

Harmonization of Transport Law under Belt and Road Initiative

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[Abstract] In the last few decades, the transport law has been in a fragmental state, which is full of over-diversification of the provisions of the special norms and international conventions, laws and regulations, the general terms of the transaction. As matter of facts, it's constituted by a very vague, even unpredictable regulatory system. It is not only harmful to protect the safety of transactions, but also creates unfair competitive situation. This paper analyzes the necessity and possibility of harmonization of transport law under Belt and Road Initiative, and points out that harmonization will help to the elimination of unfair competition and meet the needs of efficient and orderly transportation and logistics.

[Key words] fragmentation; transport Law; Harmonization; Belt and Road Initiative

I. Introduction

China's Belt and Road Initiative (BRI) has become a priority in Beijing's foreign policy, a process towards the rebuilding of connectivity across the Eurasian continent and Africa, thereby linking local markets to regional and global value chain.¹ However, there are numerous several challenges, such as geopolitical instability, culture, religion and regulatory frictions which inevitably will be faced or have already been encountered.² Among them, there are also major differences in transport law which has been in a fragmental state and is full of over-diversification of the provisions of the special norms and international conventions, laws and regulations, the general terms of the transaction. As matter of facts, it's constituted by a very

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¹ Swaine, Michael D. "Chinese views and commentary on the 'One Belt, One Road' initiative." *China Leadership Monitor* 47.2 (2015): 3.

² Huang, Yiping. "Understanding China's Belt & Road Initiative: Motivation, framework and assessment." *China Economic Review* 40 (2016): 314-321.

vague, even unpredictable regulatory system.³ It not only creates unfair competitive situation among the different stakeholders, but also bring negative impact to the safety of business transactions.

Traditionally, land transport and air transport has been often neglected in international trade because their share of transportation are small and insignificant. The degree of harmonization of related rules is also not as good as in the maritime sector. But even in the marine transport, there are different legal regimes deriving from diverse international conventions, namely Hague Rules, Hague-Visby Rules, Hamburg Rules and Rotterdam Rules, which setting different carriers' duties and liability requirements, exclusion clauses, limits of liability, etc. As for the national level, there are also major differences in legal regimes practiced across the BRI region, including common law, continental law and Islamic law.

II. The necessity and urgency of the integration of transport law under the BRI

Transportation is like the blood system of world community which has huge impact on the free movement of person and goods and affects the share of a country's products in the international and domestic markets, not mentions its potential impact on nation security and geopolitical situation.⁴ Following the reform and opening up policy since 1978, China has been put great efforts to build a modern and efficient transportation system. A white paper regarding the development of China's transport issued by Chinese government mentioned that:

China leads the world in infrastructure construction. China's technologies for high-speed, alpine, plateau and heavy-haul railways have reached the world's advanced level, while high-speed railways have become a symbol of made-in-China

³ Hoeks, Marian. Multimodal Transport Law: The law applicable to the multimodal contract for the carriage of goods. Kluwer Law International, 2010.

⁴ Vgl. Basedow, Jürgen. Der Transportvertrag: Studien zur Privatrechtsangleichung auf regulierten Märkten. Vol. 50. Mohr Siebeck, 1987. S.1-3.

*and going-global products.*⁵

Indeed, China's transport has undergone significant changes since 1978 which also making huge contributions to its economic development. Since introducing of the BRI in 2013, China is actively pushing forward to the development of international transportation networks and promoting the interconnectivity across the BRI region.⁶ Because China put free and safe flow of market elements in high priority in order to achieve peace, mutual learning and win-win cooperation among the nations. With having connectivity on its agenda, the BRI aims to links up more closely the vibrant East Asian economies and the highly developed European economies and to drive the growth of the vast hinterland of the Eurasian continent. ⁷Harmonization transport law in the region will promote safe, seamless, streamlined and efficient multimodal transport within the region. But unfortunately, in reality, transport law is in a deep fragment situation both nationally and world widely.

Since 1970s, door-to-door transport has been developing rapidly with wide use of Container transport. ⁸Multimodal transport and the comprehensive transport system of Container transport has broken through the traditional port-to-port transport mode. The significant changes in the transport industry have optimized logistics services such as product planning, real-time management of delivery, storage, distribution, and supply chain management. The Comprehensive use of the advantages of various modes of transport not only provides more efficient service, but also demands higher level of collaborative network and a standardized new contract/legal form to control any potential risks. The traditional transport legal regime can't meet the demand of

⁵ The Information Office of China State Council on Dec 29 2016 published a white paper on the development of China's Transport. See http://english.gov.cn/archive/white_paper/2016/12/29/content_281475528034734.htm, last visited on the date of 26/04/2018.

