

Conference Report

Transportation Law on the Move: Challenges in the Modern Logistics World

Thursday, 25th until Friday, 26th of April 2019

MLaw Ramona Fischer, Research Assistant and Bar Exam Candidate

Summary

The Competency Center for Logistics and Transport law (KOLT) held a two-day conference at University of Lucerne under the theme «Transportation Law on the Move: Challenges in the Modern Logistics World». The conference started on Thursday, 25th of April 2019 and was attended by 20 speakers from 6 different countries who shared their experience, analysis and visions on modern national and international transportation law embedded in a modern logistics and supply chain management. While the predominant number of speakers were internationally recognized academic experts in transportation law, practitioners in leading positions were also present.

The aim of the conference was to compare and share the lessons learned from different legal approaches of jurisdictions such as China, Japan, Sweden, Germany, the Netherlands and Switzerland, as well as discussing flaws and potential reforms of International Conventions and new model laws. These findings may serve as a basis for recommendations regarding a potential reform of swiss transport law.

The conference touched upon a variety of topics such as the impact of digitalization and new technical solutions on transport contracts, implications of actual trends towards renationalization of transport law, concepts of mandatory regulations vs. freedom of contract, issues arising from tripartite relationships, as well as challenges of the actual economic environment and the impact of changing costumers' and consumers' needs. The final section was dedicated to an analysis of Swiss national transport law and its potential revision, drawing conclusions from the insights of the previous findings.

Thursday, 25th of April 2019

Andreas Furrer, head of KOLT, opened the conference with a brief overview of the history of the University and the city of Lucerne, before diving into the core topic of the conference: challenges in the modern logistics world.

1st session: The Transformation of the Transportation Market: Challenges and Chances

Katharina Uribe Casillas, vice president Global Business Development Contract Logistics – Automotive + Industrial + Government & Defence at Kuehne + Nagel gave insights into today's challenges faced by the second largest provider for logistic solutions worldwide. She drew attention to current highlights and challenges in the logistic industry and the impact of logistics trends on law requirements. According to Katharina Uribe Casillas, globalization and digitalization are certainly a highlight, whereas she stressed the fact that innovation is potentially disrupting the entire logistics business model. She drew attention to the need for innovation, which mainly comes from market development where it gets more and more difficult to recruit qualified people. In this context, she highlighted the business case dilemma faced by the industry upon investment decisions, taking into account labor costs and flexibility, in particular given the mid-term contracts vs. long term investments in technology. Trade wars and high level of M&A activities by costumers were identified as further challenges. Overall, the audience gained an understanding of Kuehne + Nagel's business model, whose extensive logistics services go well beyond transportation and storage of goods.

Herbert Ruile, professor at University of Applied Sciences and Arts Northwestern Switzerland FHNW (Basel) and president of Verein Netzwerk Logistik (VNL) Schweiz gave a prospect into the future with his presentation entitled «The Logistic Market in 2030». He provided an insight into the Swiss logistics market and drew attention to current trends influencing logistics in the future. In particular, these include digitalization, the increasing e-commerce, nationalism and globalization as well as limited and costly infrastructure. In context of the development of the One Belt, One Road initiative spanning over Europe, Asia, and Africa, he drew attention to Switzerland's NEAT tunnel project, which is creating a faster connection through the alps. Furthermore, information about Switzerland's innovative freight transport project «Cargo Sous Terrain» was given. It aims to provide a solution for the challenges faced by increased mobility and freight transport, resulting in traffic jams and hot spots. Herbert Ruile stressed the

importance of having a vision, citing British philosopher Bertrand Russel's famous quote: «without utopia, we are lost».

