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DOPRINOS SJEDINJENIH AMERIČKIH DRŽAVA UNIFIKACIJI MEĐUNARODNOG TRANSPORTNOG PRAVA

CONTRIBUTION OF THE UNITED STATES OF AMERICA TO THE UNIFICATION OF THE INTERNATIONAL TRANSPORT LAW

SAŽETAK

U radu se pokušava odgovoriti na pitanje koliko su Sjedinjene Američke Države, kroz stoljetnu povijest međunarodnih konvencija iz transportnog prava (počevši od Konvencije o međunarodnom prijevozu robe željeznicom, Bern, 1890. – CIM) zaista doprinosile unifikaciji međunarodnog prijevoznog prava. Prvi međunarodni ugovor globalnog značenja koji je SAD ratificirao bila je Međunarodna konvencija za izjednačavanje nekih pravila o teretnici, 1924. (Haaška pravila, 1924.) o prijevozu tereta morem – stupila na snagu 2. lipnja 1931., dok je posljednja konvencija koju je potvrdio bila Konvencija o ujednačavanju određenih pravila za međunarodni zračni prijevoz iz Montreala, 1999. (Montrealska konvencija, 1999.) – stupila na snagu 4. studenoga 2003. Dodatna specifičnost ove zračne Konvencije, zapravo zamjene za dugovječnu Varšavsku konvenciju iz 1929. je u tomu što ona jedina u jednom ugovoru uređuje prijevoz putnika i njihove prtljage kao i tereta, a što konvencije iz drugih grana prijevoza ne čine, nego imaju poseban ugovor za prijevoz putnika i njihove prtljage, a poseban za prijevoz tereta. U razdoblju između Haaških pravila, 1924. te Montrealske konvencije, 1999. (75 godina), niti prije, a niti nakon toga, Sjedinjene Američke Države nisu pokazivale pretjeran interes za unifikaciju međunarodnog transportnog prava cestom, željeznicom i unutarnjim vodama (jezera, rijeke, kanali). Jedan od glavnih razloga vidimo i u tome što kopnene konvencije imaju prije svega regionalno, a manje univerzalno značenje pa stoga nisu posebno zanimljive SAD-u.

SUMMARY

This paper attempts to answer the question of how the United States, through the centuries-old history of international conventions on the transport law (starting with the Convention on the International Transport of Goods by Rail, Bern, 1890 – CIM) actually contributed to the unification of the international transport law. The first international treaty of global importance that was ratified by the United States is the International Convention for the Unification of Certain Rules of Lading, 1924 (The Hague Rules, 1924), for the transport of cargo by sea, that came into force on 2nd July 1931, while the last convention confirmed was the Convention for the Unification of Certain Rules for the International Carriage by Air, Montreal, 1999 (Montreal Convention, 1999), that entered into force on 4th November 2003. Additional specifics of this Convention, actually the replacement for the long-term Warsaw Convention, 1929, was the fact that it is the only one governing the carriage of passengers and their baggage as well as cargo, while conventions referring to other means of transport do not regulate this part in the same, but have a separate contract for the carriage of passengers and their luggage and a special one for freight. In the period between the Hague Rules, 1924, and the Montreal Convention, 1999, (75 years), and even before and after that, the United States showed neither an excessive nor an expected interest in the unification of the international road, rail and inland waterways (lakes, rivers, canals) transport law. One of the main reasons is that the land conventions have primarily a regional rather than a universal character

Na temelju provedenog istraživanja se zaključuje da nema pravila u ponašanju SAD-a u donošenju pojedinih konvencija (međunarodnih ugovora) iz područja međunarodnog prijevoza putnika i njihove prtljage te stvari. Dodatnu potvrdu ove teze pronalazimo u doprinosu SAD-a u odnosu na Rotterdamska pravila, 2009. iz pomorskog transporta tereta koja unatoč velikim očekivanjima još uvijek nisu stupila na snagu, jer najviše nedostaje ratifikacija globalno najjače gospodarske i brodarske sile svijeta (bila je među potpisnicima 23. rujna 2009. u Rotterdamu pod okriljem Ujedinjenih naroda). Treba li razlog nepredvidljivosti tražiti i u vrlo složenom postupku ratifikacije međunarodnih ugovora u SAD-u koji, ako su ratificirani, postaju federalni izvor prava (engl. federal law) s višom pravnom snagom od propisa pojedine savezne države (engl. state law)?
Može se stoga govoriti o tomu da zakonodavstvo Sjedinjenih Američkih Država prihvaća samo najbolje od ostatka svijeta. Jednako tako, u ponašanju SAD-a pronalazimo i nacionalni ponos jer čvrsto drži do pravila koja su samostalno stvarana kroz stoljeća i u koja duboko vjeruje.

Ključne riječi: *unifikacija, transport, SAD, Rotterdamska pravila, postupak ratifikacije u SAD-u*

and therefore are not particularly interesting to the U.S.A.
On the basis of this study, it can be concluded that there are no rules in the behaviour of the U.S. in the adoption of certain conventions (treaties) in the field of international transport of passengers and their luggage and belongings. A further confirmation of this thesis can be found in the contribution of the United States in relation to the Rotterdam Rules, 2009, in the field of the transport of cargo by sea, because, despite the high expectations, it has not yet entered into force, since it lacks the ratification of the strongest global economic powers of the world in shipping (it was among the signatories in 2009 in Rotterdam under the auspices of the United Nations). On of the reasons for this unpredictability might be perhaps a very complex procedure for the ratification of international treaties in the U.S.A. which, if ratified, become a source of the federal law with a higher legal force than the state law regulations of a particular state.
One can therefore speak of the fact that the legislation of the United States accepts only the best from the rest of the world. Likewise, in the behaviour of the United States, we can identify their national pride because they firmly held to the rules that have been self-created through centuries and in which they deeply believe.

Key words: *unification, transport, the U.S.A., the Rotterdam Rules, the ratification process in the U.S.A.*

1. UVODNA RAZMATRANJA

Promet je s ekonomskog gledišta žila kucavica današnjeg svjetskog gospodarstva. Opća uprava za mobilnost i transport,[1] Bruxelles, Europske komisije objavila je pokazatelje[2] prema kojima je tijekom 2008. u sektoru transportnih usluga u EU-a bilo zaposleno 9,1 milijun osoba, odnosno oko 4,5 % ukupnog broja zaposlenih. Oko 2/3 od njih radilo je u kopnenom transportu (cesta, željeznica, unutarnji vodni putovi), 2 % u pomorskom transportu, 5 % u zračnom i 27 % na poslovima koji su neposredna podrška svakom od prijevoznika u obavljanju djelatnosti (skladištenje, sortiranje, slaganje i sl.). Dalje, u 2009. ukupne aktivnosti u EU-u su procijenjene na iznos od 3.632 bilijuna km (ovaj broj uključuje unutarnji EU zračni i pomorski transport,

[1] U radu ćemo koristiti pojmove transportno, prometno i prijevozno pravo, premda nisu istoznačice, posebno jer je prometno pravo širi pojam budući da obuhvaća i telekomunikacije. No, u međunarodnoj komunikaciji riječ "transport" je općeprihvaćena kao oznaka prijevoza, kao što je, primjerice, riječ "kargo" drugo ime za teret.
[2] V. "EU Transport in figures" (EU transport u brojkama). Dostupno na mrežnim stranicama: http://ec.europa.eu /transport /publications/statistics/pocketbook-2011. (12. 3. 2012.).

1 INTRODUCTION

Traffic is, from an economic point of view, the lifeblood of today's global economy. The Directorate General for the Mobility and Transport,[1] Brussels, of the European Commission, published the indicators[2] according to which, in 2008, there were 9,1 million people employed in the sector of transport services within the EU, what makes about 4.5 % off the total number of employees. About 2/3 of them worked in land transport (road, rail, inland waterways), 2 % in maritime transport, 5 % in air transport and 27 % in activities that are of direct support to each of the carriers in carrying their activities (storage, sorting , stacking, etc.). Furthermore, in 2009, all the activities in the EU were estimat-

[1] In this paper we shall use the terms transport, traffic and transportation law, although they are not synonymous, especially since traffic law has extended its term to cover telecommunications. However, in international communication the word "transport" is generally accepted as a term for transportation, such as, for example, the word "cargo" is another term for "load".
[2] See "EU Transport in Figures". Available on the website: http://ec.europa.eu /transport /publications/statistics/pocketbook-2011 (12/03/2012).

ali ne i transport između EU-a i ostatka svijeta). Jednako je zanimljiva i struktura koja govori o tomu koja grana transporta dominira u ukupnom iznosu. Cestovni prijevoz obuhvaća oko 46 %, željeznički je zastupljen s oko 10 %, prijevoz unutarnjim vodama s 3,3 %, koliko iznosi i transport naftnim cjevovodima. Pomorski transport između država Europske unije bio je na drugom mjestu po važnosti s udjelom od 36,8 %, dok je zračni prijevoz između članica EU-27 iznosio samo 0,1 % ukupnog iznosa. Na globalnoj razini, cestovni prijevoz tereta dominira u Kini (kao i u EU-27), dok je u SAD-u željeznica još uvijek najvažnija transportna grana. Kina je svjetska sila i u pomorskom prijevozu, a Rusija drži prednost u odnosu na ostatak svijeta u trasportu nafte cjevovodima. Zračni prijevoz tereta nije uključen u pregled jer je zanemariv.