⁶ Summers, Tim. "China's 'New Silk Roads': sub-national regions and networks of global political economy." *Third World Quarterly* 37.9 (2016): 1628-1643.

⁷ Visions and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road, Beijing: National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, March 28, 2015

⁸ Schmeltzer, Edward, and Robert A. Peavy. "Prospects and Problems of the Container Revolution." *J. Mar. L. & Com.* 1 (1969): 203.

the innovation of economic life and has produced a series of problems. The relevant specific question will be illustrated in the following aspects.

First, it lacks of transparency and predictability. If one looks for the solution for a transport legal issue today, the answer is hidden in a variety of completely different laws and regulations which is full of muss. First of all, it is necessary to distinguish between different modes of transportation and further to distinguish whether it is cargo transportation or passenger transportation, whether it is domestic transportation or cross-border transportation. This situation causes a very low degree of rationalization and theorization. In this area, various transport laws and regulations grow spontaneously like weed which is full of differences and contradictory. For example, there is no basic consensus on regulations such as the qualification of claim, requirements of liability, limitation of liability and scope of damages.

Second, it violates basic values. The value of human life or health is subject to the mode of transportation he travels. Because there are different compensation rates that have been set by the different modes of transportation. As Alan S. Boyd pointed out:

Reflecting this concentration on individual modes the law has, to a large extent, developed its own set of principles and rules applicable to each mode. The amount a person may recover when injured while traveling may depend on whether he was on a boat, a train, or a plane. And it may even depend on where he was going. The method of financing goods shipped overseas may depend on whether they are sent by sea or air.⁹

The issue of same life but different price also becomes a serious problem in China, not just because it arises ethical concerns but also violates fundamental legal

⁹ Boyd, Alan S., Stanford G. Ross, and Richard L. Teberg. "New dimensions in transportation law." *Transp. LJ* 1 (1969): 1.

principles.¹⁰ The right to life and health should not be treated differently or even derogated because the different means of transportation he travels.

Third, it creates unfair competition among different transportation modes. The differences of different modes of transportation have been over exaggerated. That leads to different policy and regulation within transport sector. Monopoly in the transport sector is quite serious and different modes of transportation are exclusive with each other both within and beyond national boundary. For instance, China's railway sector traditionally almost has full function, which means it not only just provides transportation service, but also introduces and applies the regulation rule.¹¹ That also leads to very difference restrictions of access, various subsidies for operating and infrastructure construction, contradictory liability systems.

Fourth, it constitutes a barrier to the sound development of multimodal transport. Although multimodal transport has been in the fast track of development in past decades by containerization, Conflict, Chaos and Confusion are often caused by the individualized transport rules. It is one of the core issues of the comprehensive and integrated modern transport system to properly share out the work and cooperate seamlessly. Back to 1966, President Lyndon B. Johnson of the United States proposed to coordinate the executive functions of US transportation agencies in a single coherent instrument of government and to establish a Cabinet level Department of Transportation. The main purpose of this reform is to coordinate the transport policy and to support for multimode transport. Thus, the Office of the Under Secretary of Commerce for Transportation, the Bureau of Public Roads, the Federal Aviation Agency, the Coast Guard, the Maritime Administration, the safety functions of the Civil Aeronautics Board and the safety functions and car service functions of the Interstate Commerce Commission, the Great Lakes Pilotage Administration, the St.

¹⁰ Tian Wensheng. "The Three Girls were Suffered from a Car Accident" "Different Costs at the Same Life", China Youth Daily [Zhong Guo Qing Nian Bao](2006): 01-24.

¹¹ Pittman, Russell. "Chinese railway reform and competition: lessons from the experience in other countries." Journal of Transport Economics and Policy (JTEP) 38.2 (2004): 309-332.

Lawrence Seaway Development Corporation, the Alaska Railroad, and certain minor transportation-related activities of other agencies was consolidated in the Department of Transportation.¹² Similar attempts or efforts can also be found in Switzerland, German¹³ and recently also in China¹⁴. The effort to harmonization of transport law can also be indentified in above nations, which means a more efficient multimode transport will strengthen as a whole by providing a more coordinated policy guidance and support.

