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SIONAL LIABILITY INSURANCE AND THE QUESTION OF SUSPENSION OF THE PERIOD OF LIMITATION.— IV. CONCLUSIONS.—V. SUMMARY.

ABSTRACT: Suspension of the period of limitation in case of failure of the carrier to reject the claim in writing for an indefinite period of time is unacceptable since it would leave both the carrier and his liability insurer indefinitely liable for damages. It goes against the principle of due diligence of all stakeholders in modern business, as well as the rationale behind the very short period of limitation for the contract of carriage by road. Therefore, the three preconditions needed for ending the suspension referred to in Art. 32, par. 2 CMR have to be interpreted very broadly and in a teleological way. The documents should not be returned with the rejection of the claim, the rejection can be made by the carrier as well as by his liability insurer, and it need not be made in writing; it can also be construed from the silence of the carrier after a reasonable period of time, which is decided upon by the judge seized of the case.

Keywords: suspension of the period of limitation, statute of limitations, carriage of goods by road, CMR Convention, professional liability insurance, rejection of the claim, contract of carriage.

I. INTRODUCTION

Every theoretical discussion benefits from being founded on the facts of a practical case. Let us, therefore, take an imaginary case of an international carriage of one container of frozen shrimps from the Croatian port of Rijeka to Munich, Germany, performed by a Croatian carrier. A consignment note was duly issued, based on the Convention on the Contract for the International Carriage of Goods by Road (further: CMR) \(^1\). The carriage was performed on 1 May 2016, and the cargo was handed over to the consignee, a German firm, at its premises on 2 May 2016. However, total damage was established as soon as the container was opened upon delivery. The damage occurred due to inappropriately set cooling by the carrier, which led to the load of shrimps defrosting and rotting. The consignee sent a res-

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ervation to the carrier concerning the condition of the shipment immediately upon delivery\(^2\), but subsequent correspondence between the parties aimed at establishing the facts of this case and exchanging pertinent documents did not start before February 2017. After a number of exchanged e-mail messages and an unsuccessful attempt to settle the dispute amicably, the consignee finally sent to the carrier, on 2 April 2017, a written claim for the compensation of damage for the total loss of the cargo, in accordance with Art. 32, par. 2 CMR. The carrier never responded to this letter nor did he reject the claim in writing, and all direct correspondence between the parties ceased after that date. Instead, the carrier informed his professional liability insurer, a Croatian-based insurance company, about the claim and on 15 June 2017 asked that compensation be paid directly to the consignee. The carrier’s contract of professional liability insurance had indeed been entered into between the carrier and his insurer on 15 May 2015 for the term of one year. The insurance company turned down the carrier’s claim on 20 June 2017, contending that the statute of limitations of one year after the delivery of the damaged goods had set in on 2 May 2017. The written rejection for the payment of the insurance compensation was sent by the insurance company both to the carrier and to the claimant. Following that, the claimant took no action until March 2018, when he started to consider filing a claim in court against the carrier, more than two years after the delivery. This was due to the fact that he had never received a written rejection of his claim by the carrier according to Art. 32, par. 2 CMR, so the prerequisite for ending the suspension as set out in the CMR did not occur. The claimant thinks that the period of limitation is still suspended and that there is one month left from the total of the one-year period of limitation for him to file a claim in a court of law. Is he still allowed to file a claim, or is the claim already time-barred?

This case, quite common in practice, raises several questions that need to be answered, and that we will try to address further in this paper:

1. What is the meaning and effect of the suspension of the period of limitation according to Art. 32, par. 2 CMR?
2. What are the comparative solutions found in governing national laws with respect to the extension of the period of limitation according to Art. 32, par. 3 CMR?
3. What is the effect of the failure of the carrier to give a written answer to the claim?
4. What is the position of the liability insurer in this case, and what is the effect of his written rejection of compensation to the carrier with respect to the (suspension of the) period of limitation, if any?

## II. SUSPENSION OF THE PERIOD OF LIMITATION UNDER THE CMR

Ever since the adoption of the CMR in 1956, the problem of the very short period of limitation of one year\(^3\) has been in focus of both practice and legal doctrine. Art. 32 CMR, which deal with the issues of the period of limitation, is one of the most exhaustive and detailed provisions of the Convention, setting out many a rule for different situations arising out of everyday performance of contracts of carriage of goods by road. One of them is the provision of Art. 32, par. 2 CMR on the suspension of the period of limitation. First of all, let us remember that the very short one-year period of limitation for claims concerning carriage under the CMR has its grounds in the very short duration of the carriage itself (mostly a few hours

