Chapter 13

New road carriers’ liability regime in Croatia and lessons from the old normative anomalies for the neighbouring countries

Nikoleta Radionov*

After a long period of hesitation, Croatia finally became a party to the 1978 CMR-SDR Protocol, which entered into force for Croatia on 1 May 2017. However, some of the neighbouring countries in South East Europe have still not ratified this old but important Protocol, thus creating a very dangerous normative regime for the road freight carrier and a dichotomy in the application of the CMR convention. This normative anomaly existed in Croatia until 1 May 2017, and still exists in Serbia, Montenegro and Bosnia and Herzegovina, with the consequence that, whenever the law of those states is applied to a case, the limitation of the carrier’s liability is to be calculated in Gérminal francs (GFs), instead of the generally accepted special drawing rights (SDRs). Owing to the fact that the value of GFs is related to the price of gold, the limitation arises to approximately 2000 per cent higher amount compared to that calculated from the SDRs. The contractual limitations in the professional liability insurance policies available on the market are either linked to the CMR-SDR Protocol 1978 limitations in SDRs, or expressed in fixed sums much lower that the limits calculated in GFs. As a consequence, without the SDR-CMR Protocol, the carrier remains solely liable for the excess of damages between the policy limit and the limitation in GFs. This article shows the importance of the ratification of the CMR-SDR Protocol 1978 for the remaining states not parties to it on the example of Croatia and its case law that has, over the years, adopted the calculation of limitation of liability in GFs, with detrimental consequences for the road carriers. This practice will have to be amended, and the limitation of liability in SDRs will have to be applied in Croatia on all cases that occurred after 1 May, 2017. Hopefully, the lessons will also be learned for other countries in the region.

* Professor, Department of Maritime and Transport Law, University of Zagreb School of Law.
1 INTRODUCTION AND HISTORICAL BACKGROUND

On 31 January 2017 Croatia became party to the 1978 Protocol to the Convention on the Contract for the International Carriage of Goods by Road (1978 CMR-SDR Protocol)\(^1\) by accession,\(^2\) and the Protocol entered into force in Croatia on 1 May 2017 in accordance with its Article 4(2).\(^3\) It was on the latter date that the long period of uncertainty, fear and ever-present danger for road freight carriers operating to and from Croatia finally ended. Thereafter, the legal regime governing the liability of road freight carriers for damage to the cargo in international transport in Croatia became aligned with legal regimes governing the same situation in the vast majority of states parties to the 1956 Convention on the Contract for the International Carriage of Goods by Road (CMR).\(^4\)

Thus, all cases of loss or damage to goods carried internationally where Croatian law applies, and which occur after 1 May 2017, will be governed by the CMR as amended by the 1978 SDR-CMR Protocol, which is an internationally expected standard. However, all cases that occurred before that date will be subject to the old legal regime, where only the original text of the 1956 CMR applies. Is that a problem and, if so, in what way? In order to find out, it is necessary to analyse the genesis of the problem with application of the CMR in Croatia and neighbouring countries in the region of South East Europe (SEE), with special focus on the case law, as well as liability insurance issues.

The scope of this article is to compare the two legal regimes governing the limitation of liability for damages in international road freight carriage under the CMR, with special focus on the geographical dimension of the problem, the practical application in accessible case law in Croatia and the insurance perspective.

Finally, the consequences arising from the dichotomy of the legal regimes existing in Croatia before and after 1 May 2017 will be discussed with respect to other countries in the SEE region, and possible harmonisation of the legal regimes. Such an analysis is of pivotal importance in light of the progressive liberalisation of the road freight carriage market in the EU, and the importance of providing a level playing field for operators active in the market. Clearly, a stable and predictable legal regime is vital for prosperous and competitive

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\(^2\) Zakon o potvrđivanju Protokola uz Konvenciju o ugovoru o međunarodnom prijevozu robe cestom (CMR), Narodne novine – Međunarodni ugovori 6/2016 from 30 December 2016.


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business. Stable in this context means that the laws and other legal instruments should not be subject to frequent amendment. Predictability means that the enforcement of those laws and other legal instruments by the courts seized in the case of particular legal proceedings should be transparent (and that the judgments are accessible to the public) and consistent. However, alongside stability and predictability, there is yet another key quality, especially when it comes to the transport industry – harmonisation with the comparative legal framework. It is extremely important for an industry as international as road freight carriage that the national normative framework is in line with the generally accepted legal instruments and standards governing this industry internationally.

The legal framework in this field in the region of SEE is largely a result of specific historical developments in the 1990s. It is well known that Croatia proclaimed independence from the Socialist Federal Republic of Yugoslavia (SFRY) in 1991, in which it had been until then one of the six constituent federal republics. In 1992, the new state was internationally recognised and became a member of the UN.\footnote{History: Contemporary Croatia http://croatia.eu/article.php?lang=2&id=24.} Other former SFRY republics seeking independence – Slovenia, Bosnia and Herzegovina, Macedonia and Montenegro – followed the same path.\footnote{For more details on this process see for Slovenia https://www.cia.gov/library/PUBLICATIONS/the-world-factbook/geos/si.html; for Bosnia and Herzegovina https://www.cia.gov/library/PUBLICATIONS/the-world-factbook/geos/bk.html; for Macedonia: https://www.cia.gov/library/PUBLICATIONS/the-world-factbook/geos/mk.html; for Montenegro: https://www.cia.gov/library/PUBLICATIONS/the-world-factbook/geos/mj.html.} The last constituent part of the former SFRY successfully seeking independence in 2008 was the autonomous province of Kosovo.\footnote{Although recognised by more than 100 countries, Kosovo is still not a member of the United Nations, and the tense international dispute with Serbia is still on-going. For more details see The World Factbook; Europe: Kosovo https://www.cia.gov/library/PUBLICATIONS/the-world-factbook/geos/kv.html. The region of Kosovo remains disputable as to the application of the CMR regime, due to the unclear legal status of the state, as stated above. However, a thorough discussion of this complex international public law issue remains outside the scope of this article, and will, therefore, be omitted from further elaboration.} The territory that was once a single state in the region of South East Europe, the SFRY, now consists of eight new independent states.\footnote{The term South East Europe as used in this article will only refer to the former SFRY countries and Bulgaria. It will not, therefore, be equivalent to the usual meaning of that term in the geographical sense, since South East Europe geographically encompasses a much wider region.} Slovenia and Croatia joined the EU in 2004 and 2013 respectively, whereas other countries in the region are in different stages of the negotiating process for accession to the EU. What had once been regulated at the federal level of the former SFRY now had to be regulated \textit{ab ovo} at the level of every one of those states, and the process had to start practically on the first day following the proclamation of independence.
2 THE DOUBLE LEGAL REGIME IN INTERNATIONAL FREIGHT CARRIAGE IN CROATIA AND THE REGION OF SOUTH EAST EUROPE