III. Struggle between Fragmentation and harmonization of transport law

There are different risks associated with different modes of transport, which has been deemed as the root of fragmentation in transport law. If the particularities of different modes of transport cannot be diminished, how is the possible for harmonization of the rules? Indeed, the risk of carriage by sea is quite different from carriage by land and also different from carriage by air. On the other hand, as matter of fact, the risk of every voyage is different, which does not mean we need to formulate such a purely situationalized law. Although they are operated in very different circumstance and not possible to encounter the identical risk, they still could be classified as a certain type or types. To some extent, the common attributes of different modes of transport has been overlooked. For example, the risk in modern society mostly comes from mankind's own creatures: machine, technology and management system. Human activities are less and less subject to natural disasters and other natural conditions, which means nature risk, like special whether condition at seas, tends to play a limit role in transportation.¹⁵ The risks brought by mechanization, industrialization and

¹² Grinder, R. Dale. "The United States Department of Transportation: A brief history." Retrieved October 1 (2006): 2007.

¹³ Gscheidle, Kurt. Verkehrspolitik'76: Grundsatzprobleme und Schwerpunkte: Ansprache am 29. Januar 1976 anlässlich des verkehrspolitischen Jahresgespräches in Bonn. Esdar, 1976.

¹⁴ Under the plan, the Ministry of Railways was split with its regulatory powers going to the Ministry of Transport while its commercial operations are run by a company. See Liou, Chih-shian. "Streamlining the Leviathan: The China Dream and Super-Ministry Reform." CHINA DREAMS: China's New Leadership and Future Impacts. 2015. 89-109.

¹⁵ Gauci, Gotthard. "Limitation of liability in maritime law: an anachronism?." Marine Policy 19.1 (1995): 65-74.

human element are common factors among different modes of transport.¹⁶

The transport industry has been under special protection by many government authorities, because as industry's midwife transport connects home and abroad, product and market. The first generation of transport law that emerged in the late 19th century and early 20th century was to adapt to the technological conditions at that time and met the need of globalization of markets.¹⁷ To facility the special need of early globalization and avoid over-competition in transport industry, individualized transport law was set from the very beginning. For instance, to encourage adventure at seas, special liability limitation and exemption has been granted to marine carrier which is very different from carriage by land. In the field of transport law, special rules were always prior to the general rules, which made some common values to be covered up. The general provisions of transport law had been regarded as insignificant and often been neglected. Meanwhile, each mode of transport uses its own transport document that creates administrative costs for multimodal transport. It already becomes an urgent need to create a single transport document for the carriage of goods in any mode to promote multimodal transport.¹⁸ For a long time, the isolation of the individual transport laws led to the assumption that each individual transport law had its own origin.

Furth more, the fragmentation of transport law has been strengthened by the international unification efforts of individual transport rules to some extent. It became more difficult to be coordinated because each mode of transport has its own international liability regime. However, studies have shown that the so-called autonomy mainly depends on its special liability regime comparing with maritime transport and other transport modes, which isolates them from each other.¹⁹ There is a

¹⁶ Ekwall, Daniel. *Managing the Risk for Antagonistic Threats against the Transport network*. Diss. Göteborg: Chalmers university of technology, 2009.

¹⁷ Hoeks, Marian. *Multimodal Transport Law: The law applicable to the multimodal contract for the carriage of goods*. Kluwer Law International, 2010.

¹⁸ Schelin, Johan. "The UNCITRAL convention on carriage of goods by sea: harmonization or de-harmonization." *Tex. Int'l LJ* 44 (2008): 321.

¹⁹ Vgl. zum Luftrecht ABRAHAM, *Das Luftrecht als Sonderrecht, als Bestandteil des gemeinsamen Rechts und*

lack of dialogue between the stakeholders of different mode of transport. The stakeholders in transport industry prefer to use their own cargo liability regime as a starting point for harmonization.²⁰

Transportation can be defined as a movement of people, goods from one place to other place, which includes any form of change in location. It has no legal significance by using an internal transportation system and not through the market to get the transport service. Thus transport by itself is excluded to discussion in this paper.²¹ In theory, there are two kind paths could be employed for the harmonization of transport law. One is so called civil code approach; the other is commercial code approach.

The former is by using a highly abstract concept, for example transport act, which like act-in-the-law (*Rechtsgeschäft*), to development a set of general rules of transport law. It may seem logically self-contained, but the diversity of economic life could also be neglected. As for the latter, *the commercial code approach* will not merely pursue the generalization of transport law; instead, it applies typological methods to reconcile different modes of transport. The harmonization of transport law requires a generalization and optimization of transport typology.²²

Since the 1960s, the second-generation transport law has gradually emerged. For example, the Civil Code of the Netherlands includes a book of transport Law and Means of Transportation which provides the general rules of transportation. In Germany, under the Transport Law Reform Act of 1998 (“*Transportrechtsreformgesetz*”), the carriage of goods by different modes of transport (by land, by inland waterways or by air) is governed by the provisions of Book 4 of

eines allgemeinen Verkehrsrechts, in: Beiträge zum internationalen Luftrecht –FS Meyer (1954) 9, IOf.; zum Seerecht CARBONE, La disciplina giuridica del traffico mantlmo internazionale (1982) 27.