\(^2\) According to Art. 30, par. 1 CMR.
\(^3\) Art. 32, par. 1 CMR.
or days) on the one hand, and the very fast pace of the carriage business and everyday informal conclusion of contracts of carriage on the other. The short period of limitation protects the interests of the creditor for a fast indemnification, also serving the interests of predictability and foreseeability of the legal obligations of the carrier and his liability insurer. It would not be acceptable to keep the carrier exposed to the danger of a damages lawsuit arising out of a contract of carriage that was concluded years ago, where the carriage itself lasted only a few hours, and the freight paid was minimal. In that case the carrier would have to keep all the pertinent documentation and necessary evidence to support his case for a very long time, which might not be feasible. However, an extraordinarily short period of limitation also means that the claimant must react quickly if he wants to enforce his right to compensation for a loss, damage or delay of the goods against the carrier. That, however, is not always the case, as shown in the case above—the preliminary communication between the parties to settle the claim amicably often takes months, and the written claim is addressed to the carrier very shortly before the lapse of the one-year limitation period. As Drews accurately points out, damage occurring during transport are often of a complicated nature, and it is not unlikely that it takes a long time, even more than one year, for the claimant to gather up all the evidence and documents and file a written claim to the carrier. According to Art. 32, par. 2 CMR «A written claim shall suspend the period of limitation until such date as the carrier rejects the claim by notification in writing and returns the documents attached thereto». So, according to this provision, there are three preconditions for the commencement of the suspension: the claim has to be rejected by the carrier, it has to be done in writing, and the attached documents need to be returned. An ambiguous response will not end the suspension. Although the older doctrine represented by Löwe argued that the returned documents need to be originals, such a standing was later altered due to technological advancement. The same author argued in the late 1970s that this part of the provision became meaningless and obsolete in the meantime, and the suspension would begin even if no documents are being returned. As Hill & Messent point out «it would seem very doubtful that in a commercial world any claimant would be prepared to put all his evidence in the hands of the other party, without at least keeping copies for himself. What is, of course, far more likely to happen is that the claimant, if he sends anything at all with his letter of claim, will send photocopies of relevant documents, and in this context the requirement to return documents attached to the claim makes very little sense». Indeed, Löwe explains that the rationale behind this provision of the CMR drafted in the 1950s (when no computers or photocopying machines existed) originates from the wording of the even older provision of Art. 46, § 3 CIM of 1952, whose purpose at the time was to ensure the returning

6 There is conflicting comparative jurisprudence on the issue whether the claim has to be accompanied by the documents in the first place for the suspension of limitation to set in. See A. MESSENT and D. A. GLASS, Hill & Messent CMR: Contracts for the International Carriage of Goods by Road, 3.ª ed., London-Hong Kong, LLP, 2000, p. 266 and the references cited there.
7 MESSENT-GLASS, ibid., p. 271; I. KOLLER, op. cit., 4, p. 1171.
of pertinent original documentation from the carrier to the claimant, which was needed as evidence for any legal action. Ever since the 1970s this provision of the CMR has become meaningless in modern business. So, one of the three preconditions for ending the suspension of the period of limitation has long been unnecessary. Therefore, it can be argued in our case that an unambiguous rejection of the claim by the carrier sent to the claimant, with or without the attached documents, would suffice to end the suspension of the period of limitation. However, in the case presented above, that never happened. Is there a time limit for the carrier to give an answer to the claimant and to reject the claim? According to the relevant doctrine, there is not. If there was no rejection of the claim by the carrier, the suspension did not and might never end. As Hill & Messent say: «If [...] the carrier fails to acknowledge the claim he is penalized inasmuch as the period of limitation will remain in suspension. Indeed, there is no way under the Convention in which time can begin to run again except by his rejection of the claim in writing, although it may be that the time limit under the applicable national law would eventually operate to extinguish the claim».

We find this statement to be largely problematic. First of all, the CMR and national provisions on the statute of limitations are completely separate and one has no bearing on the other. We also believe that the rejection does not have to be effected only by the carrier, and can be implied by omission, i.e. by remaining silent, which we will further elaborate on infra. So, if the carrier remains silent and the suspension goes on for more than three, five or more years, the statute of limitations for the contract of carriage of goods by road provided for in the provisions of the national law of the court seized of the case will not apply nor extinguish the claim. Furthermore, if the suspension can be ended only by a written rejection by the carrier, none of which happened in the case presented in this paper, the carrier could be sued after many years, just like debtors from other contracts to whom the regular, much longer, periods of limitation apply. We believe that such a conclusion is somewhat simplistic and rather dangerous, for the following reasons: a) it is very likely that such situations might occur in practice, even in larger numbers, and b) it would invalidate the reason for an exceptionally short one-year limitation period in transport, just because of the extreme passivity of the claimant in enforcing his rights. What is the position of the claimant in this situation, and what that of the carrier with respect to an endless suspension of the statute of limitation? In order to find the answer to this question we have to first look into certain aspects of the institute of the suspension of limitation itself. Art. 32, par. 3 CMR, which deals with the rules relating to the extension of the period of limitation, is one of the provisions in which the Convention directs towards national law for additional rules. National law in this context is to be understood as a substantive provision of the pertinent national law governing the suspension of the period of limitation, not the rules on the conflict of laws (or international private law, IPL) of that national law, which would enable internal re-directing between different national norms.