In the following panel discussion led by Andreas Furrer, the topics of innovation, digitalization and changing customer needs and their interrelation with politics gave rise to further debate. It was noted that the main driver for innovation is the private industry rather than the Government. Examples for such developments are Block Chain and the Swiss freight transport project «Cargo Sous Terrain». However, some academics noticed an increase of readiness to invest from governments. Furthermore, some participants held that political pressure might have a higher impact on promotion of innovation than decisions of private actors. In light of actual trends in global economy, investment strategies of companies in past recessive times were analysed. It was concluded that companies who were ready and able to invest into innovations were recovering more quickly than others. Furthermore, the difficulties of implementation of long-term strategies were discussed, in particular given the often mid- and short-term contractual environment. Further debates were held about transparency created through digitalization and the potential implications of publicly available data on the transport industry. Moreover, the importance of information and the question of control over data were discussed in the context of trade wars. In addition, questions arising from innovative technologies such as 3D-printing were put into relation with trends towards sustainability and changing customer's needs as well as nationalization and protectionism. Amongst other conclusions, it was held that such technologies could drastically change the industry: If consumer goods are being 3D-printed around the corner, transport ways may be reduced significantly. Further discussions were being held on the use of autonomous vehicles and questions of liability, as well as the need for «City Logistics». In more general terms, it was found that our technologies are outdated and incapable to cope with the world's growing population. Accordingly, there is a new generation requesting different logistics - if the funding for such innovation is not available in Europe, China will inevitably step into this gap as an investor.

2nd session: Basic Principles in Transportation under Review

Fumiko Masuda, professor of Commercial Law at Graduate School of Humanities and Social Sciences at Okayama University, opened the 2nd session with observations from Japan on the question of how to allocate the parties' rights and duties. After providing an overview over the essential rules applicable to all modes of transport, Fumiko Masuda analysed the right's and

duties under the recently substantially revised Japanese Commercial Code (in force since 1st of April 2019). An essential feature of the Japanese Commercial Code is that most of its provisions are non-mandatory. Moreover, the Code is not self-sufficient, but is expected to be filled by contractual agreements. However, freedom of contract in the transport business is restricted through supervision by the «MLIT» (Ministry of Land, Infrastructure, Transport and Tourism). Fumiko Masuda concluded that whereas the Japanese approach regarding the correction mechanism for possible imbalances between the parties is justifiable in context of Japanese law, it may be an inadequate solution in other legal systems.

Olaf Hartenstein, partner at Arnecke Sibeth Dabelstein attorneys at law (Hamburg), provided insight into the rights and duties of third parties in modern transportation law. He focused on the receiver and the actual carrier. Olaf Hartenstein drew attention to the practical difficulties and implications of the qualification of a third party relationship (contractual or non-contractual), thus either falling under the Rome I or Rome II regulation. He further drew attention to a case brought by a passenger against Air Nostrum. In this 2018 case, the ECJ ruled that there was a contractual relationship between the passenger and the actual carrier (Air Nostrum), who was acting on behalf of Air Berlin and Iberia. The ECJ based this qualification on the contractual goal of the claims. In his findings, Olaf Hartenstein noticed a tendency towards less differentiation between contractual and non-contractual relationships and more inclusion of the rights of third parties. He argued that such solution is difficult to support, as long as there are other ways to reason.

Gen Goto, associate professor of Commercial and Corporate Law at University of Tokyo provided insight of the Japanese approach towards limitation of the carrier's liability. A specific characteristic of Japan's approach is the lack of statutory limitation of the carrier's liability to a certain amount. The only exceptions are international carriage of goods by sea or air, to which the Hague-Visby Rules and the Montreal Convention apply. However, this freedom of contract is on one hand restricted by a special rule regarding «valuable goods»: it provides for complete exemption of the carrier's liability for undeclared valuable goods. On the other hand, contractual limitations are introduced via standard terms and conditions. Gen Goto provided further explanations on the supervision by the MLIT through such standardized contract forms and approval requirements. In his concluding remarks, he found that the lack of

statutory limitation is based on the reliance of freedom of contract, whereas he also observed a reluctance to set a uniform limitation amount or formula applicable to all modes of transport.