Slijedom navedenog, razumljivo je da prijevoznici kao i korisnici njihovih usluga žele imati potpunu pravnu sigurnost u poslovanju. To znači da žele unaprijed znati prema kojim pravnim pravilima će međusobno odgovarati jedni prema drugima u slučaju tjelesnih i materijalnih šteta. Put svladavanja svih nesporazuma i sporova jedinstvene su norme jednake za sve sudionike, a ujednačavanje prava je opravdani interes svih sudionika poslovnog pothvata. Ujednačavanje ili izjednačavanje (unifikacija) pravila, postiže se na globalnoj razini međunarodnim ugovorima[3] koji ratifikacijom i objavom postaju pravno-obvezujući za svaku državu, a po pravnoj su snazi u pravilu iznad nacionalnog zakonodavstva (usp. npr. čl. 141. Ustava RH, NN, br. 56/90., 135/97., 8/98., 113/00., 124/00., 28/01., 41/01., 55/01., 76/10. i 85/10.).

2. O UNIFIKACIJI OPĆENITO

Instituti unifikacija i harmonizacija nisu isto jer nemaju iste ciljeve [1]. Cilj je unifikacije jedinstvenost u sadržaju i detaljima, pa novi propis koji je donesen zamjenjuje različite nacionalne zakone koji su do tada postojali te se oni ukidaju i zamjenjuju novim propisom. Harmonizacija je manje zahtjevna jer joj je cilj samo

[3] Ugovor znači međunarodni sporazum koji je u pismenom obliku sklopljen između država i uređen međunarodnim pravom, bilo da je sadržan u jedinstvenoj ispravi ili dvjema ili u više međusobno povezanih isprava i bez obzira na njegov poseban naziv (čl. 2. Bečke konvencije o pravu međunarodnih ugovora). RH je stranka navedene Konvencije na temelju notifikacije o sukcesiji (NN-MU, br. 12/93.).

ed at an amount of 3,632 trillion of miles (this number includes air and sea transport within the EU, but not the transport between the EU and the rest of the world). Equally interesting are the figures that indicate which of the transport branches are dominating in the total amount. Road transport covers about 46 %, rail transport about 10 %, inland waterways transport about 3.3 % and the same percentage refers to the oil pipeline transport. Maritime transport between the European Union countries was ranked second in importance, with a share of 36.8 %, while air transport between the EU-27 covered only 0.1 % of the total amount. Globally, road transport dominates in China (as in the EU-27), while in the U.S. the rail transport is still the most important means of transport.. China is a world power in maritime transport, and Russia holds an advantage over the rest of the world in the oil pipeline transport. Air freight is not included in this overview since it is of minor interest.

Consequently, it is understandable that carriers and their clients want to have full legal security in business. That means that they want to know in advance what legal rules will be mutually applied to one another in case of any physical or material damage. In order to overcome all misunderstandings and disputes, uniform standards equally applicable to all the parties and the equalization of rights is a legitimate interest of all the parties in a business venture. The equalization or unification of rules is achieved on a global level by international treaties[3] which, after being ratified and published, become legally binding for each state and have the power to rule that is over the national legislation (e.g. Art. 141 of the Counstitution of the Republic of Croatia, Official Gazette of the Republic of Croatia, No. 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10 and 85/10).

2 ABOUT THE UNIFICATION IN GENERAL

The institutes of unification and harmonization are not the same because they do not have the same goals [1]. The aim of the unification is

[3] Contract means an international agreement in writing concluded between the states and regulated by international law, whether embodied in a single document or in two or more interrelated documents and whatever its particular designation is (Article 2 of the Vienna Convention on the Law of Treaties). The Republic of Croatia is a party to this Convention on the basis of the notification of succession (Official Gazette of the Republic of Croatia, NN-MU, No. 12/93).

približavanje osnovnih načela različitih nacionalnih zakona te dopušta nacionalne različitosti kada nisu regulirani s harmoniziranim zakonom. Nacionalna zakonodavstva trebaju slijediti put međunarodnih ugovora. To se postiže ratifikacijom konvencija s izravnim učinkom (opcija 1.), tj. ugradnjom jedinstvenih instrumenata u nacionalno zakonodavstvo. Ugradnja instrumenata može se postići upućivanjem na tekst konvencije (opcija 2.) ili dodavanjem odredaba konvencije u nacionalno zakonodavstvo (opcija 3.). Međutim, u praksi uvijek postoje problemi vezani za unifikaciju, unifikacijske instrumente, kao i s primjenom takvih instrumenata. Zato su potrebna jedinstvena rješenja u izradi i provedbi. *Hendrikse* i *Margetson* [2] navode čak 9 mjera koje mogu značajno pomoći u ostvarenju cilja. Sedam mjera odnosi se na poboljšanja u jedinstvenoj izradi pravila, jedna mjera vezana je uz poboljšanje primjene, a jedna uz poboljšanje u izradi kao i u primjeni. Mjere koje se odnose na poboljšanje u izradi su: 1) sve veća potreba upotrebe opsežnih baza podataka sadržanih u sudskim odlukama država članica, 2) mogućnost uključivanja što većeg broja definicija, 3) korištenje metodologije u izradi propisa, 4) preispitivanje proturječnih odredaba, 5) veća pozornost metodama u izradi odredaba sadržanih u "vanjskim" konvencijama, 6) upotreba samo jednog službenog jezika i 7) suradnja međunarodnog suda s nacionalnim sudovima u rješavanju problema u izradi međunarodnih odredaba. Glede mjera koje doprinose boljoj provedbi konvencija, autori navode upotrebu što cjelovitijih konvencija. Kao deveta mjera koja u sebi sadržava i poboljšanja u izradi, kao i u provedbi je veća pažnja u edukaciji korištenjem pravne teorije i sudske prakse.

Unifikacija u okviru jedne države se provodi, što je i razumljivo, puno lakše nego na međunarodnom planu. U međunarodnom privatnom pravu unifikacija prava ogleda se u namjeri ujednačavanja kolizijskih pravila i pravila međunarodnoga građanskog postupovnog prava izradom višestranih i dvostranih međunarodnih ugovora [3].

2.1. Unifikacija transportnog prava

Transportno pravo je pod snažnim utjecajem međunarodnih izvora jer promet, kako smo istaknuli (v. *supra*) nije ograničen jednom državom ili regijom ili kontinentom, nego ima izraženu međunarodnu dimenziju [4]. Stoga se uni-

uniqueness in content and detail so that the new regulation adopted has replaced various national laws that existed previously, and that were repealed and replaced by a new regulation. Harmonization is less demanding because it is aimed only at the convergence of the basic principles of different national laws and at allowing national diversities when they are not regulated by the harmonized law. National legislations should follow the path of international treaties. This is achieved by ratifying conventions with a direct effect (option 1), i.e. by incorporate unique instruments into a national legislation. The incorporation of instruments can be obtained by referring to the text of the Convention (option 2) or by adopting the provisions of the Convention into the national legislation (option 3). However, in practice, there are always problems related to the unification, to the unification instruments, as well as to the application of such instruments. Therefore, unique solutions are required in their development and implementation. *Hendriks and Margetson* [2] listed 9 measures that can significantly help in achieving the goal. Seven measures are related to improvements in the development of unique rules, one measure is related to the improvement in application, and the last one to the improvement in the development as well as in implementation. Measures relating to the improvement in the development are: 1) the growing need of an extensive use of the Member States judicial decision databases, 2) the possibility of the involvement of a large number of definitions, 3) the use of the methodology in the development of regulations, 4) the reconsidering of contradictory provisions, 5) greater attention to the methods used in developing provisions out of "external" conventions, 6) the use of only one official language and 7) cooperation of the international court with national courts in resolving problems in the development of international rules. With regard to measures which contribute to a better implementation of the Convention, the authors point out to the use of conventions which are as much complete as possible. As a ninth measure, which in itself contains improvements in the development and in the implementation as well, there is a greater attention paid to education effected through legal theory and judicial practice.

Unification within one country is conducted, and that is understandable, much easier than at the international level. In private international law unification of the law is reflected in the intention of harmonizing rules of conflict and rules of international civil procedural law creating

fikacija već odavno pokazala kao imperativ [5]. Na općem planu najpoznatije unifikacije su upravo iz područja transportnog prava jer mnoge države svoje zakonodavstvo donose ili po ugledu na konvencije ili konvencije primjenjuju kao svoje unutarnje pravo (npr. Haaška pravila, 1924. u Belgiji, CMR konvencija u Austriji i dr.). S druge strane, u Njemačkoj je putem Zakona o reformi transportnog prava (*Transportrechtsreformgesetz*) iz 1998. novo unutrašnje transportno pravo postalo identično za cestovni, željeznički i zračni prijevoz te prijevoz unutarnjim plovnim putovima, dok je iz kodifikacije izostavljen pomorski prijevoz [6]. Za prekogranični (međunarodni prijevoz) i dalje vrijede konvencije (za cestovni prijevoz to je CMR, za željeznički CIM, za zračni MC itd.) čiji pravni učinak po njemačkom Ustavu (*Grundgesetz*) ima prednost u odnosu na zakonsko uređenje.