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13 Messent-Glass, op. cit., 6, p. 272.
14 R. Lowe, *Die Bestimmungen...*, op. cit., 11, p. 317.
15 The text of this norm reads as follows: «Subject to the provisions of paragraph 2 above, the extension of the period of limitation shall be governed by the law of the court or tribunal seized of the case. That law shall also govern the fresh accrual of rights of action».
In the Croatian legal system, the pertinent provision is to be found in Arts. 235-239 of the Civil Obligations Act (COA)\(^{17}\). The reasons that lead to the suspension of the period of limitation under the COA refer to some specific relations or extraordinary situations\(^ {18}\), but do not include any reason for suspension related specifically to transport. As to the effect of the suspension, if the limitation period could not begin due to a legal obstacle, it shall start when such reason ceases to exist. If, however, the limitation period began running before the reason arose which interrupted its further running, it shall continue running when such reason is terminated, and the time that elapsed before interruption shall be included in the period of limitation provided by law\(^ {19}\). The suspension has effect only between the parties among which the reason for the suspension exists, not with respect to anyone else\(^ {20}\). One might ask whether there are specific provisions related to the statute of limitations (and its suspension or interruption) in the special provisions regulating the contract of carriage by road under Croatian law. There are not. The reason for that is a very specific and somewhat abnormal situation regarding the regulation of the contract of carriage by road in this legal system. The contract of carriage by road is regulated by only one article (!) of the Road Transport Act 2018\(^ {21}\), as a special law (*lex specialis*), which: a) includes no provisions on the period of limitation regarding claims against the carrier; and b) includes a special provision stipulating that contracts of carriage by road shall be governed «by the law containing the basic provisions on obligations, provisions of international agreements and conventions to which the Republic of Croatia is a signatory». There are numerous problems with this provision on various levels, but let us just point out that it violates the basic rule of *lex specialis derogat legi generali*. Instead of giving an exhaustive specific provision for the contract of carriage by road and thus derogating the general provisions of the COA, it simply refers back to the COA as the general law that applied before this one was enacted. That being so, we can only conclude that the only substantive provisions applicable to the contract of carriage can be found in Arts. 661-698 COA, where this contract is regulated in very general terms, knowing that specific derogating provisions exist (or at least should exist) for every mode of transport and that its provisions serve just to codify the contract of carriage as a specific type of contract within the legal system, according to the applicable principle of monism in Croatian law on obligations\(^ {22}\). Road transport, thus, happens to be the only mode of transport in Croatia whose regulation leaves

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\(^ {17}\) Zakon o obveznim odnosima, Narodne novine No. 35/05, 41/08, 125/11, 78/15, 29/18.

\(^ {18}\) According to the Art. 235-7 of COA, the period of limitation will be suspended:
1) between spouses;
2) between parents and children for the duration of parental rights;
3) between a ward and his guardian and the administrative body of social welfare for the duration of the guardianship and until accounts are given;
4) between persons living in a civil union for the duration of such union.
5) as regards claims of persons in military service at time of mobilisation, in case of immediate war danger or at time of war;
6) as regards claims of persons employed as domestic staff towards their employer or members of his family living with him, for the duration of such relationship.
7) Prescription shall not run for as long as the creditor is unable due to insurmountable obstacles to request performance judicially.

\(^ {19}\) Art. 238 COA.


\(^ {21}\) Art. 97 Road Transport Act (Zakon o prijevozu u cestovnom prometu, Narodne novine 41/18).

a lot to be desired with respect to the specific regimes on contracts of carriage, where the rules of the general law eventually have to be applied. In those rules on the contract of carriage there are no specific provisions whatsoever relating to the statute of limitations, or any other legal institute related to it, such as suspension. Therefore, the applicable rules are the general rules of the COA relating to the statute of limitations for claims for damages: the period of limitation of three, i.e. five years respectively\(^{23}\) (applicable to domestic contracts of carriage when CMR will not be applicable), and the provision on suspension of limitation that we have already discussed above. It can be concluded that for the contract of international carriage of goods by road where Croatian law applies, the provisions of the CMR will be applicable\(^{24}\), the statute of limitations is one year (exceptionally three years) and a written claim to the carrier suspends the limitation period, with the effect that the time elapsed before the claim is calculated within the limitation period after the suspension terminates. However, for domestic carriage of goods by road under the same law, the period of limitation is three, i.e. five years, and suspension of the limitation period is not possible, since the written claim is not envisaged as one of the reasons with that effect in the COA.

Given the fact that there is most German legal doctrine on the CMR, at this point we are going to give a short comparative analysis of German law on this issue to see possible solution to this problem. German law regulates this matter differently, and entails its own set of problems. Here, two provisions collide with respect to the question of suspension of the period of limitation: namely § 439 of Handelsgesetzbuch (HGB) of 1998\(^{25}\), which regulates the statute of limitations for the contract of carriage as a special law (*lex specialis*), and that of § 203 of Bürgerliches Gesetzbuch (BGB) of 2002\(^{26}\), as a later law (*lex posterior*). The provision from § 439, par. 3 HGB corresponds to the wording of Art. 32, par. 2 CMR, except it does not require the returning of the documents with the written rejection of the claim\(^{27}\). There is little room for misunderstanding here. However, § 203 BGB as the later law contains a very interesting provision stating that «if negotiations between the obligor and the obligee are in progress in respect of the claim or the circumstances giving rise to the claim, the limitation period is suspended until one party or the other refuses to continue the negotiations. The claim is statute-barred at the earliest three months after the end of the suspension.» Ever since this no-

\(^{23}\) According to Art. 230 COA, statute of limitations for claims for damages is three years from the moment in which the injured party learnt about the fact that the damage occurred and about the identity of the injuring party. In any case, the claim will be time-barred five years after the damage occurred. For damage arising out of a breach of contract, the statute of limitations prescribed for that contract will apply. Since there are no special provisions of the COA on the contract of carriage, those general periods of limitations of three/five years will thus apply.