Peter Mankowski, Professor and Director of the Seminar for Private International Law at University of Hamburg, held a presentation on the question of whether we still need mandatory provisions in national law and international conventions. He gave an overview of the history and functioning of a wide array of mandatory international conventions, pointing out that mandatory regulation creates transparency and a level playing field. In his conclusions, he noted that whereas mandatory regimes are necessary in B2C relationships, they are also required wherever contracts of adhesion are at stake. In the context of the Financial Crisis, Peter Mankowski observed a general skepticism towards unlimited formal freedom of contract. Hence, he found that existing mandatory regimes as established by International Conventions will not be abandoned, but rather welcomed by market players, in particular by their insurers, because of the calculability of such regimes.

Michiel Spanjaart, founder of Trains & Co (Rotterdam), visiting professor at the National University of Singapore (Multimodal Transport Law) and assistant professor at Erasmus University (Maritime Law, Charter Parties & Bills of Lading, Carriage of Goods) encouraged participants to rethink the role of multimodal transport law. Catching the audience's attention with the statement that «most conventions on carriage of goods are older than the container», he drew attention to historical reasons and issues arising from the lack of a convention regulating multimodal contracts. After demonstrating the complexity of the current legal framework on case examples, he presented his draft of a new Carriage of Goods Convention (CGC). Its key features are the principle of non-discrimination between unimodal and multimodal contracts, the establishment of a mandatory system of liability rules and limits and easy accessibility for merchants, carriers, bankers etc. In his closing word, he stressed the point that the CGC may be one of several solutions out of the «maze» of the current legal framework.

Michael Hochstrasser, partner at Schiller Rechtsanwälte (Winterthur) gave a talk about the inclusion of subcontractors in the national and international transport. He provided an analysis of the applicable rules of the Swiss Code of Obligations (CO) and the Uniform Rules Concerning the Contract of International Goods by Rail (CIM) to the relationships between the consignor, carrier and consignee. Attention was drawn to the fact that although there is no contractual relationship between the consignor and the subcontractor, the CIM qualifies the

subcontractor as an «actual carrier». Thus, the «actual carrier» is treated like a party in terms of liability. Michael Hochstrasser made a proposal de lege ferenda for the CO, according to which a provision governing the relationship between consignor and subcontractor should be inserted, whereas Art. 465 CO should be repealed. In the subsequent discussion, it was noted that there are tendencies outside of Switzerland towards recognition of each subcontractor as a successive carrier.

Friday, 26th of April 2019

3rd session: Towards a Modern Logistics Law

Sik Kwan Tai, associate professor at United International College in Zhuhai City (China) gave a talk on the ongoing revision of Chinese Maritime Law. He outlined the historical background leading to the revision, set out the principles, structure and issues of the current Chinese Maritime Law and explained its interrelation with the Civil and Commercial Laws. In his findings, he promoted the viewpoint that the Chinese Maritime Law should be a Maritime Code, providing an extensive and comprehensive as well as practical set of rules for the maritime industry and the international trade. Alternatively, he suggested using the English system as a role model for Chinese Maritime Law, thus dividing it into three major areas (Carriage of Goods by Sea Law, Maritime International Law and Admiralty Law). In this context, he drew attention to the current dispute in academia regarding localization vs. internationalization. Sik Kwan Tai ended his presentation arguing for internationalization and modernization of Chinese Maritime Law.

Andreas Furrer, director of KOLT and professor for Private Law, Comparative Law, International Private Law and European Law at University of Lucerne and partner at MME Legal | Tax | Compliance (Zurich), held a presentation under the title «The Corner Stone of a Logistic Law and its Implications on Transportation Law». He argued that mandatory rules are becoming less convincing in view of modern technologies and logistical concepts. Regarding the question of law reform on a national level, he promoted the view that a logistic contract could be qualified as a special type of mandate. A corresponding legal regulation could not only lay down the position of third parties and handling of electronic documents, but also take into account the securing of long-term investments by abolishing the right to terminate contracts at any time as set out in the general rule applicable to mandate contracts in Swiss Law (Art. 404 para. 1 Code of Obligations [CO]). He further argued that legal regulation could

provide for legal certainty within the extensive domain of logistics. Such regulation could be anchored in Swiss law or in an international convention which takes into account the learnings from the Rotterdam Rules, potentially incorporating main features of the CISG and corresponding with MLETR.