Međunarodne konvencije mogu imati javnopravno ili privatnopravno značenje. Međunarodno javno pravo uređuje odnose između država ili drugih međunarodnih subjekata, dok međunarodno privatno pravo uređuje odnose između korisnika i prijevoznika u kojima postoji element inozemnosti. U ovome trenutku postoji velik broj instrumenata kao svojevrsni globalni pravni standardi s primjenom u svim vrstama transporta (zrak, more, kopno),[4] a odnose se na: a) slobodu prometa i tranzita te zaštitu interesa država bez morske obale; b) obavljanje carinskih poslova te c) transport opreme. Ipak, najpoznatije i najznačajnije konvencije su: 1) Konvencija i Statut o slobodi tranzita, Barcelona, 1921.; 2) Opći sporazum o tarifama i trgovini, Ženeva, 1947. (*General Agreement on Tariffs and Trade* (GATT), kasnije Opći sporazum o trgovini i uslugama, Ženeva, 1994. (*General Agreement on Trade in Services* (GATS)); 3) Konvencija o tranzitnoj trgovini država bez morske obale, New York, 1965. zajedno s Konvencijom i Statutom o slobodi tranzita, Barcelona, 1921. i Konvencijom o otvorenom moru, Ženeva, 1958.; 4) Briselska konvencija o osnivanju Vijeća za carinsku suradnju, 1950.; 5) Kyoto konvencija o simplifikaciji i harmonizaciji carinskog postupaka, 1973.; 6) Nairobi konvencija o zajedničkoj upravnoj pomoći u zaštiti, istraživanju i represiji od carinskih prekršaja, 1977.; 7) Ženevska konvencija o harmoni-

[4] Dostupno na mrežnim stranicama: http://ppp.worldbank.org/public-private-partnership/sector/transportat. (12. 6. 2012.).

multilateral and bilateral international agreements. [3]

2.1 Transport Law Unification

Transport law is strongly influenced by international sources since traffic, as we have pointed out (*supra*) is not limited to one country or region or continent but has a remarcable international dimension [4]. Therefore, unification has long since been accepted as an imperative. [5] At a general level the most famous unification are just in the field of transport law because many states create their legislation either on the model of the convention or conventions are applied as their internal law (e.g. the Hague Rules, 1924, in Belgium, the CMR Convention in Austria, etc.). On the other hand, in Germany, through the 1998 Act on the Transport Law Reform (*Transportrechtsreformgesetz*), the new internal transport law has become identical for road, rail, air and inland waterways transport while sea transport was omitted from the codification [6]. For trans-border (international) transport, conventions that, under the German Constitution *(Grundgesetz)* give preference to the legal effect of over the legal regulation, are still in force (the CMR for road transport, the CIM for rail transport, the MC for air transport etc.).

International conventions can have public-law or private-law meaning. International public law governs the relations between states and other international entities, while private international law governs the relationships between the user and the carrier with foreign elements included. At this moment, a large number of instruments, representing a kind of global legal standards applicable to all types of transport (air, sea, land),[4] are available and related: a) to the freedom of transport and transit, and to the protection of interests of the landlocked states, b) to the performance of customs operations, and c) to the transport equipment. However, the best known and the most important conventions are as follows: 1) Convention and Statute on the Freedom of Transit, Barcelona, 1921, 2) General Agreement on Tariffs and Trade, Geneva, 1947 *(General Agreement on Tariffs and Trade (GATT)),* later the General Agreement on Trade and Services, Geneva, 1994, *(General Agreement on Trade and Services (GATS)),* 3) Convention on Transit Trade of Landlocked States, New York, 1965, together with the Convention and Statute on the

[4] Available on the website: http://ppp.worldbank.org/public-private-partnership/sector/transportat. (12/06/2012).

zaciji graničnih kontrola tereta, 1982.; 8) Briselska konvencija o paletama, 1960.; 9) Ženevska carinska konvencija o kontejnerima, 1956. i 1972.; 10) Briselska konvencija o ambalaži, 1960. i 11) Ženevska konvencija o kontejnerima, 1994. i dr.

Za SAD su obvezujuće samo neke od konvencija, primjerice GATT, GATS, Ženevska carinska konvencija o kontejnerima, 1956. (pristup 3. 12. 1968.); Ženevska carinska konvencija o kontejnerima, 1972. (ratifikacija 12. 11. 1984.); Konvencija TIR, Ženeva, 1959. (pristup 3. 12. 1968.); Njujorška konvencija o carinskim olakšicama u tranzitu, 1954. (ratifikacija 25. 6. 1956.) i dr. Sjedinjene Američke Države nisu međutim ratificirale, npr. Konvenciju i Statut o slobodi tranzita, Barcelona, 1921. kojom je ustanovljeno načelo o slobodi prometa i tranzita u svim prometnim granama.

2.2. Unifikacija i hrvatsko prijevozno pravo

Kako se Republika Hrvatska ponaša u svezi s mjerama ujednačavanja odredaba međunarodnih ugovora s nacionalnim zakonodavstvom? Najopćenitije govoreći, uočljiv je trend prihvaćanja svih aktualnih promjena na međunarodnoj razini. Pomorski i zračni prijevoz su naša najuređenija transportna prava, usuglašena u cijelosti s pravilima važećih međunarodnih ugovora. S druge strane, u kopnenom prijevozu vidljivi su nedostaci. Zakon o izmjenama i dopunama Zakona o prijevozu u cestovnom prijevozu (NN, br. 82/02.) izbrisao je odredbe ugovora o prijevozu robe, putnika i prtljagom cestom u prijevozu unutar Hrvatske, a nije niti ratificiran Protokol CMR, 1978. (v. u nastavku). Zakon o ugovorima o prijevozu u željezničkom prometu (NN, br. 87/96.) još nije u cijelosti prihvatio pravila iz CIM-1999 Protokola. Zakon o plovidbi i lukama unutarnjih voda (NN, br. 109/07. i 132/07.) određuje da se na ugovore u domaćem prijevozu odgovarajuće primjenjuju odredbe Budimpeštanske konvencije o ugovoru o prijevozu robe unutarnjim plovnim putovima (CMNI) (čl. 181.) dok se na ugovore u prijevozu putnika i njihove prtljage na odgovarajući način primjenjuje Pomorski zakonik (čl. 1. st. 2.).

Cilj prema kojem bi trebalo težiti naše zakonodavstvo jest promptno unošenje cjelovitih ratificiranih međunarodnih ugovora u zakone. Stoga nam se čini lošim rješenje iz npr., Zakona

Freedom of Transit, Barcelona, 1921, and the Convention on the High Seas, Geneva, 1958, 4) Brussels Convention on the Establishment of the Customs Cooperation Council, 1950, 5) Kyoto Convention on the Simplification and Harmonization of the Customs Procedures, 1973, 6) Nairobi Convention on Mutual Administrative Assistance in the Protection, Investigation and Repression of Customs Offenses, 1977, 7) Geneva Convention on the Harmonization of Cargo Border Controls, 1982, 8) Brussels Convention on Pallets, 1960, 9) Geneva Customs Convention on Containers, 1956 and 1972, 10) Brussels Convention on Packaging, 1960, and 11) Geneva Convention on Containers, 1994, etc.

Only some of the conventions, such as the GATT, GATS, Geneva Customs Convention on Containers, 1956, (accessed on 3rd December 1968), Geneva Customs Convention on Containers, 1972, (ratified 12th November 1984), TIR Convention, Geneva, 1959, (accessed on 3th December 1968), New York Convention on Customs Facilitation in Transit, 1954, (ratified 25th June 1956) etc. are binding for the United States. However, the United States, have not ratified, for example the Convention and Statute on the Freedom of Transit, Barcelona, 1921, which established the principle of the freedom of traffic and transit in all tranport branches.

2.2 Unification and the Croatian Transport Law

What are the attitudes of the Republic of Croatia towards the measures harmonizing the provisions of the international agreements with the national legislation? Generally speaking, there is a visible trend towards the acceptance of all current changes at the international level. Maritime and air transport are our best arranged transport laws that completely harmonize with the rules in force in international agreements. On the other hand, there are visible deficiencies in land transport. The Law on the Amendments to the Act on Road Transport (Official Gazette of the Republic of Croatia, No. 82/02) has deleted the provisions of the Contract on the Carriage of Goods, Passengers and Their Luggage by Road Transport within the Republic of Croatia, and has not even ratified the CMR Protocol, 1978, (see below). The Law on the Contracts on the Carriage in Rail Transport (Official Gazette of the Republic of Croatia, No. 87/96) has not yet fully accepted the rules of the CIM-1999 Protocol. The Law on Navigation and Inland Ports (Official Gazette of the Republic of Croatia, No. 109/07 and 132/07) stipulates that the provisions

o plovidbi i lukama unutarnjih voda koji jedinim člankom upućuje na tekst Budimpeštanske konvencije koja inače sadrži 38 članaka (NN – MU, br. 10/04.). U slučaju da pojedini postojeći zakoni imaju više izmjena i dopuna poželjno je donošenje pročišćenih tekstova zakona. Sve navedene mjere, naposljetku, dovode do potpune pravne sigurnosti kao krajnjeg cilja suvremenog transportnog prava.

