comply with every regulation applicable to incumbents in the market with whom the new entrant will be competing.

55. *Illinois Transp. Trade Ass’n v. City of Chicago*, 839 F.3d 594, 598 (7th Cir. 2016).

Here's an analogy: Most cities and towns require dogs but not cats to be licensed. There are differences between the animals. . . . Dog owners, other than those who own cats as well, would like cats to have to be licensed, but do not argue that the failure of government to require that the "competing" animal be licensed deprives the dog owners of a constitutionally protected property right, or alternatively that it subjects them to unconstitutional discrimination. The plaintiffs in the present case have no stronger argument for requiring that Uber and the other TNPs be subjected to the same licensure scheme as the taxi owners. Just as some people prefer cats to dogs, some people prefer Uber to Yellow Cab, Flash Cab, Checker Cab, et al. They prefer one business model to another. The City wants to encourage this competition, rather than stifle it as urged by the plaintiffs, who are taxi owners.⁵⁶

* * *

There are enough differences between taxi service and TNP service to justify different regulatory schemes, and the existence of such justification dissolves the plaintiffs' equal protection claim. Different products or services do not as a matter of constitutional law, and indeed of common sense, always require identical regulatory rules. The fallacy in the district judge's equal protection analysis is her equating her personal belief that there are no significant differences between taxi and TNP service with the perception of many consumers that there are such differences—a perception based on commonplace concerns with convenience, rather than on discriminatory or otherwise invidious hostility to taxicabs or their drivers. If all consumers thought the services were identical and that there was therefore no advantage to having a choice between them, TNPs could never have gotten established in Chicago.⁵⁷

The seemingly opposite conclusion that Uber is essentially no different than a taxi company was reached the same month by a United Kingdom Employment Tribunal.⁵⁸ In a decision examining the same business model examined by the Seventh Circuit, the UK Employment Tribunal ruled that Uber is essentially a taxi company and Uber drivers are workers for purposes of the law. Arguably, the Seventh Circuit's decision addressed the question of whether Uber's services were sufficiently different from a taxi company to permit it being regulated differently than a taxi company, while the Tribunal's decision was focused on whether it was providing a transportation service. Nonetheless the Tribunal's reasoning at paragraphs 86 through 89 of its decision underscores the different conclusions that are being reached about the fundamental legal status of ride-sharing services. It is worth quoting in detail:

^{56.} *Id.* at 597-98.

^{57.} *Id.* at 598-99.

^{58.} Reasons for the Reserved Judgment on Preliminary Hearing Sent to the Parties on 28 October 2016 at ¶ 89, *Aslam, et al v. Uber B.V., et al*, Nos. 2202550/2015 & Others, (U.K.).

86 . . . We have reached the conclusion that any driver who (a) has the App switched on, (b) is within the territory in which he is authorised to work, and (c) is able and willing to accept assignments, is, for so long as those conditions are satisfied, working for Uber under a ‘worker’ contract and a contract within each of the extended definitions. Our reasons merge and/or overlap in places, but we will endeavour to keep the main strands separate.

87 In the first place, we have been struck by the remarkable lengths to which Uber has gone in order to compel agreement with its (perhaps we should say its lawyers’) description of itself and with its analysis of the legal relationships between the two companies, the drivers and the passengers. Any organisation (a) running an enterprise at the heart of which is the function of carrying people in motor cars from where they are to where they want to be and (b) operating in part through a company discharging the regulated responsibilities of a PHV operator, but (c) requiring drivers and passengers to agree, as a matter of contract, that it does not provide transportation services (through UBV or ULL), and (d) resorting in its documentation to fictions, twisted language and even brand new terminology, merits, we think, a degree of scepticism. Reflecting on the

Respondents’ general case, and on the grimly loyal evidence of Ms Bertram in particular, we cannot help being reminded of Queen Gertrude’s most celebrated line:

The lady doth protest too much, methinks.

88 Second, our scepticism is not diminished when we are reminded of the many things said and written in the name of Uber in unguarded moments, which reinforce the Claimants’ simple case that the organisation runs a transportation business and employs the drivers to that end. We have given some examples in our primary findings above. We are not at all persuaded by Ms Bertram’s ambitious attempts to dismiss these as mere sloppiness of language.

89 Third, it is, in our opinion, unreal to deny that Uber is in business as a supplier of transportation services. Simple common sense argues to the contrary. The observations under our first point above are repeated. Moreover, the Respondents’ case here is, we think, incompatible with the agreed fact that Uber markets a ‘product range.’⁴¹ One might ask: Whose product range is it if not Uber’s? The ‘products’ speak for themselves: they are a variety of driving services. Mr Aslam does not offer such a range. Nor does Mr Farrar, or any other solo driver. The marketing self-evidently is not done for the benefit of any individual driver. Equally self-evidently, it is done to promote Uber’s name and ‘sell’ its transportation services. In recent proceedings under the title of Douglas O’Connor-v-Uber Technologies Inc. the North California District Court resoundingly rejected the

company's assertion that it was a technology company and not in the business of providing transportation services. The judgment included this:

Uber does not simply sell software; it sells rides. Uber is no more a "technology company" than Yellow Cab is a "technology company" because it uses CB radios to dispatch taxi cabs.

We respectfully agree.⁵⁹

The one conclusion that can be reached between the multitude of court and regulatory decisions around the world grappling with how to classify and regulate TNCs is that the contrasting approaches of the Seventh Circuit and the UK Employment Tribunal decisions will not be the final word on the subject.

59. *Id.* ¶ 86-89 (citing Douglas O'Connor v. Uber Tech., Inc., 82 F. Supp. 3d 1133, 1141 (N.D. Cal. 2015) (other footnotes and citations omitted).