CECCA NEWSLETTER

September 2017 - Issue Three

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1. Special Observer: The 19th national congress of the Communist Party of China

Hayang YU, LL.M[1]

What is the Congress (CPC)?

On 18th October, the Communist Party of China (CPC) will hold its 19th national Congress plenary meeting at the 'Great Hall of the People' in Beijing[2]. At the Congress, which will be composed of by 2,287 delegates coming from all over China, the CPC will reveal its new leadership and new policies will be pondered and approved for the next 5 years.

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What changes might be brought to China herself by the Congress?

The Agenda

Even though the detailed calendar for the Congress has not yet been published, what is known for sure is that Xi Jinping will kick-off the proceedings by an opening address. This opening address will reveal the outline of the party's priorities for the next five years. Around one week later, the conference will be wrapped up by Xi's closing speech, during which the new leadership line-up will be introduced to the world[3].

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[1] Comments written by editor, Haiyang YU (LL.M. from Erasmus University Rotterdam)

[2] Xinhua, 'Xinhua Insight: Understanding China's path in the next 5 years', 15.10.2017 <http://news.xinhuanet.com/english/2017-10/15/c_136680771.htm> accessed on 15.10.2017

[3] The Guardian, 'China's Communist party congress – all you need to know' 13.10.2017, <https://www.theguardian.com/world/2017/oct/12/chinas-communist-party-congress-all-you-need-to-know > accessed on 15.10.2017

The Prediction of results

This Congress marks the start of Xi's second and supposedly last five-year term. Most expect that the Congress will result in a continuation of current domestic policies and assertive international posture.

Concerning the domestic policies, China will continue developing herself into a 'moderately prosperous society' and a modern socialist country, meaning the improvement of people's livelihood will continue to be an important task of the central authorities. On the other hand, there will still be strict party governance, which means the anti-corruption measures will continue to exist. The continuation of current policies is likely to be done in the form of making amendments to the party's constitution.

As far as the international posture is concerned, China will continue to actively participate in globalization and propose solutions to establish the new international relationship to achieve a win-win cooperation, which means the famous 'Belt and Road Incentives' will still play an important role in China's diplomacy policy.

What does this mean to China and our world?

Domestic Economy Growth

From the domestic point of view, according to Xinhua, incomes of all residents rose from RMB 7,311 yuan (about 1,111 U.S. dollars) in 2012 to 23,821 yuan in 2016, an annual increase of 7.4 percent. At the same time, around 700 million people were out of poverty. The continuation of implementing the current policies will guarantee the growth of China's economy, Chinese people would benefit from the results.

Globalization and Safeguarding Common Interests

From the point of view of globalization, the continuation of current international posture means China will continue to take greater responsibilities and becoming a more reliable partner to other countries.

Take the famous 'Belt and Road Incentive' (B&R or OBOR) for example, it provides more opportunities for countries with different regimes to work together for their interests in common, which is to create a stable environment with fewer wars and military conflicts, fewer crises and lower risks of terrorism[4]. Sharing common interests, different parts of the world will have closer relationships and there will be a bigger chance for global economic growth and more importantly, peace.

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[4] Xinhua, 'Interview: China to assume greater responsibilities as global role increases: former French PM', 15.10.2017 < http://news.xinhuanet.com/english/2017-10/15/c_136680973.htm> Accessed on 15.10.2017

2. Transport Law

2.1. Carriers Beware! – Circumstances in Which Navigation Addresses Conflicting Liability Regimes (I)

Dr. Lijun Zhao[5]

The Rotterdam Rules, as the latest marine cargo convention, seeks to promote legal uniformity of multimodal transport. The network-liability approach of this convention at-tempts to harmonise conflicts of liability regimes among different types of navigation in multi-modal transport. However, its Articles 26 and 82 only harmonise limited scenarios among all the potential conflicts of interest. Additionally, the network-liability approach itself relies on localising any occurrence of damage to or loss of goods, which corresponds to different degrees of liability among marine, land and air navigation. Thus, it is impossible for carriers and navigators to anticipate their liabilities when entering into a contract of multi-modal transport. Through analysing UNCITRAL negotiating documents, a comprehensive safeguard is proposed to solve these problems.