Prof. Dieter Schwampe, attorney-at-law at Arnecke Sibeth Dabelstein (Hamburg) with focus on (marine) insurance law, maritime law and transport law, gave practical insights into implications for the insurance of logistical services. He drew attention to developments such as changing needs and changing contractual agreements. In particular, he highlighted the shift of focus on liability towards loss prevention and performance. He also considered the changing legal environment, in particular regarding the allocation of rights and duties and different viewpoints on mandatory law and limitation. Dieter Schwampe provided an overview of the complex structures of today's contractual solutions and set out traditional insurance concepts of integrated insurance cover. In his critical analysis of new insurance cover clauses, particularly their description for the assured's business, he raised awareness for their complexity and practical difficulties in their implementation.

4th session: Legal frameworks of the modalities

Wolf Müller-Rostin, attorney-at-law specialized in airfreight law and honorary professor in insurance- and airfreight law offered some guidance and learnings from Air Law for a potential reform of Swiss transport law in his presentation entitled «Legal Framework in Air Freight». He analysed approaches and provisions adopted by German, Swiss and International Air Law and concluded that there are some interesting features of the Montreal Convention (MC) which might be considered for introduction into a reformed Swiss Law. These are the e-Air Waybill, the limitation of carrier's liability with limits being unbreakable and the provisions for multimodal transportation. He further recommended the implementation of a single book of law governing the carriage of freight by rail, road, inland waterway and air, using the German approach as a role model. Germany harmonized domestic transport law in 1998 into a single body of law, whereas the predominant number of provisions follow the principles of the CMR convention. However, the German Law allows deviation from the mandatory character of the CMR Convention.

Erik Evtimov, european and international rail transport lawyer and lecturer at University of Bern, held a presentation about the Legal Framework in Railway Freight. In the course of his

overview of the legal structure and scope of application of the Convention concerning International Carriage by Rail (COTIF), he invited the audience to consider the trend of nationalization from a philosophical point of view. He then went on to consider the complex triangle of legal relationship between the carrier, the client and the infrastructure manager as well as other parties of the international carriage by rail. The main part of his presentation consisted in an analysis of the qualifications, rights and obligations as well as liability and compensation rules applicable to the involved parties. In his closing words, Erik Evtimov raised the question whether it is time for a revision of the rail-centered COTIF. In the course of such revision, standards of international law should be taken into account.

Tomotaka Fujita, professor for Commercial Law at University of Tokyo, provided an overview over the Legal Framework in Maritime Freight. He considered the following fundamental questions, which arise from the variety of transport law regimes across the different modes of transport: (1) Why are they different? (2) Is there any justification for the different regimes? (3) Is there a convergence between the regimes or do they remain different? In the course of his presentation, he analysed the international legal regime of maritime freight, explained basic features of the law on the carriage of goods by sea and examined the justification for these features. In particular, Tomotaka Fujita concluded that mandatory regulation should be relaxed, at least between the contractual parties. Furthermore, he took position for a revision of the legal framework in the field of maritime freight and favoured an international approach regarding legislation.

Wouter Verheyen, associate professor at Erasmus School of Law (Rotterdam), gave insights into the Legal Framework in Road Freight. The core of his presentation was an analysis of the issues arising from the application of the Convention on the Contract for the International Carriage of Goods by Road (CMR) on sharing logistics contracts. Pointing out the drastical changes in contract chains, he considered this question by using two case studies: Crowd Logistics and Platooning Cooperation. He further examined the liability of the growing circle of people involved in such sharing logistics contracts. Wouter Verheyen closed his presentation with an assessment of the role of contracts against the background of uncertainty and ineffectiveness of the CMR in selected scenarios of sharing logistics.