\(^{24}\) The Republic of Croatia is a state party to both CMR 1956 and SDR-CMR Protocol 1978. See: Odluka o objavljivanju mnogostranih međunarodnih ugovora kojih je Republika Hrvatska subjekt na temelju notifikacija o sukcesiji (Decision on the publication of multilateral international agreements to which the Republic of Croatia is a subject on the basis of notifications of succession), Narodne novine - Međunarodni ugovori 1/92, p. 2; Zakon o potvrđivanju Protokola uz Konvenciju o međunarodnom prijevozu cestom (CMR) (Act on the Ratification of the Protocol to the Convention on the Contract for the International Carriage of Goods by Road (CMR), Narodne novine - Međunarodni ugovori 6/2016.


\(^{27}\) According to the original text of § 439 par. 3 HGB «Die Verjährung eines Anspruchs gegen den Frachtführer wird auch durch eine Erklärung des Absenders oder Empfängers, mit der dieser Ersatzansprüche erhebt, bis zu dem Zeitpunkt gehemmt, in dem der Frachtführer die Erfüllung des Anspruchs ablehnt. Die Erhebung der Ansprüche sowie die Ablehnung bedürfen der Textform. Eine weitere Erklärung, die derselben Ersatzanspruch zum Gegenstand hat, hemmt die Verjährung nicht erneut». 
vum in German civil law, there has been extensive discussion as to the relationship between those two provisions. Let us point out again that Art. 32, par. 3 CMR directs towards the substantive provision on the suspension of limitation in the national law, not the rules of international private law (IpL) of that national law which can, in turn, direct internally between different norms. What would finally be the applicable substantive provision of the German law on the suspension of limitation? There are three possibilities: first, to apply only § 439, par. 3 HGB based on the rule *lex specialis derogat legi generali*, second, to apply only § 203 BGB based on the rule *lex posterior derogat legi priori*, and third, to apply a combination of the two, i.e. primarily § 439, par. 3 HGB, requiring a written claim for a suspension of the period of limitation and a written rejection to end the suspension. After that, for the remainder of the limitation period, if the parties start new negotiations on the same claim, the period of limitation would be suspended again for as long as those negotiations go on, even if they are being conducted verbally.

The discussion and final decision on this topic in Germany is often blurred by the fact that a large part of the relevant commentaries of the CMR that discuss the national regulations on suspension according to Art. 32, par. 3 CMR have been written before the large reform of transport law and the enactment of the new transport law regulations in HGB in 1998. If we consider only the recent works on this topic that take into account the parallel existence of both HGB and BGB provisions, we find that the final answer is far from simple. Drews, in his thorough legal and practical analysis of 2004, concludes that in national transport law in Germany only § 439, par. 3 HGB is to be applied, and that the same provision is the substantive provision to be applied according to Art. 32, par. 3 CMR. Only this conclusion fulfills the needs of everyday practice and has a solid legal basis. However, a later decision of the Bundesgerichtshof (BGH) of 2008 completely changes the picture by stating that § 203 BGB is to be applied alongside § 439, par. 3 HGB. In practice, it means that after the carrier rejects the claim in writing and thus ends the suspension of the period of limitation, a new suspension can indeed occur if the carrier continues to communicate with the claimant regarding the same claim, exchanges the documents and information regarding that claim (file number, delivery number, etc.) and negotiates on the content of the claim. The BGH argues that such behavior represents negotiations in the sense of § 203 BGB, and that it represents a ground for a new suspension of the period of limitation until the moment in which the carrier rejects the claim. The BGH obviously thinks that such a conclusion does not go against the last sentence of Art. 32, par. 2 CMR or § 439 par. 3 HGB according to which «the running of the period of limitation shall not be suspended by further claims having the same object». Also, such a solution is a legal hybrid, allowing for a parallel application of both the special and the later law, going against, or maybe beyond, the basic legal rules for resolving such situations mentioned supra. According to § 203 BGB the suspension would then continue until one of the parties permanently leaves the negotiations, in which moment the suspension would end. The statute of limitations would apply three months from that moment. How long should one party remain silent before we can conclude that he abandoned the negotiations? There is no answer to that question. As Drews points out, correctly
and somewhat predictively (being that his commentary precedes the decision in question by four years) «For the important question of statute of limitations, the legislator, therefore, for good reason introduced a time limit. It is aimed to make the limitation period predictable, which again primarily serves the purpose of legal certainty and, eventually, the higher good of legal peace. [...] The legislator emphasized the requirement for clearer and shorter limitation periods in transport law to be in compliance with international practice. However, such severity would run counter to the purpose, if due to simple oral negotiations after the written rejection the limitation period is suspended each time. [...] It is totally impracticable and not intended» 32. We completely agree with this argumentation. The commentaries of the HGB therefore leave no doubt that the intention of the reform of transport law in 1998 was to provide a special, thorough and definite framework for such situations, where both parties could predict the timeframes in which they have to settle their claims 33. Those timeframes are, and for the reasons already stated above, have to be shorter than in other contractual relations. We believe that a solution where only § 439, par. 3 HGB is to be understood as the substantive provision of German law within the meaning of Art. 32, par. 3 CMR, and no further negotiations (oral or written) on the same subject matter can suspend the limitation period, is to be considered the right one. Everything else invalidates the very reason for an extremely short period of limitation for transport contracts, and unjustifiably favors the passivity of the claimant, who postpones exercising his rights to file a claim in court by endless (informal) negotiations and, consequently, numerous suspensions of the limitation period, facts of which can be very hard to prove afterwards in a judicial process. As for the effect of the suspension in German law, it is the same as in Croatian: the period during which limitation is suspended will not be included in the calculation of the limitation period 34.