2.1.1. INTRODUCTION.

Nowadays a large amount of sea cargo is shipped within containers from door to door. In order to meet this commercial need, carriers increasingly have had to handle multimodal transport and navigation on land, at sea and/or in the air in one transaction. However, carriers are exposed to legal uncertainty in multimodal transport. That is to say, one type of navigation might fall into a liability regime that usually regulates other types of navigation. A more challenging question is that conventions of various types of navigation compulsorily impose different legal requirements. Marine carriers are

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traditionally not liable for nautical fault, but a new seaborne cargo convention has tried to abolish this exemption. Accordingly, knowing the conflicting extent of possible liabilities is beneficial for carriers, the master and the crew. This allows them to take precautions, such as to pay extra attention to avoid damages or to arrange sufficient insurance to cover possible risks. Therefore, carriers should be aware of the circumstances in which navigation triggers the applications of conflicting legal rules and take precautions.

The latest sea cargo convention – the Rotterdam Rules (RR) (UN, 2008) – seeks to regulate transport which contains at least one seaborne journey. It extends its coverage from a sea leg to other modes of transport, which is called 'maritime-plus' or 'wet' multimodal scope of application (Berlingieri, 2009). Nevertheless, this raises potential conflicts between the RR and other international instruments governing carriage by other modes of transport (Franco, 2012; Hancock, 2009). This paper attempts to identify these conflicts for carriers and navigators.

This paper focuses on the conflicts that exist among the compulsory rules relating to carriers' liability for each type of navigation. It aims to help carriers and navigators foresee the legal risks of various kinds of navigation before the occurrence of damages, and alleviate these risks through taking precautions or arranging insurance.

This paper also addresses another essential issue – how to reconcile conflicts between carriage conventions of different modes. There are two basic approaches: either to let other international conventions prevail over the RR (network liability system), or to provide uniform rules applying to all modes of transport (uniform liability system) (De Wit, 2010; Ulfbeck, 2010). The RR try to harmonise potential conflicts through a limited network system of liability under Articles 82 and 26 (Franco, 2012). These two fundamental articles regarding multimodal transport regimes will be examined in detail.

2.1.2. THE POSSIBLY RELATED CONVENTIONS REGARDING NAVIGATION OF WET MULTIMODAL TRANSPORT.

Existing cargo conventions merely govern single modal transport, and even the RR themselves are 'maritime-plus' rather than a true multimodal convention. However, all of the various conventions include mandatory rules on liabilities with different levels of limitations of liability. Thus, conflicts arise in the event of multimodal transport.

Because the majority of goods are shipped by sea, this paper focuses on wet multimodal transport, which contains a seaborne journey.

Apart from the RR, the possibly related conventions cover "the carriage of goods by air" (e.g. the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention; LN, 1929) and the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention; UN, 1999)), "the carriage of goods by road" (e.g. the Convention on the Contract for the International Carriage of Goods by Road (CMR; UN, 1956) and Carmack Amendment (US, 1906), "the carriage of goods by rail" (e.g. the Convention Concerning International Carriage By Rail (CIM-COTIF; UN, 1952 &1970)[6]), and "the carriage of goods by inland waterways" (e.g. the Budapest Convention on the Con-tract for the Carriage of Goods by Inland Waterway (CMNI; UN, 2001)). The conflicting rules of liability among these kinds of navigation are listed in Tables 1 and 2.

[6] The Convention concerning the Carriage of Goods by Rail (CIM) is modified and incorporated as Appendix B to the International convention concerning the Carriage of Goods by Rail (COTIF) from May 1999.

Table 1. Monetary Limitation Levels of Existing Transport Conventions.