With respect to international road freight transport, the situation was better, although not ideal. In 1992, Croatia became party to all the international treaties that the former SFRY had been previously party to by virtue of succession. International carriage of goods by road in the former SFRY was governed by the 1956 CMR. The former SFRY never ratified the 1978 CMR-SDR Protocol. Therefore, as of 3 August 1992 Croatia was bound only by the CMR Convention in its original 1956 wording until ratification of the SDR-CMR Protocol in January 2017, applicable from 1 May 2017. The other SEE countries also became parties to this Convention by virtue of succession in the early 1990s, making the CMR in its original 1956 text the prevailing legal regime for international road freight carriage in the region for the last three decades.

A majority of the CMR accessions were done in times of war (Slovenia, Croatia, Bosnia and Herzegovina) or in politically turbulent times, without

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9 In its letter to the Secretary General of the UN dated 27 July 1992, received by the UN on 4 August 1992 and accompanied by a list of multilateral treaties deposited with the UN, Croatia stated:

[The Government of] ... the Republic of Croatia has decided, based on the Constitutional Decision on Sovereignty and Independence of the Republic of Croatia of 25 June 1991 and the Decision of the Croatian Parliament in respect of the territory of the Republic of Croatia, by virtue of succession of the Socialist Federal Republic of Yugoslavia of 8 October 1991, to be considered a party to the conventions that the Socialist Federal Republic of Yugoslavia and its predecessor states (the Kingdom of Yugoslavia, Federal People's Republic of Yugoslavia) were parties, according to the enclosed list. In conformity with international practice, [the Government of the Republic of Croatia] would like to suggest that this take effect from 8 October, 1991, the date on which the Republic of Croatia became independent.


10 The former SFRY became a party to the CMR by ratification, Narodne novine – međunarodni ugovori (Official Gazette of the Federative Peoples’ Republic of Yugoslavia – International Agreements) No 11/58, 8.

11 Bosnia and Herzegovina (1 September 1993), Slovenia (6 July 1992), Macedonia (20 June 1997); Serbia (12 March 2001); Montenegro (23 October 2006); Bulgaria (20 October 1977). Apart from the states deriving from the former SFRY, Bulgaria is the only state in the SEE region that has not ratified the CMR-SDR Protocol, and is therefore part of the region where the CMR in the original version from 1956 is to be applied. However, the application of SDR instead of GFs is envisaged by national law, therefore the practical problem that is discussed in this paper in case of Bulgaria can be avoided. Therefore, throughout the text we are stressing out that Bulgaria is, indeed, among states that have not ratified the Protocol, but omitting it from discussion on states where practical problem for operators exists.
specific intent or sufficient time for a substantive analysis of the modern normative developments in the said field. Had such an analysis been carried out, most (or all) of the countries in the SEE region would probably have ratified the CMR-SDR Protocol on the same occasion. That not being the case, however, in the 1990s the entire region found itself bound by the legal regime inherited from times when the former SFRY ratified the CMR, back in 1958.

The only exception at the time and, indeed, a very important one to note, was Macedonia,\textsuperscript{12} which became a party to the CMR in 1997 by succession, and used this opportunity to become party to the 1978 CMR-SDR Protocol by accession.\textsuperscript{13} Therefore, at the end of the 1990s, Macedonia was the only SEE country that was a party to the CMR as revised by the 1978 CMR-SDR Protocol. Soon the negative practical implications of this situation for the transport and insurance industries, which will be discussed in more detail below, became obvious. For a very long time the transport insurance industry, operators and scientific circles in both Slovenia and Croatia exerted strong pressure on the relevant authorities (respective ministries in charge of transport), which eventually led to Slovenia becoming a party to the 1978 CMR-SDR Protocol in 2013,\textsuperscript{14} and Croatia in 2017.

It can therefore be concluded that there are two distinctly different regimes in force governing carriers’ liability in the SEE region at the moment, namely the one provided by the original 1956 CMR in Bosnia and Herzegovina, Serbia, Montenegro and Bulgaria, and the modern one provided in the CMR as revised by the 1978 CMR-SDR Protocol in Slovenia, Macedonia and Croatia from 1 May 2017.\textsuperscript{15} However, the fact that the legal regime in question in Croatia changed only recently must be taken very seriously into account. The old legal regime will still be applicable to all cases arising before 1 May 2017 and it is

\textsuperscript{12} The official name of the state in the UN is the Former Yugoslav Republic of Macedonia (FYROM), due to the still on-going territorial dispute with Greece. However, in this article we will use the name Macedonia when referring to the FYROM. For more information on the dispute over the country’s name see The World Factbook; Europe: Macedonia https://www.cia.gov/library/publications/the-world-factbook/geos/mk.html.


\textsuperscript{14} Slovenia became a party to the 1978 CMR-SDR Protocol on 21 November 2013.

\textsuperscript{15} The region of Kosovo remains disputable as to the application of the CMR regime due to the unclear legal status of the state, as stated above. Kosovo is not a member of the UN, and therefore not a member of the UNECE either. For a list of UNECE member states see http://www.unece.org/oes/nutshell/ecemap.html. At present, Kosovo is not a state party to either the CMR or the CMR-SDR Protocol. Whether Kosovo might be able to accede to the CMR and its subsequent protocols according to art 42(1) and (2), should the state wish to do so, is therefore disputable.
therefore important to analyse the Croatian case law formed in the period from 1992 to date, where the original CMR was applied. This is useful in two ways: first, the established practices visible through accessible case law are sometimes slow and difficult to change. Since the application of the SDR-CMR Protocol in Croatia from 2017 asks for a U-turn in practices of the courts with respect to the question of limitation of the carrier’s liability for damages, it is important to know where they stand at present.

Moreover, Croatian experience in the last couple of decades of limitation of liability in GFs, and the practical implications for road haulage industry of such a regime can present a very important example and lesson for other countries in the region still outside the scope of application of the SDR-CMR Protocol. It is only through such research that the importance of the ratification of the SDR-CMR Protocol for the remaining states can be highlighted. The following paragraphs will, therefore, research the case law and related liability insurance issues in Croatia, trying to give a thorough overview of the case law existing before the period when the SDR-CMR Protocol began to apply. In particular, consideration will be given to: (a) the extent to which the rules relating to carrier liability for damage provided for in the CMR have been used in adjudication; and (b) whether and in what way the limitation of liability as provided for in Article 23(3) of the CMR has been applied in practice.