In conclusion, we can say that in the imaginary case presented in this article, the suspension of the limitation period is still on according to Art. 32, par. 2 CMR even if German law is applied, since the carrier remained silent to the first written claim directed towards him. The above discussion and theoretical misguidances would lead to no different solution in that particular case.

There is another very important question to be addressed in this context: can the claimant file a claim in court during the suspension of the period of limitation? Taking into account what we said above about the background of the wording of Art. 32, par. 2 CMR, i.e. that the carrier has to return the documents attached to the claim while rejecting it in writing, that may have been impossible at the time of the drafting of the CMR, when original documents had to be physically returned to the claimant so that he may be able to prove the claim. As we have argued supra, original documents are not exchanged between the parties anymore, nor is that necessary to terminate the suspension. Although no previous theoretical analysis of this particular situation can be found, there seems to be no reason that would prevent the claimant from filing a claim in court during the suspension of the period of limitation 35. Filing a claim in court would represent the end of the suspension period and, at the same time, the resumption of the limitation period 36.

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32 DREWS, op. cit., 5, p. 341.
33 The provisions on statute of limitations in HGB are to be seen as the lex specialis with respect to those of BGB. So KOLLER, Fn. 4, p. 440; DREWS, op. cit., 5, p. 341.
34 § 209 BGB.
35 There are no theoretical analyses of this particular situation neither in national commentaries of the BGB, COA, procedural laws, nor in the commentaries of the CMR dealing with the issue of suspension of limitation period.
36 § 212, Art. 1, p. 2 BGB, Art. 241 COA.
In the case presented above, the suspension of the period of limitation started eleven months after the delivery, i.e. one month before the expiry of the prescribed one-year limitation period. With the carrier remaining silent and not rejecting the claim in writing, as we have demonstrated in the discussion above, strictly legally speaking, the suspension can go on forever. On the other side, the failure of the claimant to file a claim in court even after many years of carriers not replying to his claim would keep the carrier in the liability zone, which is, in our belief, contrary to the teleological explanation of the extraordinarily short limitation periods for the contract of carriage, and dangerous for the overall business position of both the carrier and his liability insurer. The claimant acting with due care must be aware, after the one-year period after the delivery has passed and no answer from the carrier is obtained for a certain period after that, that he should take action in order to enforce his rights. The carrier acting with due care should also give a written answer regarding the claim to the claimant. One can say that, in our case, both parties failed to act with due care and share the risk of certain consequences. In the case in hand, the carrier informed his liability insurer about the claim he obtained and asked him for payment, but only two months after the receipt of the claim. The insurer, in turn, rejected the claim within a few days and informed both the carrier and the claimant of his decision. Does that fact have any legal consequences for the final question we have to answer here: is the legal action still allowed against the carrier more than two years after the delivery? What is the position of the professional liability insurer in this case?

III. PROFESSIONAL LIABILITY INSURANCE AND THE QUESTION OF SUSPENSION OF THE PERIOD OF LIMITATION

From the 1950s, when the CMR was drafted, to this day, the position of the liability insurer within the transport industry and the relationship between the carrier and his insurer have changed drastically. In the 1950s professional liability insurance in road transport was rudimentary. Today, it is one of the pillars of modern haulage and a vital tool for a profitable, sustainable and professional operator. Liability insurance also becomes essential in meeting the requirements for engaging in the occupation of road transport operator, where the prerequisite of good financial standing of the hauler can be proved, among other, also by adequate professional liability insurance. The modern hauler relies on the «safety net» provided by his liability insurer through the insurance contract in case his liability for damage to the cargo occurs. The insurer, on the other hand, regulates, through his general terms of insurance, the complicated legal issues that might arise regarding the insured risks arising from the performance of a contract of carriage. In those general terms, the insurer gives directions to the carrier as to the conduct expected from him in different situations. Comparing some of the general terms of three leading insurance companies in the transport insurance niche in Croatia and Slovenia, we came to some interesting results. All of those sources have very similar

37 We also have to take into account the fact that, in practice, carriers are often oblivious of legal nuances regarding their liability regime, which of course does not exempt them from legal consequences of such ignorance.