Types of navigation	Convention	Per package limitation	Per kilo limitation	Which is applicable
By sea	Hague-Visby Rules (UN, 1979)	666.67 Special Drawing Rights (SDRs)	2 SDRs per kilogram	Whichever is higher
	Rotterdam Rules (UN, 2008)	875 SDRs	2.5 SDRs	Whichever is higher
By lorry (truck)	CMR (UN, 1956) Art. 23		8.33 SDRs	
	Carmack Amendment (US, 1906) Art.(f)		an amount equal to the *replacement* value of such goods, subject to a maximum amount equal to *the declared value* of the shipment and to rules issued by the (US) Surface Transportation Board and applicable tariffs	
By rail (train)	CIM-COTIF (UN, 1952 & 1970) Arts. 30 and 33		17 SDRs per kilo of gross mass short	
By inland waterway	CMNI (UN, 2001) Art. 20	666.67 SDRs per package or other *loading* unit	2 SDRs per kilo of weight of goods lost or damaged	Whichever is higher
By air	Warsaw Convention (LN, 1929) Arts. 19 and 22; Montreal Convention (UN, 1999) Art. 22		17 SDRs per kilo	
By more than more one mode of transport	Multimodal Convention (UN, 1980; not entering into force) Art. 18	920 SDRs per package or other *shipping* unit	2.75 SDRs per kilo of gross weight of goods lost or damaged	Whichever is higher

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Table 2. Limitation of Carriers' Liability for Delay under Existing Conventions.

Kinds of navigation	Convention	Limitation for delay
By sea	Hague-Visby Rules (UN, 1979)	Not regulated
	Hamburg Rules (UN, 1978) Art. 6(1); Rotterdam Rules (UN, 2008) Arts. 59 and 60; the UN Multimodal Convention	2.5 times freight payable for/on goods delayed
By lorry	CMR (UN, 1956) Art. 23	the carriage charges
By train	CIM-CITIF (UN, 1952 & 1970) Arts. 30 and 33	4 times the carriage charges for the goods lost
By inland waterway	CMNI (UN, 2001) Art. 20	the value of the freight
By air	Warsaw Convention (LN, 1929) Arts. 19 and 22; Montreal Convention (UN, 1999) Art. 22	17 SDRs per kilo

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2.2. The Application of Art. 29 CMR in German Case Law and the influence of the secondably burden to adduce facts as a means of breaking the limitation of liability[7]

Dr. Tobias Eckardt[8]

Germany is sometimes referred to as a country in which it is comparatively easy to break the limitation of liability under the CMR. Indeed, there is a wealth of case law reported on Art. 29 CMR. This article endeavours to provide some insight as to the requirements to establish wilful misconduct and gross negligence under German case law to the CMR. Further, it tries to provide some explanation as to the aspects of procedural law which come into play here and, finally, to highlight situations in which a contribution of the sender to the occurrence of the loss might lead to the carrier not having to bear the full amount of the loss even though gross negligence has been established.

2.2.1. WHAT IS GROSS NEGLIGENCE?

When considering the liability under Art. 29 CMR one will need to note that in 1998 there was a reform of German transport law which changed the requirements for gross negligence. Whereas before 1998 it was only necessary to establish that the carrier had grossly ignored the interests of the sender, it is now necessary to prove a very grave violation of the carrier's duty in which the carrier grossly disregards the security interests of the sender; this is not only an objective test to be met but there is also a subjective side which requires that the person acting/omitting to act did realise that the occurrence of the loss was a likely consequence of this negligence act or omission.

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[7] Revised version of a presentation given at International Conference 60 years CMR, at Erasmus University Rotterdam, The Netherlands; first published in Tijdschrift Vervoer & Recht <www.uitgeverijparis.nl/tijdschriften/tijdschrift/1/Tijdschrift-Vervoer-Recht-TVR>, TVR 2017, 72-78. Because of the limited space, CECCA editorial department deleted all footnotes in this article. If any readers would like to get the whole article with the footnote, please feel free to contact the CECCA

[8] Dr. Tobias Eckardt, Partner, Ahlers & Vogel Rechtsanwälte PartG mbB, Leer/Germany.

2.2.2. ESTABLISHING GROSS NEGLIGENCE BY MEANS OF THE SECONDARY BURDEN TO STATE FACTS

So in essence one would have thought that the requirement of unlimited liability was difficult to be met. However, this change in the statutory situation of the material law was in effect counter-acted by a development in the procedural law approach.