3. ODNOS SAD-a GLEDE PRIPREME, IZRADE, POTPISIVANJA I RATIFIKACIJE TRANSPORTNIH KONVENCIJA

Pravila koja su usvojena od najšire svjetska zajednica ne znače da će na njih konačno pristati i Sjedinjene Američke Države. One to čine uistinu rijetko te se može slobodno tvrditi da je nezahvalno prognozirati ponašanja SAD-a glede usvajanja, potpisivanja te ratifikacije pojedinih međunarodnih instrumenata. Na primjer, SAD je 24. 4. 1970. potpisao Bečku konvenciju o pravu međunarodnih ugovora (usvojena 22. 5. 1969.), ali je nije i ratificirao, iako ovaj međunarodni ugovor ima 112 stranaka, tj. država koje su pristale biti njome vezane i za koje je ona na snazi (stanje na dan 14. 12. 2012., v. www.treaties.un.org). S druge strane, može se, bez obzira na spomenuti izuzetak s priličnom sigurnošću tvrditi da uspjeh ili neuspjeh pojedine međunarodne konvencije na globalnoj razini zavisi upravo od ponašanja SAD-a. Ako SAD konvenciju ratificira, onda će to uraditi i druge, posebno manje zemlje pa je uspjeh zajamčen sukladno nepisanom pravilu: "*Sve što je dobro za Ameriku, dobro je i za ostatak svijeta*" [7]. I obrnuto, neratificiranje konvencije od strane SAD-a pouzdan je znak da su sve radnje i troškovi u stvaranju novog međunarodnog ugovora *de facto* i *de iure* bili uzaludni.

3.1. Pomorski transport

Prva konvencija koju je SAD ratificirao iz transportnog prava bila su Haaška pravila iz 1924., a odnose se na međunarodni prijevoz tereta morem (*International Convention for the Unification of Certain Rules of Law to Bill of Lading and Protocol of Signature Hague Rules 1924*.). *The Carriage of Goods by Sea Act*, 46 U.S.C. par. 1300. – 1315. (1936) ili COGSA zamijenio je dugovječni *Harter Act*, 1893. u po-

of the Budapest Convention on the Contract on the Carriage of Goods by Inland Waterways (CMNI) (article 181) shall be appropriately applied to contracts in domestic transport, while on Contracts on the Carriage of Passengers and Their Luggage, the Maritime Code (article 1, paragraph 2) will be appropriately applied.

The goal towards which our legislation should aim at is a prompt introduction of ratified international treaties into internal laws. Therefore, it seems a bad solution that, for example, the Law on Navigation and Inland Ports refers to the text of the Budapest Convention with only a single article, while the Convention contains 38 articles (Official Gazette of the Republic of Croatia, No. 10/04). In case some ruling laws have more amendments, it is advisable to adopt the revised texts of the law. All these measures ultimately lead to a complete legal security what is in fact the ultimate goal of a modern transport law.

3 THE U.S.A. ATTITUDE TOWARDS THE PREPARATION, DRAFTING, SIGNING AND RATIFICATION OF TRANSPORT CONVENTIONS

The rules adopted by the widest international community does not mean that the United States will ultimately agree to them. They do act in such a way really rarely and one may well affirm that it is not wise to predict the attitude of the U.S.A. towards the adoption, signing and ratification of certain international instruments. For example, a delegation of the United States signed the Vienna Convention on the Law of Treaties (adopted 22nd May 1969) on 24th April 1970 but did not ratified it, and, although this international treaty has 112 parties, i.e. countries that have agreed to be bound by it and for which it is in force (as stated on 14th December 2012, see: www.treaties.un.org). On the other hand and regardless of the above-mentioned exception, one may well affirm that the success or failure of a particular international convention depends precisely, on a global scale, on the attitudes of the United States. If the States ratify the Convention, then the other countries, and in particular the smaller ones, will do the same, and the success is guaranteed in accordance with the unwritten rule: *"All that is good for America is good for the rest of the world"* [7]. And visa versa, Conventions not ratified by the U.S. are a reliable sign that all actions undertaken and expences

području brodareve odgovornosti od ukrcaja tereta na brod do njegova iskrcaja s broda [8]. COGSA se odnosi na vanjski prijevoz, a *Harter Act* (ako brodar nije izričito izabrao primjenu COGSA) obuhvaća i unutarnji prijevoz. Pri ratifikaciji Haaških pravila, 1924. (29. lipnja 1937.) SAD je iskoristio konvencijsko pravo na *rezerve* u odnosu na obračunske jedinice. Naime, Haaška pravila, 1924. određuju granice odgovornosti prijevoznika i broda za gubitke ili oštećenja koja su prouzročena na robi ili u svezi s robom do iznosa od 100 zlatnih funta sterlinga po koletu ili jedinici tereta ili odgovarajućeg iznosa u nekoj drugoj valuti, osim ako je krcatelj narav i vrijednost robe naznačio prije ukrcavanja i ako je ova izjava bila unesena u teretnicu (čl. 4., st. 5.), a novčane jedinice u ovoj Konvenciji uzimaju se prema vrijednosti u zlatu (čl. 9., st. 1.). Sukladno tomu, COGSA prihvaća granicu odgovornosti do 500 USD *"per package lawful money of the Unites States, or in case of goods not shipped in packages, per customary freight unit"* (46 U.S.C. par. 1300 – 1315.). U slučaju sukoba između Haaških pravila i COGSA, odredbe COGSA imat će prednost (Rezolucija Senata SAD-a od 6. 5. 1937.).

Iz sadašnje perspektive, odluka SAD-a o ograničenju odgovornosti za prijevoz tereta (posebno ograničenje odgovornosti) u nacionalnoj valuti koja nema podlogu u zlatu pokazala se kao dalekovidna. Naime, matematičkim izračunom može se lagano utvrditi da bi danas iznos granica brodareve odgovornosti za teret bio čak 80 puta veći (40.368,28 USD, umjesto 500 USD),[5] a što bi značilo da brodar (prijevoznik) korisniku odgovara neograničeno – do stvarne štete.

Vezano uz opće ograničenje odgovornosti brodovlasnika, u SAD-u se više od 150 godina primjenjuje Zakon o ograničenju odgovornosti iz 1851. (*U.S. Limitation of Liability Act*) prema kojem se ograničenje svodi na vrijednost broda i pripadajuće vozarine (tzv. stvarno ograničenje).[6] S druge strane, veliki dio pomorskih država prihvatio je pravila iz Konvencije o ograničenju odgovornosti za pomorske tražbine (London, 1976.) koja ima tzv. engleski sustav

[5] Cijena unce zlata (31,1035 grama) je 1.714,71 US$ (na dan 15. 11. 2012.). Dijeljenjem tih dvaju iznosa dobiva se iznos od 55,13 US$ za gram zlata. Zlatna funta sterling znači 732,238 grama zlata te pomnožena s iznosom od 55,13 US$ daje iznos od 40.368,28 US$.

[6] V. 46 U.S.C.Sec. 183, sada kodificiran u 46 U.S.C. Sec. 30505.

incurred in creating a new international agreement have been *de facto* and *de jure* in vain.

3.1 Maritime Transport

The first convention ratified by the U.S. out of the transport law were the 1924 Hague Rules and it refered to the international carriage of goods by sea *(International Convention for the Unification of Certain Rules of Law on the Bill of Lading and the Protocol of the Signature of the Hague Rules, 1924). The Carriage of Goods by Sea Act,* 46 U.S.C. par. 1300-1315 (1936) or the COGSA for short, was replaced by the long-lived *Harter Act*, 1893, in the domain of the liability of the carrier for the cargo from its loading on board the ship to its discharge from the ship [8]. COGSA relates to the transport abroad, while the *Harter Act* (if the ship operator has not explicitly chosen the application of the COGS) includes the inland transport too. While ratifying the 1924 Hague Rules (on 29th June 1937) the U.S.A. used conventional right to *restrictions* with regard to the accounting unit. Namely, the 1924 Hague Rules determine the limits of liability of the carrier and of the ship for any loss or damage that is caused to the goods or in connection with the goods to the amount of 100 gold pound sterling per shipment package or per cargo unit or per an equivalent amount in another currency, unless the nature and value of the shipped goods were indicated by the shipper before loading them and if this statement was registered in the bill of lading (article 4, paragraph 5), and the monetary unit are calculated in this Convention according to the value of gold (article 9, paragraph 1). Consequently, the COGSA accepts the liability limit by up to US$ 500 *"per package lawful money of the Unites States, or in case of goods not shipped in packages, per customary freight unit"* (46 U.S.C. par. 1300-1315). In case of a conflict between the Hague Rules and COGSA, the COGSA provisions will take precedence (Resolution of the U.S.A. Senate of 6th May 1937).

From the today's perspective, the decision brought by the U.S.A. on the limitation of liability for the transport of cargo (a special limitation of liability) in national currency without any gold backing turned out to be a visionary one. Namely, mathematical calculations can easily show that the today's limit of the carrier's liability for cargo would be even 80 times higher (US$ 40,368.28 instead of US$ 500),[5] which would

[5] The price of an ounce of gold (31.1035 grams) is US$ 1,714.71 (as on 15th November 2012). Dividing this two amo-

(osobno ograničenje) jer brodovlasnik odgovara vjerovnicima do određenog iznosa, a prema tonaži broda. S obzirom na navedeno, nije realno očekivati promjene u američkom sustavu općeg ograničenja odgovornosti u pomorskom poduzetništvu [9].