39 Some of the insurers use general terms of liability insurance as annexes to particular insurance policies, whereas other include terms within the tailor-made contracts. Both general terms of liability
demands from the carrier towards his insurer in cases in which the carrier activates his liability insurance policy, when asked to pay damages by the claimant either by way of a court order or an insurance claim. The carrier as the insured person is obliged to inform the insurer of the occurrence of the insured risk and of the written claim for compensation directed towards him no later than three days after learning about them. If this deadline is not respected, as in the case presented in this article, the carrier will still retain his insurance cover, but will be liable for damage caused by the delay to the insurer, unless it would have occurred even without the delay. In our case, no direct damage to the goods occurred as a result of the delay of the carrier to report the claim to the insurer, so the carrier’s rights from the insurance contract would have remained intact. Furthermore, some contracts have provision according to which the carrier is not authorized to respond to a claim for damages without prior consent of the insurer, in particular to admit the claim, settle or make the payment, unless the facts of the case make it impossible to reject the claim without doing obvious injustice. The carrier’s failure to recognize that there is no liability on his part or that the facts were wrongly established is no excuse. Some contracts expressly stipulate that the insurer can decline payment of the insured sum entirely if the carrier has acknowledged the claim or paid more than he was liable for without the consent or knowledge of the insurer. If a judicial proceeding has been started against the carrier, he is obliged to submit all the related documents and data important for handling the claim to the insurer. If the claimant directs his claim for damages directly to the insurer, the carrier is also obliged to submit all the relevant documentation to his insurer related to the amount and nature of the damage as well as the substance of the claim. From the wording of the above provisions one can observe the serious intention of the insurer to be informed of and involved as soon as possible in any situation which might represent an obligation for him, and a threat of sanctions if the carrier does not comply with them. Of particular importance is the provision found in some general terms giving right to the claimant to direct his claim directly to the insurer, but only up to the amount of the insured sum. This refers to the right of the claimant to settle the claim directly with the insurer in out-of-court proceedings. The right to direct action (Lat. actio directa) against the insurer as a judicial remedy, on the other hand, is provided for in many transport conventions, particularly in maritime law, but not in road haulage 40. However, it is important for us to explore further the possible direct legal relationships between the claimant and the road carrier’s liability insurer provided for either in the general terms of the insurance contract or in the law, since that might be important in finding the final answer to the pivotal question in this article: can a written rejection of the claim by the insurer be treated equally as that of the carrier for ending the suspension of the period of limitation? In Croatia, professional (contractual) liability insurance of road freight carriers is of a non-compulsory nature, and no right to direct action connected to this type of insurance is envisaged in the law 41. However, as shown above, the general terms of one insurer on the market included in this research envisage

40 F. e. see: Art. 7, par. 8, International Convention on Civil Liability for Oil Pollution Damage, 1992 (1992 CLC Convention); Art. 4 bis, par. 10, Athens Convention relating to the carriage of passengers and their luggage by sea, 2002; Art. 7, par. 10, International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, etc.

41 For all types of compulsory insurances in transport see Art. 2, Zakon o obveznim osiguranjima u prometu (Compulsory Insurances in Transport Act), Narodne novine 151/05, 36/09, 75/09, 76/13, 152/14.
the right of the claimant to refer his claim directly to the insurer, thus completely bypassing the carrier in an amicable settlement of the claim. The practical question that remains is - how will the claimant know to which insurer to address his claim? Obviously, this information has to be provided to him by the carrier, who in turn is interested in redirecting the settlement of the claim to his insurer. In Germany, the right of direct action is expressly envisaged by § 115, par. 1 of Versicherungsvertragsgesetz (VVG)\textsuperscript{42} only for claims arising out of compulsory insured risks as envisaged by Pflichtversicherungsgesetz (PflVG)\textsuperscript{43}. So, we can conclude that direct action is foreseen for compulsory insurance envisaged by PflVG, and not for other cases of compulsory insurance envisaged by other legislative acts. PflVG, in its § 1, envisages compulsory insurance only for third-party liability arising out of the use of motor vehicles (motor vehicles insurance), and that would be the case in which direct action is allowed. However, there is another legislative act that envisages compulsory insurance also for the contractual liability of the carrier, quite uniquely in the EU: § 7a of Güterkraftverkehrsgesetz (GüKG)\textsuperscript{44}. Since VVG is \textit{lex posterior} in relation to both PflVG and GüKG, it is to be concluded that direct action for claims settled from professional liability insurance as envisaged by GüKG is not allowed. Therefore, in Germany, as in Croatia, there is no legally established relationship between the claimant and the insurer of contractual liability of the carrier. The contract between the liability insurer and the carrier is a \textit{res inter alios acta} with respect to the claimant and his legal position with respect to the insurer is, strictly speaking, completely separate from that of the carrier. Notwithstanding that, some insurers obviously take into account the fact that they themselves have prohibited or greatly limited their insured clients in communicating directly with the claimants with respect to liability and claims for damages. Therefore, they count on direct communication and allow for the claim to be directed to them in the first place, although the claimant has no legal right to file a claim in court against them. Obviously, the insurer is stepping into the shoes of the carrier very aggressively when it comes to the communication with claimants. That is happening through the operation of the contractual terms of some insurers, but it is without a doubt influencing greatly the behavior and code of conduct of the transport industry. The carrier, on the other hand, can still give a direct answer to the claimant with respect to the claim, but in most cases (if general terms of insurance so imply) only as previously instructed by the insurer. If he does otherwise, the insurer might turn down the payment of the insured sum from the insurance contract if he (the insurer) thinks the liability of the carrier does not exist at all, or that the amount paid should be lower than that paid by the carrier. In other words, the carrier is not at all free to reject a claim in writing on his own, whereas the insurer is. We find this argument very convincing in proving that the written answer by the insurer directly to the claimant rejecting his claim can, without a doubt, be treated equally as a written rejection of the carrier within the meaning of Art. 32, par. 2 CMR. It can, therefore, be taken as a fact that ends the suspension of the period of limitation.