2.1 Carrier liability for damages under the CMR in Croatian case law from 1992 to 2016

The present research has been conducted with regard to 67 court decisions of various courts in Croatia issued in the period from 1995 to 2014 in which the CMR was applied as the applicable law. Of those 67 decisions, only 21 deal with various issues related to carrier liability for damage to goods in transport, and only four directly invoke the institute of limitation of liability of the carrier. Therefore, the answer to the first, and partially to the second question above arising from the analysis of the sample of court decisions, is that the implementation of Articles 17–23 of the CMR in Croatian case law is scarce. It is, however, impossible to know the total number of cases involving the application of the CMR before the Croatian courts because public access to case law is difficult, and only a (very) limited number of decisions are published. The reason for this can be found in the fact that continuous and thorough publication of case law is a costly affair, and the Croatian judiciary system has been

16 Including 12 decisions of the Supreme Court of the Republic of Croatia (SCRC), 46 decisions of the High Commercial Court (HCC), 6 decisions of the commercial courts, 1 decision of the Municipal Court in Zagreb and 2 decisions of the County Court in Zagreb.
under-budgeted for many years. Selected decisions become publicly accessible only at the level of the appeal courts (Supreme Court, High Commercial Court and the county courts), with very unclear criteria for selection being left to the discretion of each court.

A more thorough analysis of these decisions reveals the following findings. First, in cases involving international haulage, first instance courts tend to apply the Croatian Civil Obligations Act (Croatian: Zakon o obveznim odnosima or ZOO) instead of the CMR. It is a case of erroneous application of substantive law, and therefore a ground for appeal. It is only at the second instance level that the CMR is regularly applied. This has been observed throughout

There are several channels through which case law can be accessed in Croatia. The most popular are commercial web services such as ING-Biro (www.ingbiro.hr) and IUS-INFO (www.iusinfo.hr) with over 200,000 selected decisions of selected courts in their unabridged versions, and over 8,500 short summaries of other notable decisions. Concerning road freight transport, only selected decisions of the Supreme Court, the High Commercial Court and the county courts in the field of road transport are listed. Since commercial courts and municipal courts are not included, all of the first instance judgments are therefore not accessible for public scrutiny through this channel. A vast number of decisions that have not been appealed before a higher court is therefore lost for the public. Another source of case law are court websites, but those are often irregularly updated with non-transparent criteria of selection of decisions to be posted. See eg on the website of the Zagreb Commercial Court (www.tszg.hr) no decisions could be found through a search for the keyword ‘transport’, although it is the largest first instance commercial court in the country, with a substantial number of cases dealing with transport in all of the transport modes. There are also other printed and web-based sources, but they all rarely, if ever, publish full texts of judgments concerning the road transport sector, and some of the web-based sources are obsolete and technically incorrect due to a lack of funding (eg www.sudacka-mreza.hr). Due to the rule of anonymisation, the data about the parties are very often not disclosed upon publication of a court decision. For this reason, in this article only the name of the court and the official number of the decision will be cited. Decisions from the courts of first instance (commercial and municipal courts) have been obtained directly from the parties involved in the respective cases, as they were not otherwise accessible from the above-mentioned sources.

Zakon o obveznim odnosima, Narodne novine (Official Gazette of the Republic of Croatia) Nos 35/05, 41/08, 125/11, 78/15.

According to art 141 of the Croatian Constitution: ‘[i]nternational treaties which have been concluded and ratified in accordance with the Constitution, published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law...’. Narodne novine (Official Gazette of the Republic of Croatia) Nos NN 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

Cases involving international haulage where the CMR was not applied in the first instance:
the period in question. It is possible that the reason for such persistent practice might be attributable to the lack of specialisation of judges in first instance courts and, consequently, many judges will deal with matters such as this on a rather infrequent basis.

Secondly, the most frequently invoked ground for exoneration referred to in Article 17(2) of the CMR are the ‘[c]ircumstances which the carrier could not avoid and the consequences of which he was unable to prevent’. Theft of part or whole of the cargo, or theft of a vehicle with the cargo are not construed as such a circumstance, and is therefore not perceived as a ground for exoneration from liability. The particular circumstances of the case (guarded or unguarded parking lot, locked vehicle, vicinity of a police station) do not seem to affect the unanimous standing of the appellate courts and the Supreme Court.21

The Supreme Court therefore stated that:

because of the mere nature of carriage of goods by road, the theft that the defendant refers to cannot be subsumed under the term of force majeure. Theft of a vehicle loaded with cargo is not a circumstance that could not have been prevented, obviated or avoided in the sense of ... Article 17(2) CMR, but rather falls under the carrier’s risk and does not represent a reason for his exoneration from liability for damage occurred. The circumstance that the loaded vehicle was parked in the vicinity of a police station and patrol cannot result in his exoneration from liability’.22

In another case, the Zagreb County Court stated that:

the defendant has failed to prove that the theft of the carried goods was caused by an act of the claimant or other external causes that could not have been prevented, obviated or avoided. Theft cannot be considered as force majeure in the transport industry. Theft is ... a carriers’ risk, and the carrier thus cannot be relieved from his liability on this ground. The circumstance that the loaded vehicle was parked in the vicinity of the shop and locked by the driver, cannot be decisive for exoneration from liability.23

Similar reasoning is given in the judgment of the High Commercial Court, which stated that: ‘[t]he carrier could have foreseen the risk of theft of the vehicle and cargo, and bearing in mind the profession he is engaging in, should have made an insurance policy for the vehicle and the carriage itself ...’.24

21 Theft of a vehicle does not arise to the ‘circumstance’ in the sense of the art 17(2) CMR in the following cases: Zagreb County Court 17 Gž-499/10-2 of 11 February 2014; SCRC Rev 761/2010-2 of 14 December 2011; SCRC II Rev-227/1999-2 of 18 February 2003; HCC Pž-3770/02 of 6 April 2004.
23 HCC Gž-499/10-2 (n 21) 21.
It is worth noting that courts in their reasoning unanimously and exclusively use the term ‘Act of God’ (French: *Force majeure*, Croatian: *viša sila*) when referring to the ‘circumstance’ in the sense of Article 17(2) CMR. It is generally not considered that there might be a substantive difference between those two institutes: according to the Croatian civil law doctrine, for an ‘Act of God’ to apply the element of externality is needed, although this is not the case for the Article 17(2) of the CMR wording regarding the ‘circumstances’.25