²⁰ Crowley, Michael E. "The limited scope of the cargo liability regime covering carriage of goods by sea: the multimodal problem." Tul. L. Rev. 79 (2004): 1461.

²¹ Mukherjee, Prohanto K., and Abhinayan Basu Bal. "A legal and Economic analysis of the volume contract concept under the Rotterdam rules: Selected issues in perspective." J. Mar. L. & Com. 40 (2009): 579.

²² Evans, Malcolm. "Uniform Law: A Bridge Too Far." Tul. J. Int'l & Comp. L. 3 (1995): 145.

the German Commercial Code.²³

As matter of fact, the basic rules of the contract of carriage essentially could apply for all modes of transport since the steam engine revolution. Transportation is nothing more than the use of different vehicles to transport specific transport objects (cargo, passenger) from one place to another within a certain period of time. There are three basic elements in any transport contract regardless any modes of transportation: time, space and cargo/passenger. As far as the general obligations of carrier and shipper are concerned, the different modes of transport stay the same. The carrier is responsible for "taking good care of the goods", "successfully transporting the goods to their destinations" and "making a deliver to the consignee".²⁴ The shipper has the obligation to pay the agreed freight. Although there are unique provisions such as salvage and maritime liens for carriage by sea, these systems usually are not subject to the contract of carriage itself but constitute independent auxiliary systems beyond the transport contract.²⁵

Transport contract is essentially a contract for works (Werkvertrag) which is different from service contract (Dienstvertrag).²⁶ The latter only requires service be provided in accordance with the contract, but can't guarantee the success (Erfolg) of service, such as legal service, medical service and etc.²⁷ Transport contract regardless of which mode not only requires the carrier providing the service in accordance with the contract, but also requires the carrier to successfully deliver the goods to its destination within agreed period of time.

With emerging of new trade revolution, especially the cross-border e-commerce under

²³ Blettgen, H. "Die Regelung des multimodalen Transports nach dem Transportrechtsreformgesetz (TRG)." *Multimodal Transport und Binnenschifffahrt*. Nomos, Baden Baden (2001): 53-63.

²⁴ Oetker, Hartmut. "§ 10 Das Vertragsrecht der Transportgeschäfte." *Handelsrecht*. Springer, Berlin, Heidelberg, 2015. 269-275.

²⁵ Pfeifer, Michael. "Die Reform des Transport-und Seehandelsrechts in Japan und Deutschland aus rechtsvergleichender Perspektive." *Zeitschrift für Japanisches Recht* 21.41 (2016): 267-273.

²⁶ Ramberg, Jan. *The law of carriage of goods: attempts at harmonization*. Almqvist & Wiksell, 1973.

²⁷ Basedow, Jürgen. *Der Transportvertrag: Studien zur Privatrechtsangleichung auf regulierten Märkten*. Vol. 50. Mohr Siebeck, 1987. S. 4-5.

BRI, Interconnection has been in a stage of rapid development which puts forward higher requirements for “door to door” transportation and its regulations.²⁸ The contemporary transport law neither can meet the needs of cross-border e-commerce nor is it conducive to the fair competition among the different modes of transportation.²⁹ It is of great significance to build a safe, efficient, green and comprehensive transportation system across the BRI region for supporting a regionalized or internationalized transport network, but harmonization or unification of the standards and rules is an even more important element.³⁰

As well known in transport industry, the United Kingdom has maintained its dominant position in the shipping related high-end service industry partly by relying on the complex set of shipping rules and regulations, even though the United Kingdom has become increasingly insignificant in the real shipping industry, such as shipbuilding, maritime transport and ports. There is no country can shake up its superior position in shipping finance, shipping insurance, shipping brokerage, and legal services. As matter of fact, the complexity of the shipping law somehow causes the complexity of the shipping insurance rules, which to some extent helps to maintain the superiority of shipping insurance industry. As have been discussed above, the different risk of different modes of transport is the root of fragmentation of transport law. But the different risk has been properly dealt and covered by related insurance. Why does the divergent situation remain? It seems not necessary to complicate the rules by dealing with transport risk twice.