Što se tiče konvencija glede prijevoza putnika i njihove prtljage najvažnija je Atenska konvencija o prijevozu putnika i njihove prtljage morem iz 1974. (stupila na snagu 28. travnja 1987.) s Protokolom iz 1976. (usvojio S*pecial Drawing Rights* – SDR kao obračunsku jedinicu), zatim Protokolom iz 1990. (značajnije povisio ograničenja odgovornosti prijevoznika) te Protokolom iz 2002. (uvođenje obveznog osiguranja od odgovornosti prijevoznika za štete zbog smrti i tjelesne ozljede putnika, dvostupanjski sustav odgovornosti i *actio directa* prema osigurateljima) [10, 11]. Ipak, Atenska konvencija nije izazvala očekivano veliko zanimanje u svijetu (35 država, a RH obvezuje od 12. 4. 1998.) pa tako niti u SAD-u koji se čvrsto vezao uz vlastiti *General Maritime Law (U.S. Federal Maritime Law)* pa nije prihvatio niti jedan međunarodni ugovor. S druge strane, Sjedinjene Američke Države obvezuje SOLAS konvencija iz 1974. (*International Convention on Safety of Life at Sea*) kao i njezin sastavni dio ISM pravilnik iz 1993. (*International Safety Management Code)* – (Poglavlje IX).[7]

3.2. Kopneni transport

U kopneni prijevoz spadaju željeznički i cestovni prijevoz te transport u unutarnjim vodama (rijeke, kanali, jezera). SAD nije prihvatio niti jednu konvenciju iz kopnenog transporta zbog toga što su one imale i imaju obilježja kontinentalnih (regionalnih), a ne interkontinentalnih (globalnih) konvencija u kojima američki prijevoznici uopće ne sudjeluju ili ako sudjeluju, sudjeluju minimalno.

3.2.1. Željeznički transport

Haaška pravila, 1924. nisu bila prvi pomorski, a niti međunarodni instrument globalnog značenja iz prometa. Prije njih, na razini međunarodne zajednice pojavile su se konvencije iz željezničkog prijevoza. Švicarska je oduvijek bila kolijevka željezničkog prava [12]. Međunarodna konvencija o prijevozu robe željeznicom,

[7] V. internet stranicu http://www.imo.org/ (12. 3. 2013.).

mean that the shipping company (the carrier) has an unlimited liability towards the user for the loss or damage incurred – up to do the actual loss of or damag to the goods.

With regard to the general limitation of liability of shipowners, the Law on the Limitation of Liability, 1851, *(U.S. Limitation of Liability Act)* has been applied in the U.S.A. for more than 150 years according to which the limit is reduced to the value of the ship and the associated freight charges (the so called actual limit).[6] On the other hand, a great part of the maritime states have accepted the Rules of the Convention on Limitation of Liability for Maritime Claims (London, 1976) thus accepting the so called English system (personal limitation), because the shipowner is responsible to creditors up to a certain amount, and according to the tonnage of the ship. It follows from above that it is not reasonably to expect changes in the American system of general limitations of liability in maritime entrepreneurship [9].

As far as the Convention on the Transport of Passengers and their Luggage is concerned, the most important one is the Athens Convention on the Carriage of Passengers and their Luggage by Sea, 1974, (entered into force on 28th April 1987) with the 1976 Protocol (adopted the *Special Drawing Rights* – SDR as an accounting unit), then with the 1990 Protocol (significantly increased the limits of liability of the carrier) and with the 2002 Protocol as well (introduction of the mandatory carrier's liability insurance against damages caused by the death of and physical injury to passengers, a two-stage level liability and actio *directa* against insurers) [10, 11]. However, the Athens Convention did not cause the expected great interest in the world (35 countries, and it became binding for the Republic of Croatia from 12th April 1998), not even in the U.S.A. that were closely bind to their own *General Maritime Law (The U.S.A. Federal Maritime Law),* and did not accept any international contract. On the other hand, the United States are bined by the 1974 SOLAS Convention *(International Convention on the Safety of Life at Sea)* and by its component part the 1993 ISM Code *(International Safety Management Code)* – (Chapter IX).[7]

unts, the price of US$ 55.13 per gram of gold is derived. A golden pound sterling means 732.238 grams of gold and if multiplied by the amount of US$ 55.13, the amount of US $ 40,368.28 is obtained.

[6] See 46 U.S.C.Sec. 183, now codified into 46 U.S.C. Sec. 30505.

[7] Available on the website: http://www.imo.org/ (12th March 2013).

Bern, 1890. (CIM) najstariji je međunarodni ugovor transportnog privatnog prava, dok je druga po starosti Međunarodna konvencija o prijevozu putnika i prtljage željeznicom, Bern, 1923. (CIV). SAD nije ratificirao niti jedan od ta dva ugovora, kao što nije ratificirao niti kasnije vrlo važne izmjene i dopune ugovora o željezničkom prometu iz 1980. i 1999. (COTIF, 1999 Protokol, CIM-1999 Protokol i CIV-1999 Protokol). Naime, 1999 Protokol obvezuje čak 47 država iz Europe, Azije i Afrike, a stupio je na snagu 1. srpnja 2006. RH je ratificirala 1999 Protokol 3. 6. 2001. (NN-MU, br.12/00.), dok mu je Europska unija, kao regionalna ekonomska integracija, pristupila 23. 6. 2011. Protokol je u odnosu na EU stupio na snagu 1. 7. 2011. godine.

3.2.2. Cestovni transport

Željeznički prijevoz bio je nesporan uzor izradi međunarodnih ugovora iz cestovnog prometa pod okriljem Ujedinjenih naroda. To su: 1) Konvencija o ugovorima o međunarodnom prijevozu robe cestom, Ženeva, 1956. (CMR) te 2) Konvencija o ugovoru o međunarodnom prijevozu putnika i prtljage cestom, Ženeva, 1973. (CVR) koje su dopunjene protokolima u 1978. zbog uvođenja posebnih prava vučenja SDR kao nove obračunske jedinice, umjesto zlatnih Germinal franaka. SAD nisu zanimale niti ove konvencije iako CMR konvencija ima 55 država stranaka među kojima je i RH (od 3. 8. 1992.). Protokol CMR ima 41 državu stranku među kojima nije i RH unatoč nespornom pravnom interesu za ratifikacijom ove Konvenciju (zbog obračunske jedinice SDR umjesto Germinal franka). Protokol CMR je stupio na snagu 28. 12. 1980. CVR konvencija obvezuje 8 država među kojima je i RH (od 3. 8. 1992.) i stupila je na snagu 12. 4. 1994. Protokol CVR konvencije je potpisala samo Latvija.

SAD ne pokazuje preveliko razumijevanje i za regionalne konvencije iz cestovnog prometa. OAS (*The Organization of American States*) je 15. srpnja 1989. usvojio *Inter-American Convention on International Carriage of Goods by Road* kojim je konačno trebalo riješiti sve dugogodišnje sporne situacije u svezi s odgovornošću između država članica, no umjesto očekivanog uspjeha dogodio se potpuni neuspjeh jer ugovor nisu ratificirale Sjedinjene Američke Države [13].

3.2 Land Transport

Land transport involves rail and road transport as well as inland waterways transport (rivers, canals, lakes). The United States have accepted not even a convention on land transport because they had and still have the characteristics of a continental (regional) rather than of a intercontinental (global) convention that the U.S. carriers do not take part in, and in case they do, it is reduced to a minimum.

3.2.1 Rail Transport

The 1924 Hague Rules were neither the first maritime nor the international instrument of a global significance for the transportation market. Before them, and on the level of the international community, Conventions on road transport appeared. Switzerland has always been the cradle of the rail transport law [12]. The International Convention on the Carriage of Goods by Rail, Bern, 1890, (CIM) is the oldest international transport private law treaty, while the second oldest is the International Convention on the Carriage of Passengers and Luggage by Rail, Bern, 1923 (CIV). The United States have ratified neither one of these two contracts, and has neither thereafter ratified very important amendments to the contract on railway traffic of the year 1980 and 1999 (COTIF, 1999 Protocol, CIM-1999 Protocol and CIV-1999 Protocol). Namely, the 1999 Protocol is binding for as many as 47 countries from Europe, Asia and Africa and has entered into force on 1st July 2006. The Republic of Croatia ratified the 1999 Protocol on 3rd June 2001 (Official Gazette of the Republic of Croatia, NN-MU, No.12/00), while the European Union, as a regional economic integration, acceded it on 23rd June 2011. As far as the EU is concerned, the Protocol came into force on 1st July 2011.

3.2.2 Road Transport

Rail transport was the indisputable model for drafting international contracts on road transport under the auspices of the United Nations. These are: 1) The Convention on Contracts for the International Carriage of Goods by Road, Geneva, 1956, (CMR) and 2) The Convention on the Contract for the International Carriage of Passengers and Luggage by Road, Geneva, 1973, (CVR), which are supplemented by the Protocols in 1978 because of the introduction of the Special Drawing Rights SDRs as a new accounting unit instead of the Germinal gold

3.2.3. Transport unutarnjim vodama

Potpunu pasivnost SAD je pokazao u međunarodnom ugovoru o prijevozu tereta u unutarnjim vodama pa Budimpeštanska konvencija iz 2000. (CMNI) nije izazvala njihovu nikakvu pažnju. Nažalost, na međunarodnoj razini ne postoji niti jedna važeća međunarodna konvencija koja govori o odgovornosti prijevoznika za štete nanesene putniku i prtljazi. Za očekivati je, međutim, da će komparativne prednosti prijevoza putnika i stvari unutarnjim vodama u odnosu na željeznički i cestovni transport (manji utrošak energije, manje onečišćenje okoliša i veći kapaciteti za smještaj tereta i ljudi) u budućnosti biti još više prepoznate što će nužno dovesti do još veće unifikacije prava unutarnje plovidbe kao transporta budućnosti [14].