This distinction might play a significant role in cases of loss attributable to reasons inherent to operation, ie damage to cargo caused by a reason internal to the carriage undertaking, which might have the characteristics necessary under the CMR of being unavoidable and whose consequences could not have been prevented. Under Croatian law, however, loss from reason inherent to operation falls under the risk of the carrier (according to the Latin doctrine of *casus sentit domino*). However, this important distinction between the national law and the CMR does not seem to be recognised in Croatian case law present. The wording in the pertinent decisions is important – albeit lamentable – since it speaks of an interpretation of the CMR through the institutes of national law, which goes against the need for harmonious implementation of the CMR, and is as such against the principle stipulated in Article 31 of the 1969 Vienna Convention on the Law of Treaties.26

First, the special risks as defined in Article 17(4) of the CMR are very rarely invoked by the carrier as a ground for exoneration, although they represent a vital tool for the carrier’s defence embedded in the CMR. The facts from the analysed cases suggest that either the existence of a circumstance representing a special risk was not entered by the carrier in the consignment note when issued, or that they are not invoked by the carrier as a ground for exoneration in first instance proceedings. One of the rare cases where special risks have been invoked is the 2007 Case HCC Pž-4028/04-3, where the insurance company as an intervener invoked ‘handling, loading, stowage or unloading of the goods by the sender’ as defined in Article 17(4)(c) of the CMR as a ground for the carrier’s exoneration from liability.

The facts of the case were as follows. The carrier was employed to perform a carriage of a printing machine from Paris to Zagreb from 12 to 17 September

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26 ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ See art 31(1) of the 1969 Vienna Convention on the Law of Treaties, UNTS 1155, 331.
The facts that the carrier performed the carriage, and that the machine arrived to the destination severely damaged due to the fact that the cargo loaded at the rear part of the vehicle collided with the machine loaded in front of the vehicle because of sudden braking, were not disputed by the parties. The dispute was as to whether the sender had failed to load and prepare the cargo for transport in the appropriate way, in which case the carrier would have been exonerated from liability on the ground of the special risk defined in the Article 17(4) c) CMR.

The judgment of the court stated that:

Given the fact that the damage ... occurred during transport of the machine by the defendant as the carrier, and that the defendant, who performs such transport as a professional activity, must have known that for the carriage of such fragile cargo it is necessary to provide conditions for safe carriage and take all necessary steps to avoid damage to the machine, and which has not been proved ... by the defendant, nor had he taken all measures that he was obliged to take within the meaning of Article 18(5) CMR taking into account the circumstances of the case, the court of first instance was right in deciding that the carrier is liable for damages incurred to the machine.27

The High Commercial Court obviously made a serious oversight regarding the shift of the burden of proof as provided in Article 18(2) of the CMR on the one hand, and the meaning of Article 18(5) of the CMR on the other. With respect to the former, once the carrier had proved the presence of the special risk referred in Article 17(2)(c) in the pertinent carriage, he is exonerated from liability, unless the plaintiff (sender) successfully proves that the damage was not attributable to that risk – either because it would be impossible or because the damage was caused by another reason for which the carrier is liable. That was neither proved in this case, nor did the court identify this circumstance. Instead, it appears that the court completely ignored the existence of a special risk in this case with the specific shift of the burden of proof and, at the same time, concluded – even though the loading had been undoubtedly performed by the sender – that the carrier should have provided conditions for safe transport of the cargo in question, without specifying what those conditions should have been in this particular case. The most worrying part is that the argument in favour of this kind of conclusion is found in Article 18(5) of the CMR, which applies only to cases of carriage of livestock, where the carrier is obliged to take all necessary measures for feeding and watering the cattle during the journey, which obviously did not relate to the case in hand.

27 High Commercial Court Pž-4028/04-3 from 11 June 2007.
It appears that special risks as causes for exoneration stipulated in Article 17(4) of the CMR are very seldom argued before the Croatian courts. The primary reason appears to be the lack of specialised knowledge and understanding of their own rights by carriers’ themselves, who do not even argue the existence of such circumstances as their defence in first instance proceedings, nor do they systematically protect their position in possible litigation by entering such circumstances in the consignment note. Moreover, the wordings of some court decisions, as cited above, show a somewhat perfunctory approach when applying the institute of special risks while bypassing the sophisticated system of burden of proof instituted precisely to preserve the economic interests of the carrier.

2.2 Limitation of carrier’s liability under the original CMR and the GF problem

A carrier’s right to limit his liability with respect to the compensation payable is the last, but a very effective way of protecting his economic interests. This limit should ideally be covered by a professional liability insurance policy and the carrier should, therefore, not suffer any economic loss in the event of damage or loss of cargo during transit. However, the system of calculating that limit in Croatia before the CMR-SDR Protocol entered into force, as well as in neighbouring countries in the SEE region still bound by the original CMR, is extremely problematic, and the whole construction upon which modern road haulage is based is therefore brought into question.

The original wording of Article 23(3) of the CMR stipulates that ‘compensation shall not, however, exceed 25 francs per kilogram of gross weight short’. ‘Franc’ refers to the gold franc weighing 10/31 of a gram and of a millesimal fineness 900”, or 25 GFs per kilogram of gross weight short. The CMR was amended in 1978 by the CMR-SDR Protocol with that sole purpose: to change the unit of account from gold into a (much more) stable, modern and transparent unit of SDRs. Article 2(1) of the CMR-SDR Protocol amends Article 23(3) of the CMR, and instead of 25 GFs, stipulates that the new limitation of liability of the carrier is 8.33 SDRs per kilogram of gross weight short.

Today, of the 55 states parties to the CMR, 44 have also ratified the CMR-SDR Protocol. Among those are all of the EU Member States except Bulgaria. From 1961, when the Protocol came into force, this limit became dominant.
in international road transport governed by the CMR, and the GF as a unit of measurement was rather forgotten about. However, the legal truth is quite different in the SEE region today, and the consequences of such a normative anomaly and dual system of limitation of liability has potentially devastating economic consequences for haulage operators.