However, if the insurer rejects the payment of the insured sum from the liability insurance contract and informs only the carrier about it, but not the claimant, the suspension of the period of limitation does not cease. Clearly, the claimant is

\textsuperscript{43} Gesetz über die Pflichtversicherung für Kraftfahrzeughalter (Pflichtversicherungsgesetz) vom 5. April 1965 (BGBl. I S. 213), das zuletzt durch Artikel 1 der Verordnung vom 6. Februar 2017 (BGBl. I S. 147) geändert worden ist.
still waiting for a response to his written claim sent to the carrier. Should he not receive any, we believe that he should pursue enforcing his rights within a reasonable time. In this case, as well as in any other in professional commercial conduct, the claimant cannot sit idle for a very long time, sometimes even years, only to argue afterwards that he is still entitled to judicial enforcement of the claim due to the (indefinite) suspension of the period of limitation according to a strictly literal interpretation of Art. 32, par. 2 CMR. We believe the legal provisions, especially those as old as the CMR, should not be interpreted literally, but an «autonomous interpretation is thought to be more appropriate» 45. What should a judge do should a case similar to the one presented in this paper come before him, but with the following twist: the insurer has informed of the rejection of the claim only the carrier; but not the claimant? The claimant, oblivious to that, continues waiting with the enforcement of his claim for years, not taking any action whatsoever nor communicating with the carrier, before he filed the judicial claim. Is this action time-barred or is the suspension of the period of limitation still ongoing? The black letter interpretation of Art. 32, par. 2 CMR would lead us to the conclusion that the suspension is still ongoing, since the claimant has not received a written rejection of his claim from the carrier. However, we strongly believe this to be a completely unacceptable outcome and understanding of this problem today, taking into account different parameters necessary to correctly adapt the wording of the CMR to the present time: the ever increasing speed and volume of road transport, the trend of digitalization, the utmost importance and position of the insurer within the transport industry and the code of professional conduct. It is important to remember the understanding of the suspension in the German legal system, where, according to § 203 BGB, the suspension of the period of limitation is ongoing as long as the parties are actively seeking to settle the claim. When they stop such activities the suspension ends, three months after that the statute of limitations applies and the claim becomes time-barred. We believe the particular situation at hand with respect to Art. 32, par. 2 CMR should uniformly be dealt with and interpreted using the same logic. The moment where the parties undertook the last activity or communication aimed at settling the particular claim should be the moment from which a reasonable amount of time should elapse before the suspension of the period of limitation ends. From that moment, the rest of the period of limitation that did not elapse before the suspension starts to run, until a full year has elapsed and the statute of limitations applies. What would be understood as «reasonable time» in this case is up to the national judge to decide, according to the customs and practices in that particular legal system and the code of conduct between the professionals concerned. We believe it to be between three and six months. Should one apply this interpretation, the claim in the case presented in this article would also be time-barred in the case where the claimant has not received the written rejection of his claim from the insurer; nor from the carrier.

IV. CONCLUSIONS

International transport of goods by road has changed drastically in the last 50 or more years, but the provisions of the CMR governing it have mostly remained unchanged, with only two amending protocols in over 60 years 46. This is undoubt-

edly a good thing, since it promotes legal certainty and uniformity throughout the vast area of application of the CMR. However, there are some points where the provisions of the CMR strongly reflect the era and the ways of doing business which were common at the time of drafting, which was in the 1950s. Tremendous technological advances in transport and the society in general, as well as the development of different sectors and services in the road haulage sector make those provisions poorly adapted to the present times and the needs of the carrier. One of those provisions is certainly Art. 32, par. 2 of the CMR, which deals with the suspension of the period of limitation. For the suspension to start only one precondition is needed: the claimant has to send a written claim to the carrier. This provision is certainly needed in order for the carrier to be informed of the pending claim, and to be given the opportunity to settle the claim in an amicable way and avoid court proceedings, saving everybody involved time and money. For the suspension to end, however, the CMR requires three preconditions: the claim has to be rejected in writing, it has to be done by the carrier himself, and the documents attached to the claim have to be returned to the claimant together with the rejection. What about the situation where the carrier does none of the above: he remains silent and passive for a very long period of time, there is no communication between the parties nor are there any activities aimed at settling the claim, but the liability insurer has, in turn, sent the written rejection of the claim to the claimant directly? Can a suspension of the period of limitation last forever in this case with a strict interpretation of Art. 32, par. 2 CMR, or do we have to search for a more teleological interpretation of this old provision in order to make it work today? In our analysis we have proved that of the three preconditions needed for the suspension, the one related to the returning of the documents is deemed superfluous and obsolete in practice. Therefore, original documents had to be sent by the claimant to the carrier in order for him to pay the claim. Should he refuse to do so, he had to return those originals to the claimant in order for him to be able to file a claim in court should he decide to do so, where the original documents were actually proving the existence of the claim and other pivotal elements. Those were, undoubtedly, different times, with different professional ethics and code of conduct between professionals in this line of business. Today, transport is moving towards digitalization and the e-standard, where paper documents are being substituted by electronic ones, only to be kept and stored virtually for a limited period of time. No originals are exchanged, possibly copies, which for apparent reasons do not have to be sent back should the claim be rejected by the carrier. Such a conclusion is also confirmed by the wording of German § 439 HGB, which adopts the wording of Art. 32, par. 2 CMR on the suspension of the period of limitation, but omits the need of returning the documents. Therefore, we have to conclude that the three preconditions for ending the suspension of the period of limitation as set by Art. 32, par. 2 CMR do not have to be fulfilled cumulatively —they merely represent a description of the elements needed at the time of the drafting of the provision so that the claimant may take further legal action against the carrier—. Thus, the remaining two elements for ending the suspension can also be put to the test of time. Does the rejection have to be made by the carrier and nobody else? No. As shown in this analysis, the professional liability insurer of the carrier has in the meantime undoubtedly stepped in the shoes of the carrier through their general terms or contractual obligations for this type of insurance when it comes to communication with the claimants af-