3.3. Zračni transport

Zaseban je slučaj međunarodni zračni prijevoz. SAD je 31. srpnja 1934. ratificirao Varšavsku konvenciju, 1929. (152 države ugovornice), Haaški protokol (1956.) (137 država članica), a dao je odlučujući doprinos u donošenju i širokom prihvaćanju Montrealske konvencije iz 1999. (MC) koja na jedinstven način, putem jednog ugovora uređuje prijevoz putnika i njihove prtljage te tereta [15]. Konvenciju je ratificirao kao trideseta država (kod depozitara u Montrealu su pohranile 5. rujna 2003. dokument o ratifikaciji) uz dopuštenu rezervu (*Pursuant to Article 57 of Convention, United States of America declares that the Convention shall not apply to international carriage by air performed and operated directly by the United States of America for non-commercial purposes to the functions and duties of the United States of America as a sovereign State*). MC je stupila na snagu 4. studenoga 2003., a danas obvezuje čak 102 zemlje i najprihvaćeniji je noviji međunarodni instrument na koji se obvezala i Europska unija za prijevoz unutar država članica kao i u okviru međunarodnog zračnog prijevoza [16]. Postavlja se pitanje zašto je SAD ratificirao Montrealsku konvenciju? Smatramo da je to učinjeno iz nekoliko razloga koji se odnose na veću zaštitu putnika. Prvi razlog je, tzv. dvostupanjski sustav odgovornosti (engl. *two tier system*) za štete u slučaju smrti ili povrede putnika. U prvom stupnju prijevoznik odgovara objektivno do iznosa od 100.000 SDR pri čemu ne može ograničiti niti isključiti svoju odgovornost, dok u

francs. The U.S.A. were not interested in any of these conventions although the CMR Convention has 55 parties including the Republic of Croatia (since 3rd August 1992). The CMR Protocol has 41 parties and the Republic of Croatia is not one of them despite the indisputable legal interest for the ratification of the Convention (due to the SDR accounting unit instead of the Germinal franc). The CMR Protocol entered into force on 28th December 1980. The CVR Convention is binding for 8 countries including the Republic of Croatia (since 3rd August 1992) and entered into force on 12th April 1994. The Protocol of the CVR Convention was signed only by Latvia.

The U.S.A. do not show too much understanding for the regional conventions on road transport. On 15th July 1989, the OAS *(Organization of the American States)* adopted the *Inter-American Convention on International Carriage of Goods by Road,* supposing that it should have finally solved all long-standing contentious situations regarding the responsibility among Member States. But instead of the expected success, it was a complete failure because the contract was not ratified by the United States [13].

3.2.3 Inland Waterways Transport

The U.S.A. showed a complete passivity as regards the International Contract for the Carriage of Cargo by Inland Waterways, so that the Budapest Convention, 2000, (CMNI) did not draw any attention of the U.S.A. goverment Unfortunately, there are no international conventions in force, at the international level, that deal with the carrier's liability for damages caused to passengers and luggage. However, it is expected that the comparative advantages of the carriage of passengers and goods by inland waterways as against to rail and road transport (less energy consumption, less pollution and greater capacity for stowing cargo and accommodate people) will be even more recognized in the future and will thus necessarily lead to a even greater unification of the right of inland waterways navigation as the transport of the future [14].

3.3 Air Transport

The international air transport is a particular case. On 31st July 1934, the U.S.A. goverment ratified the Warsaw Convention, 1929 (152 contracting states), the Hague Protocol, 1956, (137 member states) and gave an outstanding contri-

drugom stupnju odgovara temeljem subjektivne odgovornosti (pretpostavljene krivnje) neograničeno. Nije odgovoran jedino ako dokaže: a) da takva šteta nije nastala radi nemara ili drugog štetnog djelovanja ili propusta prijevoznika ili njegovih službenika ili agenata, ili b) da je takva šteta nastala isključivo radi nemara ili drugog štetnog događaja ili propusta treće osobe (čl. 21.).[8] Drugi razlog za ratifikaciju je osiguranje od odgovornosti prijevoznika što oštećenoj osobi daje pravo na izravnu tužbu *actio directa* prema osiguravatelju prijevoznika (čl. 50.). Treći razlog je mogućnost revizije ograničenja u slučaju inflatornih kretanja. Tako je ICAO (*International Civil Aviation Organization*) sukladno čl. 24. Montrealske konvencije korigirao granice odgovornosti na sljedeći način: 19 SDR za teret, 1.131 SDR za prtljagu, 4.694 SDR za zakašnjenje putnika te 113.100 SDR za svakog putnika za štete u slučaju smrti ili tjelesnih ozljeda (u prvom stupnju) s primjenom od 30. 12. 2009.

Ipak, ozbiljan nedostatak Montrealske konvencije je nepostojanje odredbe o gubitku ograničenja odgovornosti u prijevozu tereta (engl. *quite unbreakable*) [17]. Gubi li prijevoznik prava na ograničenje do 19 SDR po kilogramu tek u slučaju kada se dokaže šteta nastala zbog njegove neizravne namjere (*dolus eventualis*) te namjere (*dolu*s) kao i u drugim transportnim konvencijama? Čl. 22. Montrealske konvencije ne daje odgovor, pa će ovu pravnu stvar morati rješavati sudska praksa.

3.4. Mješoviti (multimodalni) prijevoz

Konvencija Ujedinjenih naroda o međunarodnom multimodalnom prijevozu robe (Ženeva, 1980.) najveći je neuspjeli pokušaj međunarodne zajednice u rješavanju pitanja prijevoza s više vrsta prijevoznih sredstava. SAD je sudjelovao u radu, ali ovu Konvenciju nije niti potpisao, a niti ratificirao, pa je logično da nije široko prihvaćena (samo 11 ratifikacija u 36 godina).

[8] Ova je Konvencija bila nesporno uzor (model) za Protokol iz 2002. o izmjenama Atenske konvencije o prijevozu putnika i njihove prtljage morem iz 1974. Stoga je logično očekivati da će i konvencije iz drugih prijevoznih grana (rijeka, cesta, željeznica) prihvatiti ova pravila u zaštiti putnika kao novi međunarodni standard.

bution to the adoption and wide acceptance of the Montreal Convention, 1999, (MC), which in a unique way, governs the carriage of passengers and their baggage and cargo [15]. The U.S.A. ratified the Convention as the thirtieth country (the ratification document was deposited at the depositary in Montreal on 5th September 2003) with an acceptable reserve *(pursuant to article 57 of the Convention, the United States of America declare that the Convention shall not apply to the international carriage by air performed and operated directly by the United States of America for non-commercial purposes to the functions and duties of the United States of America as a sovereign State).* MC came into force on 4th November 2003, and today is a binding one for 102 countries, being at the same time one of the current most accepted international instrument that the European Union committed itself to in the field of transport within the Member States as well as in the framework of international air transport [16]. The question is why has the U.S.A. ratified the Montreal Convention? We believe that this is done for several reasons related to a greater protection of passangers. The first reason is the so-called. two-tier system of liability for damages in case of death of or injury to passengers. At the first tier, the carrier is objectively liable up to the amount of SDR 100,000, whereby his liability can neither be limited nor excluded, while at the second tier his liability is unlimited as based on the individual liability (pressumed guilt). He is not iable only if he can prove: a) that such a damage was not due to the negligence or other harmful effect or omission of the carrier or its employees or agents, or b) that such a damage was caused exclusively due either to the negligence or other harmful incident or oversight of a third person (Article 21).[8] Another reason for the ratification is the carrier's liability insurance which gives the injured party the right to *actio directa* to the carrier's insurer (Article 50). The third reason is the possibility of the revision of the limits in case of inflationary trends. Thus, the ICAO *(International Civil Aviation Organization),* pursuant to Article 24 of the Montreal Convention, revised the limits of liability as follows: SDR 19 for cargo, SDR 1,131 for baggage, SDR 4,694 for delayed passengers and SDR 113,100 SDR per passenger for damages result-

[8] This Convention was undoubtedly a model for the 2002 Protocol on the amendments to the Athens Convention on the Carriage of Passengers and their Luggage by Sea, 1974. Therefore, it is logical to expect that the conventions from other transport branches (river, road, railway) are to accept these rules to protect passengers as a new international standard.