The change of currency unit in 1970s from GFs to SDRs proved to be of vital importance for the calculation of the road carrier’s right to limit his liability as the price of gold rose enormously owing to the increase in demand and limited supply on the world market. The problem for carriers in countries that had not ratified the CMR-SDR Protocol of 1978 thus became a burning issue, threatening their existence in cases of substantial loss or damage to cargo. In order to understand the gravity of the problem, it is vital to compare today’s value of limitation limits as expressed in GFs in the CMR 1956 with the limits expressed in SDRs by the CMR-SDR Protocol 1978. Unlike the more recent international treaties,\(^\text{30}\) any subsequent amendments of any of the provisions of the CMR 1956 have to be made in the form of a separate international treaty, subject to the process of ratification or accession in accordance with Article 49 of the CMR. Therefore, the limits of liability as provided for in the 1978 CMR-SDR Protocol do not bind states parties to the original treaty unless they expressly became a party to it. By comparing the lists of the states parties to the CMR 1956 and the CMR-SDR Protocol 1978, it can be concluded that 27 EU Member States have ratified both the CMR and the 1978 CMR-SDR Protocol to date. In those states the limit of liability of the carrier is set at 8.33 SDRs per kilogram in the event of loss or damage to the cargo.

In the region of SEE outside the EU, the same limit will apply in Macedonia and Albania, since both countries have also ratified the CMR-SDR Protocol 1978. In Bulgaria, as explained above, the situation is somewhat unusual, since the SDR-CMR Protocol has not been ratified, but the application of SDRs instead of GFs is envisaged by the national legislation. It would be helpful if Bulgaria were to ratify the Protocol and harmonise its international legal regime with the rest of the EU countries, although the problem of limitation of liability of carriers in GFs has now disappeared. However, that is not the case today for Bosnia and Herzegovina, Serbia and Montenegro, where the limit of 25 GFs must be applied, since those countries are still bound by the 1956 CMR alone. Also, the same system still has to be applied in Croatia to all the cases that arose before 1 May 2017, when Croatia was part of the same system of

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limitation. The value of SDRs is established by the IMF on a daily basis. On 29 January 2016, the value of 1 SDR was equivalent to €1.25. Therefore, the limitation of liability as set by the Article 23(3) of the CMR as amended by the CMR-SDR Protocol would be €10.4 per kilogram.

As opposed to that system, however, in order to establish the current value of 25 GFs, the value of one gram of gold of a millesimal fineness 900 must first be established. Nowadays, gold is a commodity traded on stock exchanges, to which access is restricted to stock brokers; values of commodities fluctuate and the available data is not easily comprehensible to non-professionals. One way of bypassing this problem is to use the value of gold listed on one of the gold-trading websites. According to one such website, the value of 1 gram of gold equals €37.4 on the day of calculation. One GF equals 10/31 grams of gold of a fineness 900, ie 1 GF = 0.323 grams of gold of a fineness 900. Since the limitation of liability in Article 23(3) of the CMR is set to 25 GFs, by doing the calculation we can conclude that today the limitation of liability of the carrier in the countries that have not ratified the CMR-SDR Protocol is set at approximately €302.

Table 1: Comparison of limitation of liability amounts according to the CMR 1956 and CMR as revised by CMR-SDR Protocol 1978

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<tr>
<th>Limitation of liability</th>
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<tr>
<td>CMR 1956</td>
<td>CMR-SDR Protocol 1978</td>
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<tr>
<td>Unit of measurement: GFs</td>
<td>Unit of measurement: SDRs</td>
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<tr>
<td>Limitation: 25 GFs</td>
<td>Limitation: 8.33</td>
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<tr>
<td>1 GF = 10/31 gr gold fineness 900 = approx. 0.323 gr</td>
<td>1 SDR = €1.25</td>
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<tr>
<td>25 GFs = 0.323 x 25 = 8.075 gr</td>
<td>8.33 x 1.25 = €10.4</td>
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<td>1 gr gold = €37.4</td>
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<td>37.4 x 8.075 = €302</td>
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<td>25 GFs = €302</td>
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33 One of the most user-friendly websites is http://www.goldprice.org/, where the price of gold can be easily calculated according to different parameters (weight, currency, period of time). However, the downside of this method of calculation that it is not possible to find out the fineness of the gold traded there, ie whether it is the 900 or 999 fineness gold traded for the price available. Notwithstanding this, for the purpose of this article, we will be using the prices of gold available via that site in our calculations in order to find out the approximate value of GFs today.
34 http://www.goldprice.org/.
This simple calculation leaves us with the conclusion that the liability limit for the carrier to whom the law of non-signatories of the CMR-SDR Protocol 1978 is applied is as much as 2000 per cent higher than the limit for the carrier to whom the law of the country signatory to the Protocol applies. This has tremendous implications for the economic position of the road carrier, and devastating consequences for market competition for carriers coming from the SEE countries, as well as for Croatian carriers until only recently when the SDR-CMR Protocol has finally been ratified and the danger of a potential economic disaster in case of damage removed. Where exactly does the danger lie in the application of limitation in GFs?

It is reasonable to assume that only very rarely would the declared value of cargo exceed €302 per kilogram. With the limit of liability set to such a high amount, in all cases where law of the countries parties to only the original CMR, carriers are legally obliged to compensate for the full extent of damage occurred. The countries non-signatories to the CMR-SDR Protocol 1978 thus effectively deprived their haulage industries of the right to limit their liability, as one of the fundamental rights in transport law, enjoyed by carriers in all the other transport modes.

With respect to the question of limitation of liability, Croatian case law is extremely scarce, which is not surprising since until very recently there was virtually no limit of liability in the CMR to which carriers could refer owing to that limitation being set in GFs. In most cases, the parties can only raise the issue of determining the value of the lost or damaged goods according to Article 23(2) of the CMR, but the actual right to limit liability on the value determined this way has been invoked in only a few of the accessible decisions. The judgment of the Commercial Court in Zagreb LIV P-4913/03 from 2003 is one of those where the right of limitation of liability was discussed. In that case, a Fujitsu plasma monitor worth €13,370 was transported from Zagreb, Croatia to Madrid, Spain, where it arrived completely destroyed. In short, the plaintiff claimed damages from the carrier, whereas the carrier as the defendant claimed that the damage to the monitor was attributable to the inappropriate packaging.

35 Municipal Court Sesvete I-P-1339/08 from 10 July 2009 as amended by the decision HCC 17 Gż-499/10-2 (n 21), where the High Commercial Court stated that: ‘[T]he amount of claim was never disputed during the proceeding, and was evidenced in the bill issued by the plaintiff for the pertinent transported goods’. Similarly, in the decision SCRC II Rev-227/1999-2 from 18 February 2003, the Supreme Court, in a third-instance decision, stated that: ‘[A]ccording to art 23(1) CMR, the damages to be paid are calculated from the value of the goods at the moment of handing the goods over for transport. In this particular case, the amount equals USD 57,923.02’. The right to limitation of liability was evidently invoked neither in the first, nor in the second instance proceedings. See also decision HCC Pż-2028/04-3 of 11 June 2007.
provided by the sender/plaintiff. The defendant claimed that the contract had been entered into according to his general terms and conditions of carriage, in which the limitation of liability was set to 8.33 SDRs per kilogram.