IV. Way to harmonize the transport law under BRI

The development of the modern transport industry is to serve and respond to the needs

²⁸ Yang, Lifan. "The Development Situation and Strategies of Cross Border E-commerce in China." *Development* (2017).

²⁹ Giuffrida, Maria, et al. "Cross-border B2C e-commerce to Greater China and the role of logistics: a literature review." *International Journal of Physical Distribution & Logistics Management* 47.9 (2017): 772-795.

³⁰ Zhang, Mingli, Wei Zuo, and Hongping Zheng. "Research on the Coordination Mechanism and Improvement Strategy of the Business Model from China's Export Cross-border E-commerce--Based on the Theory of Coevolution." WHICEB. 2016.

of trade development both domestic and international, but it in turn also provides a possible channel for the innovation of trade. There are three large-scale regional trading zones had been developed from ancient times up to the beginning of the 15th century which included the trade circle in Southeast Asia (Nanyang / 南洋), Indian Ocean region and Mediterranean region.³¹ These three major trading circles are subject to different trade routes and are relatively independent from each other. There was only an indirect transfer trade between them. It should be said that before the advent of the Great Navigation Age, there was virtually no real world trade.³² But even today, it is still subject to such factors as transport infrastructure, business customs, cultural traditions, and geopolitics along BRI region, especially different customs, border, inspection and transport rules. The interconnection of different regions remains as one of the main theme of our time.

China in its Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road stated:

*On land, the Initiative will focus on jointly building a new Eurasian Land Bridge and developing China-Mongolia-Russia, China-Central Asia-West Asia and China-Indochina Peninsula economic corridors by taking advantage of international transport routes, relying on core cities along the Belt and Road and using key economic industrial parks as cooperation platforms. At sea, the Initiative will focus on jointly building smooth, secure and efficient transport routes connecting major sea ports along the Belt and Road.*³³

The BRI seeks to a common ground for cooperation and development by following

³¹ See Reid, Anthony. Southeast Asia in the Age of Commerce, 1450-1680: Expansion and crisis. Vol. 2. Yale University Press, 1988. Aslanian, Sebouh David. From the Indian Ocean to the Mediterranean: The global trade networks of Armenian merchants from New Julfa. Vol. 17. Univ of California Press, 2014. Risso, Patricia A. Merchants and faith: Muslim commerce and culture in the Indian Ocean. Routledge, 2018.

³² Findlay, Ronald, and Kevin H. O'rourke. Power and plenty: trade, war, and the world economy in the second millennium. Princeton University Press, 2009.

³³ Visions and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road(Beijing: National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, March 28, 2015).

market operation, improve the region's infrastructure, and upgrade their connectivity to a higher level. In this regard, a harmonized transport law shall be important element to deepen closer economic ties. Traditionally, by negotiating and adopting international treaties or convention is the only way to harmonize of rules of different nations. But it sometimes causes a further fragmentation of rules and standards. For instance, The Rotterdam Rules tries to modernize the existing international rules relating to contract of carriage of goods by sea, and replaces the Hague Rules, the Hague-Visby Rules and the Hamburg Rules. But it in turns leads to further disagreement and fragmentation at least at this moment. ³⁴

Adopting model transport law and standard transport contract clauses might be a more effective way to minimize divergence and achieve the harmonization of transport law. A model law is an appropriate vehicle for legal harmonization by providing a model legislative text to States for enactment as part of their national law, because it allows states to make adjustments to the text of the model to meet local special requirements.³⁵ It is easier and more flexible than to negotiate a rigid treat text that usually cannot be altered. The practice of UNCITRAL in trade law showed that easier acceptance of a model law than of a treaty in dealing with business transaction. In order to avoid the divergence, an easily understandable, transparent standard transport contract clauses and transport document shall also be provided. Strict liability of carrier shall be opted-in in mode transport law to simplify the transaction, facility the e-commerce, and enhance the predictability of transport risk. Meanwhile, transport insurance productions shall be upgraded to accommodate the simplicities of carrier liability regime.

³⁴ Zhao, Lijun. "Uniform seaborne cargo regimes-a historical review." *J. Mar. L. & Com.* 46 (2015): 133. Honnold, John O. "Ocean Carriers and Cargo; Clarity and Fairness-Hague or Hamburg." *J. Mar. L. & Com.* 24 (1993): 75.

³⁵ Faria, Jose Angelo Estrella, and José Ángel. "Legal Harmonization Throughmodel Laws: The Experience of the United Nations Commission on International Trade Law (UNCITRAL)." (2011).