4. ROTTERDAMSKA PRAVILA, 2009. I SJEDINJENE AMERIČKE DRŽAVE

Konvencija Ujedinjenih naroda o ugovorima o međunarodnom prijevozu stvari u cijelosti ili djelomično morem (*United Nation Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*) ili Rotterdamska pravila (2009.) novi je međunarodni ugovor iz prijevoza tereta morem koji je trebao zamijeniti Haaška (1924.), Visbyjska (1968.) i Hamburška pravila (1978.). SAD je aktivno sudjelovao u svim stadijima rada na ovoj Konvenciji te je 23. rujna 2009. i potpisao, ali je još uvijek, nakon tri godine od potpisivanja nije i ratificirao. Vodeći američki znanstvenici iz pomorskog prava misle da je došlo vrijeme za promjene u odnosu na COGSA: "*The UNCITRAD Convention addresses all of these problems: the need for a modern legal regime, the need for uniformity, and the need for flexibility. That is why the convention is important to the United States*" [18]. S druge strane, *Clarke* i *Tetley* [19] smatraju da su Rotterdamska pravila, 2009. vrlo složena (96 članaka) i bit će ih teško primjenjivati u praksi pa ih stoga i ne preporučuju. Ističu, kao negativnu stranu i pravno neriješen odnos s drugim konvencijama iz kopnenog prijevoza jer ona žele obuhvatiti cijelo trajanje prijevoza od vrata do vrata (*door to door*) [20]. Nasuprot njima, *Berlingieri* [21] smatra da su nova rješenja svima prihvatljiva te da nema miješanja u unimodalne konvencije. Čini nam se da bi od važnosti mogla biti odluka da nautička pogreška (radnje i propusti u plovidbi i rukovanju brodom) nije više ekskulpacijski razlog za prijevoznika čime je napušteno tradicionalno načelo Haaških, a prihvaćeno rješenje Hamburških pravila.

U američkoj pravnoj literaturi mogu se pronaći stajališta da su granice odgovornosti prijevoznika od 875 SDR za paket i 3 SDR za kilogram tereta previsoke u odnosu na 500 USD za paket. *Carlson* ipak smatra da to nije, a niti može biti bitan razlog za odbijanje ratifikacije pa će SAD biti među prvim državama koje će ratificirati novu pomorsku konvenciju. *Michael F. Sturley*, stariji savjetnik američke delegacije u Radnoj skupini III UNCITRAL-a vjeruje u uspjeh Rotterdamskih pravila, 2009. U literaturi se često citira njegova rečenica: "*The new* ing in death or bodily injuries (in the first tier), applicable as from 30th December 2009.

However, a serious disadvantage of the Montreal Convention is the lack of the provisions on the loss of the liability limit in the carriage of cargo *(quite unbreakable)* [17]. Is the carrier losing the right to limits up to 19 SDR per kilogram only in case when there is an evidence that the damage is caused by his indirect intent *(dolus eventualis)* and intent *(dolus),* as is the case in other conventions on transport? Article 22 of the Montreal Convention does not give an answer, and this legal matter will have to be settled through judicial practice.

3.4 Combined (multimodal) transport

The United Nations Convention on the International Multimodal Transport of Goods (Geneva, 1980) is the greatest failed attempt of the international community in solving the issues of transport by introducing different means of transport. The United States of America took part in the work on the convention, but the convention was neither signed nor ratified, and it is, therefore, logical that it is not widely accepted (only 11 ratifications within 36 years).

4 THE ROTTERDAM RULES, 2009, AND THE UNITED STATES OF AMERICA

The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea *(United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea)* or the Rotterdam Rules, 2009, is the new international treaty on the carriage of cargo by sea, which should have replaced the Hague (1924), the Visby (1968) and the Hamburg Rules (1978). The U.S.A. were actively involved in all stages of the work on the Convention and on 23rd September 2009 signed it, but still, after three years of its signing, it has not been ratified yet. The leading American scientists and experts in maritime law think it is time for changes in relation to the COGSA: *"The UNCITRAD Convention addresses all of these problems: the need for a modern legal regime, the need for uniformity, and the need for flexibility. That is why the convention is important* to *the United States"* [18]. On the other hand, *Clarke and Tetley* [19] have found that the Rotterdam Rules, 2009, are very complex (96 articles) and it

convention is deliberately evolutionary, not revolutionary" [22]. Zbog toga je logično za očekivati da će Amerikanci prihvatiti kao svoja nova pravila jer su ih u velikoj mjeri i kreirali (posebno odredbe o količinskom ugovoru – *volume contract*) koji daju novu, osebujnu dimenziju međunarodnom prijevozu tereta morem omogućujući prijevozniku i korisniku prijevoza veću dispoziciju u sklapanju poslova [23]. Mogu li dakle Rotterdamska pravila, 2009. pobuditi interes SAD-a kao što su prije 80-ak godina to uradila Haaška pravila, 1924. ili će interesi privatnog kapitala biti odlučujući i onemogućiti ratifikaciju? Drugim riječima, može li privatni sektor značajno zastupan u saveznim državama SAD-a usporiti postupak ratifikacije na federalnoj razini? *Carlson* stoga zaključuje "*... the federal goverment's interest in this Convention is derived from that of the private sector, and while the goverment can explain the merits of the Convention, the Senate will look to the private sector for support for U.S. ratification*".

5. POSTUPAK RATIFIKACIJE MEĐUNARODNIH UGOVORA U SJEDINJENIM AMERIČKIM DRŽAVAMA

Međunarodni ugovori koje zaključi SAD imaju istu pravnu snagu kao i federalni zakoni[9] i podređeni su samo Ustavu.[10] Međutim, u slučaju neujednačenosti između međunarodnog ugovora i kasnijeg federalnog zakona, predviđena je supremacija federalnog zakonodavstva (*The Last in Time doctrine*). Ugovor na međunarodnom planu može zaključiti predsjednik SAD-a, uz suglasnost 2/3 članova Senata. Da bi međunarodni ugovor stupio na snagu na teritoriju SAD-a, mora biti preuzet posebnim federalnim zakonom. Izuzetak od

[9] Prema mišljenju predsjednika Vrhovnog suda SAD-a Charlesa Evansa Hughesa, kada se radi o dvama različitim tumačenjima zakona, od kojih je po jednom zakon neustavan, nedvosmislena je dužnost da se usvoji drugo gledište i tako spasi zakon *(National Labor Relations Board v. Jones & Laughlin Steel Corp*., 301 U, S, 1, 30 (1937)).

[10] Predstavlja najviši zakon u SAD-a i ujedno najstariji ustav na svijetu. Arbitar u pogledu ustavnih sporova je Vrhovni sud Sjedinjenih Američkih Država. Amandmane na Ustav mogu predložiti dvije trećine članova oba doma Kongresa, a moraju ih ratificirati zakonodavna tijela tri četvrtine država članica. Do danas je ratificirano dvadeset sedam amandmana, od kojih prvih deset amandmana predstavlja Povelja o pravima (*Bill of Rights*).

will be difficult to apply them in practice, and they are, therefore, not recommended. They have pointed out to its negative side, namely to the legally unresolved relation with other conventions on land transport because the 2009 Rotterdam Rules want to cover the entire duration of the transport from *door to door* [20]. On the other hand, *Berlingieri* [21] believes that the new solution is acceptable to all and that there is no interference with unimodal conventions. It seems to us that an importance might be given to the decision that the nautical fault (actions and failures in navigation and in ship operation) is no longer an exculpable reason for the carrier, since in this way the traditional principle of the Hague Rules has been given up whereas the solution of the Hamburg Rules has been accepted.

In the American legal literature, one can find viewpoints that the carrier's liability limit of SDR 875 for a package and 3 SDR per kilogram of load are too high as compared to USD 500 for a package. *Carlson* still considers that it is not, and neither can be an important reason for the rejection of the ratification and the U.S.A. will be among the first countries to ratify the new maritime convention. *Michael F. Sturley*, a senior adviser to the U.S.A. delegation to the UNCITRAL Working Group III believes in the success of the 2009 Rotterdam Rules. His sentence, reading as follows, is often quoted in the literature: *"The new convention is deliberately evolutionary, not revolutionary"* [22]. It is therefore logical to expect that the Americans will accept them as their new rules because they were largely involved in creating them (particularly provisions on volume contract) and they provide a new, distinctive dimension to the international carriage of cargo by sea allowing the carriers and transport users a greater disposition in concluding business transactions [23]. Can, therefore, the 2009 Rotterdam Rules, arouse the interest of the U.S.A. as the 1924 Hagues Rules did so 80 years ago or will the interests of the private capital be decisive thus preventing the ratification? In other words, can the private sector, considerably represented in the federal states of the U.S.A. slow the ratification process at the federal level? *Carlson,* therefore,concludes *"...the federal goverment's interest in this Convention is derived from that of the private sector, and while the goverment can explain the merits of the Convention, the Senate will look to the private sector for support for the U.S.A. ratification"*.

ovoga pravila predstavljaju međunarodni ugovori koji se neposredno primjenjuju. Inače, predsjednik SAD-a je ovlašten zaključivati posebne izvršne međunarodne sporazume bez odobrenja Kongresa. Ovakvi sporazumi imaju istu pravnu snagu kao i međunarodni ugovori i u praksi se mnogo češće zaključuju. Također, Senat[11] ima velike ovlasti prema predsjedniku u oblasti vanjske politike, jer je ovlašten ratificirati međunarodne ugovore, koji su zaključeni sa stranim državama. Senat to čini dvotrećinskom većinom prisutnih članova, pa je tako, vršeći to svoje pravo, odbio ratificiranje nekih međunarodnih ugovora od velike važnosti (primjerice, Versajski mirovni ugovor iz 1920.) Može se reći da su sve ove ovlasti Kongresa prema predsjedniku, zapravo, protiv ovlasti predsjednika prema Kongresu, pa je tako, analogno predsjednikovom vetu prema Kongresu, nastao tzv. "Kongresni veto". To je ovlast Kongresa prema predsjedniku, koja omogućuje Kongresu blokiranje pojedine ovlasti predsjednika [24].