In this particular case, the sender had not paid additionally for the excess value or special interest in delivery, nor had he taken out a cargo insurance policy. The court appointed a court expert for accounting and finances, who had to calculate the amount to which the compensation of damage is to be limited, according to (both) the CMR and the general terms and conditions of the defendant. In the first expert opinion, Article 23(3) of the CMR was applied and the amount of €11,819.25 was calculated from the value of GFs. The court appointed another expert to provide a second opinion, this time applying the limitation in SDRs as set in the general terms and conditions of the defendant, which he did, and obtained the amount of €933.18. In the part of the judgment related to the problem of limitation of liability, the court simply stated that the expert opinion on the calculation of the limit according to Article 23(3) of the CMR is fully accepted, and decided that the plaintiff was to pay the amount of €11,819.25 in damages, with no further elaboration as to the legal ground for the decision.36

The case was appealed to the Supreme Court, and thereafter remitted to the Commercial Court for a retrial. In its 2013 decision P 13/13, Zagreb Commercial Court applied the limitation of liability in GFs, ruling that the carrier had to pay the sum of €11,819.25 in damages. Ruling on the appeal that claimed the need to apply limitation in SDRs, the HCC in its recent 2015 decision Pz-10871/13-5 finally decided that:

\[\text{according to the Convention the limitation of liability is to be calculated as 25 Germinal francs \ldots} \text{The Convention has been amended 1978 by the Protocol which amended the Germinal franc in gold by more modern \ldots} \text{SDR \ldots} \text{The Protocol has amended the carriers’ limitation of liability for 40 states parties that ratified it from 25 GF into the 8.33 SDR \ldots} \text{Croatia has not ratified this Protocol, therefore only Convention in its original wording from 1956 can be applied as positive law. Therefore, the carrier in Croatia could not invoke the limitation of liability calculated in SDR, but only in the respective amount in GF.} \]

However, the carrier’s liability insurance policy in this case was linked to the limitation in SDRs per kilogram. Therefore, he was only able to recover approximately €900 (less than 10 per cent of the damages in this case) under the policy, whereas the rest of the amount had to be borne by the carrier himself.38

36 Commercial Court Zagreb LIV P-4913/03 of 7 February 2008.
37 HCC Pz-10871/13-5 from 3 November 2015.
38 The information obtained directly from the liability insurer.
In another case from 2002 where the right to limitation of liability was not pleaded at all, the Supreme Court stated that:

[The first instance court was] right to invoke the provision of Article 23(1), providing that in the case of liability for complete or partial loss of goods the damages should be calculated on the basis of the value of the goods at the time and on the place of handing over for carriage. However, within the meaning of Article 23(3) CMR the damages may not exceed 25 francs per kilogram of gross weight short, where the franc equals the value of gold weighing 10/31 grams of a millesimal fineness of 900. Accordingly, in making a determination as to the admissibility of the amount of claim, the provision of Article 23(3) CMR was to be applied, and the amount of claim assessed according to it. In addition, any circumstances that might have a bearing on the decision with regard to the provision of Article 24 CMR, which provides that the sender may declare in the consignment note for the agreed value of goods exceeding the limit specified in Article 23(3), in which case the value of the goods would be determined in accordance with the consignment note, and the amount of damages to be paid would not be subject to the limit referred to in Article 23(3) CMR.39

In this case, it was the Supreme Court who was the first to invoke the limitation of liability right, on the grounds of erroneous application of law, instead of the carrier who failed to do so in all three instances of the process.

Of particular interest is the recent 2015 case HCC Pž-3894/11-3. In this case, the carriage of goods worth €101,137.54 was performed from Bari, Italy to Split, Croatia. A total of 207 boxes of cargo was stolen from the rest area Conore on the A-14 route, near Ancona. Part of the cargo, worth €30,676.80 was delivered to the consignee, whereas the rest, worth €63,092.33 was lost. The carrier’s liability insurer paid out the amount of €15,617.80 according to the terms of the policy, whereas the remaining €47,474.53 was claimed from the carrier. In its reasoning, the Court stated that:

[P]ursuant to Article 23(3) of the Convention ... if a carrier is liable for partial or full loss of goods, and when the liability is calculated in accordance with the Convention, the amount of liability may not exceed 8.33 SDR per kilogram of gross weight of the goods. ... It is also visible from the payment authorisation of the carrier’s insurer ... that a shortage of 1700.00 kg of gross weight of the goods was established on the basis of carriage customs documentation. In accordance with Article 23 CMR, the insurer calculated the value of each missing kilogram of gross weight of the goods as 8,33 SDR ... However, the final amount of HRK 116,059.00 was reduced by the contracted maximum deductible of 250 SDR, and the amount of HRK 114,009.96 was paid out. Seeing as the plaintiff was entitled to full compensation, he has the right to be paid the amount of the deductible by the defendant, pursuant to the Convention ... The remaining amount of claim

of 47,224.52 euro ... exceeds the damages limited at 8.33 SDR per kilogram ... provided in Article 23(3) of the Convention, which is the liability of the carrier.\textsuperscript{40}

From this wording it is impossible to detect the legal basis on which the court applied the limitation in SDR years before Croatia ever became bound by the SDR-CMR Protocol. One of the possible solutions can be found in the fact that the liability insurer in this case evidently calculated the indemnity payable according to his policy limits based on the limitation from the CMR-SDR Protocol 1978, namely 8.33 SDRs/kg. This calculation was, of course, valid as to the insurer’s contractual obligations, but completely inadmissible as reasoning for the court in deciding on the carrier’s liability for the remaining amount of €47,224.53 in damages. While accepting the limit of liability in SDRs as invoked by the insurer, the court failed to note the difference between the contractual freedom of the insurer to define policy limits and to apply them in the calculation of indemnity, and the law applicable to the case which, in this particular instance, enabled the court only to apply the limitation in GFs according to the CMR 1956, where the carrier remained liable for the remaining amount of €47,224.53.