After a claim has been made, as well as all other practical and legal questions arising out of the contractual liability for damages of the carrier as their client. The carrier is facing a possible loss of insurance coverage should he bypass the insurer and directly handle the claim, acknowledge it or reject it without having consulted the insurer. Once he has consulted the insurer and received his input, it is possible for him to inform the claimant of his position directly, but such a possibility is clearly deemed as an exception, and not the rule in this situation. So, the preferred code of conduct today in this line of business would be direct communication between the liability insurer and the claimant with respect to the possible rejection of the claim. Therefore, we have to come to the conclusion that the second precondition of Art. 32, par. 2 CMR is also not applicable in a strict sense anymore, and the rejection of the claim can be made by the carrier, but also by his liability insurer for the suspension of the period of limitation to set in. That leads us to the third precondition: the written form of the rejection. In a case where there was no written rejection of the claim sent directly to the claimant by the liability insurer, nor was there one sent by the carrier himself, the suspension might go on endlessly due to the passivity of the claimant to enforce his claim judicially. Can silence of the carrier for a certain period of time after he has been informed of the claim be taken as a rejection of the claim? We believe it can. The carrier and the claimant both share the responsibility for their professional behavior and diligence in pursuing their rights. Should they both fail to behave in such a manner and remain passive in settling or enforcing the claim, the result cannot be an endless suspension of the period of limitation. The judge seized of the case should interpret Art. 32, par. 2 CMR in a teleological way, seeking to preserve the basic premise of the one-year (in rare cases three-year) statute of limitations: the speed and volume of today's road haulage industry. The judge should take the moment of the last activity or communication between the parties concerning the claim as the starting point, after which a reasonable time should elapse before the suspension of the period of limitation would end. The concept of a reasonable time in this context has to be construed from the usual code of conduct in business in that particular legal system. We believe this to be between three and six months, after which moment the limitation period (which did not elapse before the suspension started) resumes. Such an interpretation would certainly divert from the black letter of Art. 32, par. 2 CMR, but would also prevent an endless duration of the suspension of the period of limitation, which is dangerous for various reasons. Firstly, it keeps the carrier liable for damages for an undetermined period of time, which is against the logic of the extremely short period of limitation for contracts of carriage of goods, which is in turn due to the characteristics of the operations of transport of goods by road: fast, numerous and informal. Secondly, keeping the carrier liable means automatically keeping his liability insurer liable as well, without him knowing of any possible pending claims on that account, being able to handle those cases or allocate and plan the funds for those claims. That is certainly unacceptable for the modern transport insurance industry, which is of vital importance for a sustainable haulage industry. It is undoubtedly hard to deviate from the wording of the old and influential instrument of unification such as the CMR. However, in order to keep it as such for the benefit of the industry, on some isolated points that have failed the test of time, such as the Art. 32, par. 2 CMR in case of silence of the carrier to reject the claim, national judges have to find strength to go beyond the black letter of the norm and perceive the entirety of modern carriage of goods by road and the interests involved therein. Only in such a way can the CMR survive the challenges of rapid changes and developments in the industry and remain the pillar on which all the stakeholders in road transport industry can still rely.
V. SUMMARY

The institute of suspension of the period of limitation in international transport of goods by road is governed by Art. 32, par. 2 and 3 CMR. It is also one of the rare points where the CMR directs towards national laws, so the practical implication of the suspension will depend on the law of the court seized of the case. In jurisdictions where time elapsed during the suspension of the period of limitations is not calculated into the period of limitation, it is not clear how long the claim can remain in suspension. If the carrier never rejects the claim in writing, the black letter interpretation of Art. 32, par. 2 CMR could lead to the conclusion that the claim remains in suspension forever, and the legal action of the claimant—even after the one-year period after the delivery has long passed—would not be time-barred. Due to the tremendous changes in the road haulage industry since the time when CMR was drafted, this provision of the CMR has to be interpreted in a teleological way in order for it to be suited to the modern interests of all stakeholders in the industry. Therefore, the three preconditions for the end of suspension from Art. 32, par. 2 CMR should be understood as exemplificative, and not exhaustive. The documents do not have to be returned to the claimant together with the rejection of the claim, since today those are always copies of the originals. If one element of a legal provision is deemed obsolete, the other two elements also have to be interpreted broadly, taking into account the reality of this industry. Therefore, a claim can be rejected not only by the carrier, but also by his liability insurer, since modern contractual provisions and general terms of insurance allow quite aggressively the insurer to take over the communication concerning the claim with the claimant from the carrier. Finally, the rejection does not have to be made in writing for the suspension to end. If there has been no rejection and both parties have ceased all activities on settling the claim, a reasonable period should be applied—between three and six months—in order for the suspension to end. After that moment, the rest of the period of limitation that has not elapsed before the suspension starts running, and after even that has passed the claim is finally time-barred. This way the situation of silence of the carrier and passivity of the claimant to file a claim in court cannot lead to an indefinite period of liability of both the carrier and his liability insurer, which is very important for the preservation of financial interests and sustainability of the modern road transport and insurance industries.