The secondary burden to state facts is a universal concept of German procedural law. It is therefore not limited to CMR cases, but also to domestic road transport cases as well as to sea transports and was recently also applied in the field of medical law.

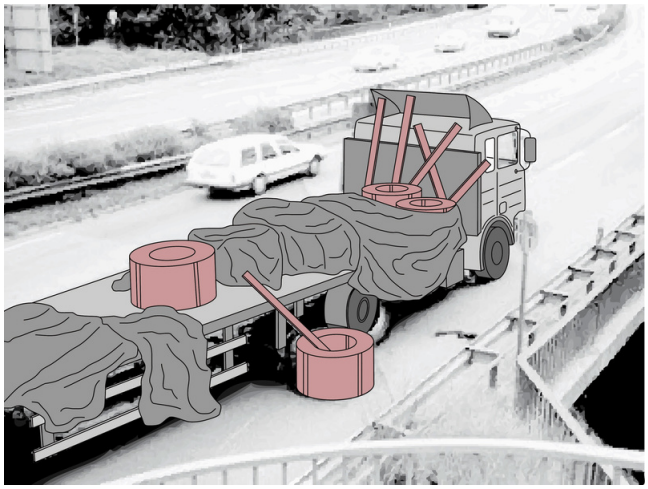
It is generally upon the claimant to demonstrate that the carrier acted grossly negligent. However, the sender or the consignee of the cargo will only know nothing or only little about how the particular shipment was carried out. He will, consequently, rarely be in a position to state the necessary facts and adduce the necessary evidence in order to establish the gross negligence. Failing to do so would mean that the carrier's liability remains limited.

The Federal Supreme Court has firmly established that the principle of good faith aids the claimant here. In cases where the party who is obliged to state the facts and to proof these facts can only make a general statement while the other party has the relevant facts at hand and can easily disclose them, that latter party is under an obligation to do so.

As a consequence thereof it is upon the claimant to (only) point out those aspects in case which make a grossly negligent transport by the carrier seem at least possible. The second burden to state facts then obliges the carrier to state (but not prove!) the facts surrounding the transport. Once the claimant has been supplied with these facts it is upon the claimant to make use of them to prove his claim to the court's satisfaction. So there is no reversal of the burden of proof.

Once the prerequisites for the secondary burden to state facts have been satisfied by the claimant, the defendant carrier needs to set out in detail which steps had been taken for this particular carriage in order to prevent a theft or damage. The haulier will have to explain how these preventive steps were documented and he is further obliged to make his own enquiries about the loss and disclose the findings to the claimant. The haulier's obligation is not limited to those facts and events which he did himself witness. Also the haulier is obliged to adduce those facts in the knowledge or possession of his employees and sub-contractors. The reason behind this is that the haulier should not escape his obligations by sub-contracting the carriage. The haulier is obliged to detail the security measures in place to such a degree that the claimant and the court can see how the different measures interact in real life in an ordered, clear and reliable manner. Also, it must become clear which measures were taken to ensure that the steps, which according to the planning should be taken, were in fact actually taken.

The secondary burden of course only covers those aspects which are relevant to the case. If a consignment was stolen, the haulier would not have to give details about his fire prevention measures.



Another example from the case law of the Federal Supreme Court: A machine being transported on a truck was damaged due to insufficient lashing and securing of the cargo. The Federal Supreme Court set out that the haulier needed to detail by which concrete steps it was ensured that the truck would only leave his premises with sufficiently secured cargo. The court held that the defendant should have stated which employee had carried out the loading of the cargo and who the supervisor was at that time. Further, the haulier should have detailed which concrete instructions were given to the supervisor in relation to safety checks and in what way it was ensured that the supervisor did indeed take these steps. Also, the court found information lacking on how the person carrying out the lashing of the cargo had been informed of how such lashing is to be done. The defendant's statement that the employees were regularly schooled in the theory and practical securing of cargo was found to be insufficient. The court insisted on information on the intervals at which these schoolings were given and what the contents of these schoolings were.