\section*{2.3 Normative anomaly and the issue of professional liability insurance}

Professional liability insurance for road carriers is not compulsory under Croatian law. Insurance contracts are governed by the ZOO,\textsuperscript{41} and its provisions apply to the contract of insurance of professional liability of the carrier in land transport.\textsuperscript{42} Croatian road carriers regularly insure the risk of their 40 HCC Pž-3894/11-3 of 10 March 2015.  
41 Zakon o obveznim odnosima (n 18). According to art 923, the provisions of this section of ZOO will not apply to marine insurance, cargo insurance in land transport, aviation insurance, claim insurance or reinsurance. Those insurance contracts are governed by the Maritime Code (in Croatian: Pomorski zakonik) as lex specialis, Official Gazette of the Republic of Croatia Nos 181/04, 76/07, 146/08, 61/11, 56/13, 26/15, Heading IV, arts 684–747d.  
42 Insurance contracts are governed by section 27, arts 921–989. According to art 924 ZOO: ‘the provisions of this Section are in principle mandatory, except where the derogation is expressly granted or where parties are free to stipulate as they wish. Derogation from other provisions ... is allowed only if it is undoubtedly in the interest of the insured party’. With respect to the majority of issues concerning cargo and liability insurance in road transport, the parties are indeed free to stipulate the terms of those contracts according to their free will and commercial interest, the terms of the contract thus becoming the primary source of law between the parties. According to the provision of art 7(2) of Regulation 1071/2009, the insurance of a carrier’s professional liability is also of a non-mandatory nature, used as an alternative means to prove his financial standing as envisaged in art 7(1), in order for him to obtain the Community licence. See Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC, OJ L 00 of 14 November 2009, 51–71.
professional liability, but fierce competition is forcing them to keep their operating expenses as low as possible. Therefore, they are sometimes prone to assess the appeal of an insurance policy offer primarily on the basis of the insurance premium to be paid, often not having sufficient professional background to understand the finesses of other stipulations of this kind of contract, such as the risks covered or the policy limit. Generally, this type of insurance contract is tailor-made to suit the particular needs of a carrier, and various elements are negotiated between the parties. Carriers usually take fleet insurance cover for a one-year period, with or without the aggregate limits and deductibles. According to the general terms and conditions of the major insurance companies operating on the Croatian market in this segment, there are certain exclusions from insurance coverage preventing the carrier from recovering under the policy, leaving him directly liable to the injured party seeking damages, which is one way of assessing the risk assumed by the insurer against the premium paid.

The other significant element of an insurance contract that is often overlooked by carriers is the policy limit. The policy limits as stipulated in the contracts on the Croatian market are calculated in CMR-SDR Protocol limitation of 8.33 SDRs per kilogram of gross weight, but cannot exceed a certain fixed sum. This sum can vary greatly from as low as €30,000 to several hundred thousand euros, depending on a carrier’s particular needs regarding the market he operates on, the cargo carried, but also the ability and willingness to bear the economic cost of a particular limit, ie the premium. The insurance limit of 8.33 SDRs is common on the single market, since it is in conformity with the carrier’s liability limits under the CMR-SDR Protocol 1978, and is thus expected to match the carrier’s needs in all cases where he can invoke

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43 The research is based on the contracts of insurance of professional liability in carriage by road, obtained by leading insurers on the Croatian market: Croatia osiguranje, Allianz Zagreb and Jadransko osiguranje. Since the particular contractual obligations obtained this way are confidential, only the general information on the liability coverage will be cited, without the reference on the particulars of the parties etc.

44 Such risks include eg robbery, all kinds of theft of plundering of the cargo or the vehicle and the cargo that occurred in a certain geographical area (the former Soviet Union region, Serbia, Bosnia and Herzegovina, Macedonia, Montenegro and Kosovo), if the damage occurred while the vehicle was parked on an inadequately guarded and lighted parking lot during the driver’s rest time, if the damage was due to an overload of the vehicle etc. Cited from the contractual terms of the fleet policy of professional liability insurance offered by one of the leading insurers of transport risks on the Croatian market.

45 Some insurers offer also €600,000.00 cover per incident only in cabotage transport, exclusively for the territory of Germany, with aggregate limit set to double this amount. Fierce competition and liberalisation of the insurance market in the EU leads to ever higher insured sums offered, often combined with various other deductibles.
the right to limit his liability. However, in SEE countries where the CMR-SDR Protocol does not apply, as well as in Croatia before 1 May 2017, the agreed policy limit plays a very important role for the carrier in case major damage occurs. The policy limit of 8.33 SDRs is meant to apply to partial loss or damage to the cargo carried, whereas the larger damages are to be limited by the fixed sum. The whole problem of carriers’ position in the respective countries worsens when the (sometimes) very low fixed sums under the policies are compared to extremely high limitation in GFs under the positive law.

The economic consequence for the carrier in a hypothetical case of a total loss of 20 000 kg of cargo whose value is (only) €40 per kg (where the limitation of liability is set, as shown above, to approximately €320 per kg) is illustrated in the table below:

<p>| Table 2: Carrier’s liability for damage in a hypothetical case against different policy limits in professional liability insurance policies |</p>
<table>
<thead>
<tr>
<th>CMR–SDR PROTOCOL 1978 REGIME</th>
<th>CMR 1956 REGIME</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Gross weight of the cargo lost/damaged:</strong> 20,000 kg</td>
<td><strong>Gross weight of the cargo lost/damaged:</strong> 20,000 kg</td>
</tr>
<tr>
<td><strong>Value of the cargo lost/damaged:</strong> €40 per kg</td>
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</tr>
<tr>
<td>Total damages: €800,000</td>
<td>Total damages: €800,000</td>
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<tr>
<td>Limitation of liability in SDR: 8.33 SDR = €10.4</td>
<td>Limitation of liability in GF: 20,000 x €302 = €6,040,000</td>
</tr>
<tr>
<td>10.4 x 20,000 kg = €208,000</td>
<td>NO RIGHT TO LIMIT LIABILITY</td>
</tr>
<tr>
<td>LIMITATION APPLIES</td>
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<td>↓</td>
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<tr>
<td>Professional liability insurance policy A) limit in SDR</td>
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</tr>
<tr>
<td>10.4 x 20,000 kg = €208,000</td>
<td>10.4 x 20,000 kg = €208,000</td>
</tr>
<tr>
<td>DAMAGES TO BE PAID BY THE CARRIER €0</td>
<td>DAMAGES TO BE PAID BY THE CARRIER €0</td>
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<tr>
<td>Professional liability insurance policy limit B) limit: fixed sum €300,000</td>
<td>Professional liability insurance policy limit B) limit: fixed sum €300,000</td>
</tr>
<tr>
<td>800,000–300,000 = €500,000</td>
<td>BANKRUPTCY RISK</td>
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<td>BANKRUPTCY RISK</td>
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<tr>
<td>Professional liability insurance policy limit B) limit: fixed sum €300,000</td>
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<tr>
<td>800,000–300,000 = €500,000</td>
<td>BANKRUPTCY RISK</td>
</tr>
</tbody>
</table>
This short theoretical survey shows that the carriers to whom the law of the countries where the CMR 1956 applies are in an extremely difficult and unfair position on the market. Neither can the insurer offer an insurance limit so high as to cover the enormous amounts of liability limits in GFs according to the CMR, nor can the carrier pay the premiums for such coverage and remain competitive. Since occurrences of major losses of cargo due to thefts or traffic accidents are inevitable, carriers are lost in the gap due to the dangerous and long-lasting normative anomaly resulting from the failure to ratify the CMR-SDR Protocol by some countries in the SEE region. When faced with the obligation to pay large damages, notwithstanding and beyond the liability insurance coverage, carriers face bankruptcy. Insurers of transport risks also suffer long-term consequences from this situation, since their potential clients for various insurance products are often forced to go out of business. This situation also nurtures mutual distrust between the carriers and their insurers as the carriers are often oblivious to all the legal nuances of the situation. Unable to recover full amounts of damages due notwithstanding their professional insurance policy and (as shown above) facing potential bankruptcy, carriers are prone to see their insurer as the culprit. Insurers in Slovenia and Croatia until only recently were, and other insurers active on the markets of Serbia, Montenegro and Bosnia and Herzegovina are, as it seems, caught between the hammer and the anvil in this situation.