5th session: Regulative Frameworks for Digital Freight Documents

Abhinayan Basu Bal, assistant professor at University of Gothenburg, examined the UNCITRAL Model Law on Transferable Records (MLETR). The aim of his presentation was to determine how MLETR may assist in better information exchange in logistics and finance of international trade. He introduced his hypothesis, according to which the MLETR can assist in creation of business processes through electronic platforms, allowing an increase of visibility of supply chains and provision of better access to finance for small and medium sized exporters and importers in international supply chains. He supported his hypothesis with a case study of an international transaction involving the transportation of completely built cards from Germany to China by railways (Chongqing Logistics Financing Service Co. Ltd. [CLFS] initiative). He concluded that the CLFS initiative has the potential to create an information driven third-party electronic platform, which would merge commercial documentation for both logistics and finance to promote supply chain finance along the Eurasian railway corridors.

Viola Heutger, private lecturer at University of Lucerne and researcher in Private Law, International Private Law, Comparative Law and European Law, provided an analysis of the EU-Proposal for a European Regulation on Electronic Freight Information (eFTI). In the course of her presentation, she set out the practical challenges created by the current fragmented legal framework and IT landscape, compared the EU-regulation with the UNCITRAL MLETR and drew attention to questions being left open by the eFTI. In particular, she found that there is a need to strive for equivalence of paper and electronic documents. According to her point of view, the eFTI is a good starting point for further reflexion. However, it does not take into account technical developments such as smart contracts and IOTA. Hence, Viola Heutger argued for reconsideration of the eFTI and implementation of a broader approach.

6th session: Insights for Switzerland

Sylvain Marchand, professor at the University of Geneva and attorney-at-law at CMS von Erlach Poncet, Geneva, discussed the question whether Switzerland needs a vision for a revised Swiss Code for Transport. After providing information about the structure and rather limited scope of applicable provisions in the Swiss Code of Obligations (CO), he found that a revision is not very likely to be undertaken in the Swiss legislator in the near future. However, he drew attention to three main aspects of his analysis which should be taken into account for a potential future revision: (1) The relationship between the contract of transport pertaining to the contract

of mandate should be clarified (2) inspiration for revision can be found in solutions adopted by international conventions on transport law and (3) more consistency with the international regime of the contract of carriage regarding the cap on carrier's liability is recommended. In sum, he promoted the viewpoint that horizontal and vertical harmonization with international conventions is more favourable than sophisticated domestic regulation.

Stephan Erbe, Partner at Thomann Fischer (Basel), provided a practitioner's viewpoint regarding the question whether Switzerland needs a revision of transport law. He set out to some problematic areas in practice, analyzing an according need for revision. In his conclusions, he pointed out that although some questions are controversially discussed, they have little practical impact. Furthermore, issues such as problems of jurisdiction in CMR-cases and the problem of multimodal transports could be resolved by juridical clarification rather than a legislative revision. In sum, he found that no fundamental revisions are necessary, under the condition that case law deals with the questions arising. The only area where Stephan Erbe identified a need for legislative adjustments is the use of modern technologies in the logistics industry. However, practice will still have to show which amendments are truly necessary.

In the course of the following Round Table led by Raphael Brunner, Partner at MME Legal I Tax I Compliance (Zurich), participants drew conclusions and insights for Switzerland from the previous presentations and discussions. Given the different backgrounds of the participants, a wide range of views was advanced. Opinions ranged from promoting uniform systems governing all means of transport to supporting the current system of recourse to international norms. In the course of the discussion, further attention was drawn to the Block Chain Act of Liechtenstein, which is to be expected to enter into force in 2020.

Whereas there was a clear consensus towards international solutions, participants also gained understanding for the Swiss approach and the reasons why the Swiss legislator does not see a need for action to revise its transport law. However, in light of the current consultation process for improvements of the legal framework regarding the use of Block Chain and Distributed Ledger technology, Switzerland is certainly receptive to regulate new developments. In this regard, legislative bodies all over the world see themselves faced with a similar issue: How to shape such regulations? On one hand, transport law is embedded in a national framework – on the other hand, harmonization through international conventions is not only a desire, but a necessity in our globalized world.