Another example: After a consignment disappeared during transport, the defendant informed the sender in a letter simply stating that the load "was damaged and its contents fully destroyed". Later defendant claimed that the letter had been a standard text and that in actual fact the truck containing the goods was stolen while it was parked on the premises of the Linz airport. The defendant claimed that a) the airport was surrounded by a high barbed wire fence, secured by a gate and under video surveillance and that b) the premises were patrolled by guards at night. The court found that the defendant had not given full details of the security measures taken. The court set out

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that the defendant should also have provided information regarding the questions of how truck was secured against theft, whether the gate had been forced or opened with a key, why the CCTV did not record the removal of truck, how often and at which intervals guards patrolled the premises, what exactly was checked by the patrols and who controlled the guards. Further, the court expected information as to how often thefts had occurred previously and which measures had been taken to prevent further losses as well as the names of the persons involved (driver, guards …).
The court held that the defendant was liable as per Articles 17, 29 CMR as he was found not to have discharged the burden of showing that sufficient organisational steps were taken to ensure the safety of the goods transported. This in turn gave rise to the finding that the measures to hinder a loss of the goods were so insufficient as to be grossly negligent. Further still, the court held that since not only the first information given by the defendant reporting the loss was incorrect, but the defendant also refused to give further information regarding the loss despite numerous requests of the claimant, gave rise to a presumption of grossly negligent organisation of the defendant's business operations.

2.2.3. THE SENDER'S CONTRIBUTORY NEGLIGENCE AS A MANS TO LESSEN THE LIABILITY

Based on the principle of good faith, a number of decisions handed down by the Supreme Court in 2004-2006 established that the sender's contributory negligence may lessen the carrier's liability in cases of Art. 29 CMR. Prior to these decisions the court had already held that contributory negligence was also to be considered in cases of unlimited liability under domestic transport law.
In cases relating to the CMR it has been held that the senders' negligence contributed to the loss in cases where the sender failed to inform the carrier about the risk on an unusually high loss due to the values of the goods. A loss is considered unusually high, if it exceeds the CMR limit of liability ten times.
Similar considerations apply in situations where the carrier has (for example in his general terms and conditions) stated that he will not accept certain valuable goods for transport. If the sender knew or should have known of this stipulation and nevertheless has the carrier transport such goods without informing the carrier of the value of the goods or their nature, this can be considered a contributory factor to the loss. The sender's failure to inform the carrier of the nature/value of the goods has contributed to the loss in cases in which the carrier would have or would have declined the transport of said goods.
The third scenario in which the senders' contributory negligence is of relevance lies in the senders' failure to declare the true value of the goods (in order to obtain a cheaper transport). The decisions on these aspects centre on the transport of parcels for which

the carrier was willing and able to offer increased protection for parcels with a declared value over a certain threshold.
The sender's contributory negligence may even completely nullify the carrier's liability.

2.2.4. SUMMARY

While German case law quite often leads to a breaking of the carrier's liability, this is not so much to be attributed to the courts' interpretation of the CMR, but to the overarching principle of the secondary burden to adduce facts. Also, German courts allow for the sender's own negligence to fully mitigate the carrier's liability.

3. News in Brief

3.1. The Provisions of the Supreme People's Court on Several Issues concerning the Application of the Company Law of the People's Republic of China (IV)

Came into force on September 1, 2017. For the purposes of accurately applying the Company Law of the People's Republic of China, based on the legal practice, the relevant legal issues have been clarified. These issues involve the validity of company resolutions, a shareholder's right to information, right to profit distribution, and pre-emptive right, and shareholder derivative actions[9].

3.2. The General Rules of the Civil Law of the People's Republic of China ("the Rules") came into force on 1 October 2017.

The Rules contain 206 provisions divided into eleven chapters covering fundamental principles, natural persons, legal persons, unincorporated organisations, civil rights, civil juristic acts, proxies, civil liability, statutes of limitation, calculation of periods of time and supplementary provisions.
Although Chinese legal system can be regarded as civil law, China has not promulgated Civil Code so far. Along with this Rules, the National People's Congress has announced that the civil code will be in place by 2020.

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[9] More details will be articulated in the next month's newsletter

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