6. ZAKLJUČNA RAZMATRANJA

Često se navodi da je izum kotača promijenio tijek civilizacije. Od tada do danas nova tehnološka otkrića predstavljaju dodatne izazove i za pravnu znanost koja mora odgovoriti na pitanja pravne sigurnosti sudionika u transportu zbog njegove naglašene međunarodne dimenzije. Prva međunarodna pravna pravila iz međunarodnog privatnog prava iz područja transporta pojavila su se krajem XIX. stoljeća u željeznici (CIM, 1890.). Nakon željeznice i pomorski su prijevoznici htjeli ujednačiti odnose između korisnika prijevoza s jedne te prijevoznika s druge strane (Haaška pravila, 1924.). Nedugo zatim i zračni prijevoz je usvojio pravila (Varšavska konvencija, 1929.), a potom i cestovni prijevoz (CMR, 1956.). Posljednji u nizu bio je prijevoz unutarnjim plovnim putovima (Budimpeštanska konvencija, 2000.). Međunarodni ugovori u svezi sa zračnim i pomorskim pravom imali su karakter općih pravila, dok su pravila iz kopnenog prijevoza bila regionalnog značenja (primjerice, Republika

[11] Zakonodavni organ na saveznoj razini je Kongres, koji se sastoji od Senata i Predstavničkog doma. Senat se sastoji od dva predstavnika (senatora) iz svake države-članice, izabranih na šest godina, od čega se jedna trećina mijenja svake dvije godine. Djeluje uglavnom kroz veći broj stalnih odbora.

5 THE PROCESS OF THE U.S.A. RATIFICATION OF INTERNATIONAL TREATIES

International treaties concluded by the United States have the same legal force as the federal law[9] and are subject only to the Constitution.[10] However, in the case of inconsistencies between the treaty and the subsequent federal law, the supremacy of the federal legislation is anticipated *(The Last in Time Doctrine).* A treaty on the international level is to be concluded by the U.S.A. president, with the approval of two thirds of the Senate. For an international treaty to enter into force within the territory of the United States of America, it must be taken over by a special federal law. The exception to this rule are international treaties which are directly applied. Otherwise, the U.S.A. President is authorized to conclude specific international executive agreements without the approval of the Congress. These agreements have the same legal force as well as international treaties and are more frequently concluded in practice. Moreover, the Senate[11] has broader powers, as against the President, in the area of foreign policy, as it is authorized to ratify international treaties, which are concluded with foreign states. The Senate does so by a two-thirds majority of the members present, and has, therefore, by using these rights, refused to ratify certain international treaties of major importance (for example, the 1920 Versailles Peace Treaty). It can be said that all of these powers of the Congress as compared to the President, are, in fact, against the authorities of the President to the Congress, so that, by the same analogy as to the President's veto to

[9] According to Charles Evans Hughes, the President of the Supreme Court of the United States of America, in the case of two different interpretations of the law, one of which states that the law is unconstitutional, the unmistakable duty is to adopt the second opinion and thus save the law *(National Labor Relations Board v. Jones & Laughlin Steel Corp*., 301 U, S, 1, 30 (1937)).

[10] It is the top law in the United States of America and at the same time the oldest constitution in the world. Ehen constitutional disputes are concerned, the arbitrator represents the Supreme Court of the United States of America. Amendments to the Constitution may be proposed by two-thirds of the members of both the Houses of the Congress and must be ratified by the legislative bodies of the three-fourths of the member states. Twenty-seven amendments have been ratified so far, of which the first ten amendments represent the Bill of Rights.

[11] The legislative authority at the federal level is the Congress, which is made up of the Senate and the House of Representatives. The Senate is formed of two representatives (senators) from each member state, elected for six years, of which one-third is being changed every two years. It operates mainly through a number of standing committees.

Hrvatska danas ima potpuno usklađeno domaće s međunarodnim pravom u prijevozu morem, zrakom i unutarnjim plovnim putovima).

SAD je usvojio ili odbio usvojiti nova pravila pri čemu je, prema našem mišljenju vodio računa o trima temeljnim načelima: 1) samopouzdanje, 2) patriotizam i 3) privatni interesi. Samopouzdanje znači uvjerenje da su postojeći američki zakoni toliko dobri da ih ne treba mijenjati novim međunarodnim ugovorima, patriotizam je pitanje nacionalnog ponosa, dok su privatni interesi, posebno u saveznim državama važni jer oni predstavljaju kotač razvoja SAD-a.

Povijesno, Sjedinjene Američke Države su pokazale, od međunarodnih ugovora iz transportnog prava interes za Haaška pravila, 1924. pa su ih i usvojile, jer su značila korak naprijed u odnosu na postojeća pravila iz Harter Acta (1893.). Zanimljivo je nadalje da su SAD pokazale osobit interes za međunarodne zračne konvencije koje su bitne zbog prijevoza putnika, a gotovo nevažne u prijevozu tereta. Varšavska pravila (1929.), kao i Montrealsku konvenciju (1999.) prihvatile su bez puno razmišljanja. Montrealsku konvenciju (1999.) usvojile su jer ona daje najsuvremenija rješenja koja su SAD-u bila potrebna u tom trenutku (*Clarke* ističe da su preniske granice odgovornosti za putnike bile osnovni razlog).

Doprinos SAD-a donošenju novih konvencija nije bio beznačajan. Sjedinjene Američke Države su uvijek pokazivale golem interes u izradi novih dokumenta u zračnom i pomorskom transportu koji imaju globalni značaj (posljednji primjer su Rotterdamska pravila, 2009.). S druge strane, SAD se nije upletao u međunarodne konvencije iz kopnenog prijevoza smatrajući da ga se one ne tiču jer imaju regionalna obilježja. Sudjelovanje u izradi novih međunarodnih instrumenata pa čak i njihovo potpisivanje ne znače i ratifikaciju SAD-a. Razlozi su mnogobrojni, a jedan od njih je i vrlo kompleksan postupak usvajanja međunarodnih ugovora.

Na kraju se, na temelju provedenih istraživanja nameće samo jedan zaključak: ostatak svijeta mora Sjedinjenim Američkim Državama ponuditi takva rješenja koja one jednostavno neće moći odbiti. Međutim, i to nije dostatno jer se mora "poklopiti" još jedan uvjet: nova konven-

the Congress, the so-called. "Congress veto" reulted of. This is the power of the Congress as compared to the President, which allows the Congress to block certain powers of the President. [24]

6 CONCLUSION

It is often stated that the invention of the wheel changed the course of civilization. Since then new technological discoveries have represented additional challenges even for the legal science that has to answer to the questions of the legal security of participants in transport because of its emphasized international dimension. The first international legal rules of the private international law in the field of transport emerged in the late nineteenth century related to the railway (CIM, 1890). After the railway, maritime carriers wanted to standardize the relations between the transport users on one side and the carriers on the other side (the Hague Rules, 1924). Shortly after that, even air transport adopted the rules (the Warsaw Convention, 1929), followed by road transport (CMR, 1956). The last in the series was the inland waterways transport (Budapest Convention, 2000). The international treaties related to air and maritime law had the character of general rules, while the rules related to land transport were of a regional importance (for example, the laws of the Republic of Croatia on the transport by sea, air and inland waterways are today fully compatible with the international ones).

The U.S.A. adopted or refused to adopt new rules and, in our opinion, while doing so, took into account the following three basic principles: 1) self-confidence, 2), patriotism and 3) private interests. Self-confidence means a belief that the existing U.S. laws are so good that they do not need to be changed by new international treaties, patriotism is the matter of a national pride, while private interests, especially in the federal states, are important because they represent the wheel of development of the United States of America.

Historically speaking, since the international treaties on the United States of America have shown, from international treaties on transport law, an interest in the 1924 Hague Rules, and they have adopted them since they mean a step forward compared to the existing rules of Harter Acta (1893). It is interesting that the U.S.A. still showed special interest in the international air

cija mora *"pasti"* u trenutku kada SAD-u, a ne ostatku svijeta, to odgovara iz političkih i gospodarskih razloga.

conventions that are essential for the transport of passengers and almost irrelevant in freight transport. The Warsaw rules (1929), and the Montreal Convention (1999) were accepted without much thinking. The Montreal Convention (1999) was adopted because it provides cutting-edge solutions that the U.S.A. needed at that moment (*Clark*e points out that too low limits of liability for passengers were the main reason).

The contribution of the U.S.A. to the adoption of new conventions was not insignificant. They always showed great interest in preparing new documents on air and maritime transport, which will have a global significance (the last example were the Rotterdam Rules, 2009). On the other hand, the U.S.A. did not interfere in the international conventions on land transport, believing that they are not of their concern because they have regional characteristics. Taking part in the development of new international instruments and even their signing does not mean the U.S.A. ratification. The reasons are many, and one of them is a very complex process of adopting international treaties.

At the end and based on the researches carried out, we can impose only one conclusion: the rest of the world must offer to the United States of America such solutions that they simply will not be able to refuse. However, not even this is enough, because one more condition must be "fulfilled": a new convention must *"emerge"* at the time when the United States of America, and not the rest of the world, have precise political and economic reasons for it.

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