3 CONCLUSION

More than 25 years after becoming a state party to the original CMR 1956, on 1 May 2017 Croatia finally also became bound by the provisions of the 1978 SDR-CMR Protocol. It was an extremely important moment for the hauliers operating in the region, since their liability for loss and damage to the cargo on that date fell as much as approximately 2000 per cent, from €302 (value of 25 GFs as calculated from the original CMR) to only €10 per kilogram of gross weight of damaged or lost cargo (value of 8.33 SDRs as calculated from SDR-CMR Protocol). It was a moment that the Croatian haulier industry had long awaited; the pressure to resolve the problem had only worsened after Croatia joined the EU in 2013. By becoming part of an almost entirely liberalised single market, the pressure of market competition highlighted the need of harmonised and uniform rules and conditions applying to all operators on the market, especially when it comes to a neuralgic financial point of the limitation of liability for damages.
Because contracts for carriage of goods by road are not within the competence of the EU but are instead in the purview of the Member States themselves, the initiative of ratification of the SDR-CMR Protocol was fully with the Croatian Ministry of Marine, Transport and Infrastructure, which had shown an inexplicable reluctance to act accordingly for many years, until 2016, when the process of accession to the Protocol began. However, it must be borne in mind that the old regime of limitation of liability of the carrier for damages in GFs according to Article 23(3) of the original CMR under Croatian law will still be applicable to all cases of damages occurring before 1 May 2017, the date on which the SDR-CMR Protocol entered into force in Croatia.

The only other EU Member State that has not yet ratified the Protocol, Bulgaria, envisaged the application of the SDRs instead of the GFs in its national legislation, therefore bypassing the danger arising from this normative anomaly. However, some of the countries in SEE – Serbia, Montenegro and Bosnia and Herzegovina – have not yet ratified the SDR-CMR Protocol, creating the area where the limitation of liability of the carrier can only be calculated in GFs in the middle of Europe, in the region lying on some of the vital TEN-T transport corridors. Therefore, today there are effectively two legal regimes of limitation of liability of the carrier under the CMR: one applicable to 44 member states of both the CMR and the SDR-CMR Protocol, where limitation is calculated in SDRs and 11 remaining member states of the CMR, where limitation is calculated in original GFs. Such a dichotomy represents a very dangerous normative anomaly, owing to the enormous difference in value of limitation of liability calculated in GFs, as opposed to that calculated in SDRs.

Croatia is finally one of those states applying the limit in SDRs, but apparently some of the neighbouring states in the SEE region have still not detected the problem. The devastating consequences for the carriers in case of larger losses or damage to the cargo have been shown in this article. Since the limitation of liability of 25 GFs/kg amounts to as much as approximately €302 per kg, it effectively abolishes the carrier’s right to limitation of liability as a necessary instrument for maintaining his profitability, because it is highly improbable that the actual value of the goods carried would extend those limits. It is also virtually impossible to buy insurance cover for such limits for a competitive premium, leaving the carrier alone in the huge gap that opens between the extent of his possible liability for damages under this legal regime and the liability insurance cover that the carrier would be able to afford.

The aim of the CMR to harmonise contractual conditions for the haulage industry that would enable insurers to offer solid insurance cover against a measurable and insurable risk to carriers is thus lost. However, the situation
where there are indeed countries where carriers are possibly liable for the full amount of damage to the cargo carried speaks volumes to the cargo interested party. There is a clear potential for forum shopping arising out of this dichotomy and normative anomaly in the region of SEE (as well as other countries that are not parties to the SDR-CMR Protocol).

The analysis of the available case law of Croatian courts based on the old legal regime existing before May 2017, when only the original CMR was applicable, shows several problems. First, public access to existing case law on the CMR is extremely limited and not transparent, which is a huge drawback for those within the industry interested in assessing their legal position and defending their rights. Case law of the High Commercial Court seems to be consistent, but with the tendency of interpreting the provisions of the CMR on carriers’ exoneration from liability in light of the interest of the cargo. Carriers very seldom invoke special risks as grounds for exoneration, and the carrier’s right to limit liability has also been invoked extremely rarely.

The pertinent case law in Croatia is therefore scarce and not harmonised, with clear signs of insufficient understanding and knowledge of specific institutes of the CMR system. The application of the limitation of liability in GFs has found its place in the case law, but so has that in the SDRs (before the ratification of the Protocol). It is therefore to be expected that the application of the new regime under the SDR-CMR Protocol will not present a problem for the courts in future, and that the dangerous period for hauliers under the Croatian law will easily be overcome. However, the detrimental effects for road freight carriers caused by the application of the CMR shown in the example of Croatia in the period before May 2017 can act as – and must in fact be – a clear and urgent warning for Serbia, Bosnia and Herzegovina and Montenegro to speed up the process of ratification of the SDR-CMR Protocol and secure the future for hauliers operating on their respective markets, especially in light of their underlying political ambitions of eventually becoming part of the single market.