MARINE AVIATION & TRANSPORT INSURANCE REVIEW

A cura di: *Cristina Castellini, Responsabile Trasporti e Aeronautica - ANIA Associazione Nazionale tra le Imprese Assicuratrici*

SOMMARIO

Ottobre 2012 - N. 4

Marine

Aviation

Transport

MARINE AVIATION & TRANSPORT INSURANCE REVIEW

Il dott. Alessandro Morelli, dopo un quadriennio alla guida del Loss Prevention Committee, è stato nominato membro dell'Executive Committee dello IUMI.

A COMPREHENSIVE GLANCE ON THE MARINE, AVIATION & TRANSPORT WORLD

The idea is to supply and update our associates with the latest legislative juridical developments at a national and European level. Our aim is to present the information in a way that is easy to access and use. We believe that this newsletter will fill an important gap due to the fact that most journals and legal reviews are often complex and it takes a lot of time to find the information required by insurance staff.

DISCLAIMER

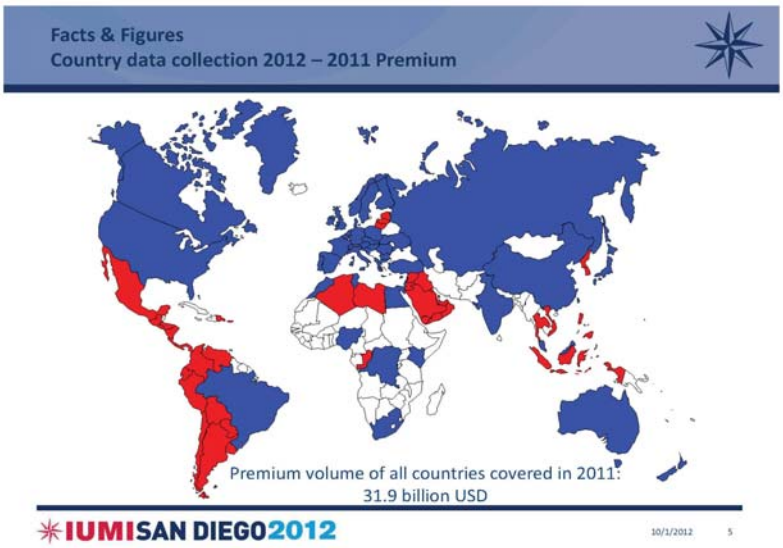
IUMI - FACTS AND FIGURES

Massimo Nicola Spadoni
Coordinatore GdL Trasporti ANIA

GENERAL REMARKS

Come ogni anno uno degli appuntamenti maggiormente attesi alla Conferenza IUMI è quello della presentazione di dati, statistiche e analisi del mercato Marine mondiale.

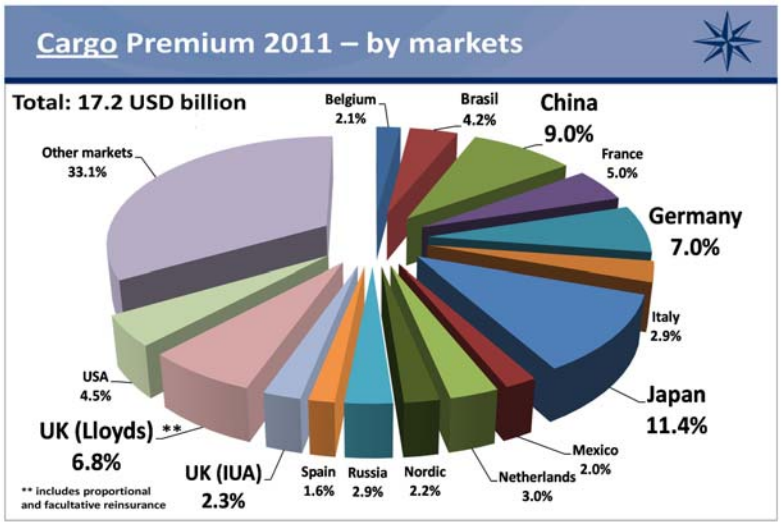
Un grande sforzo è stato fatto dal Facts & Figures Committee che ha implementato le elaborazioni statistiche con l'aggiunta di dati riferibili a mercati di paesi dell'America latina e del Medio e Estremo Oriente.

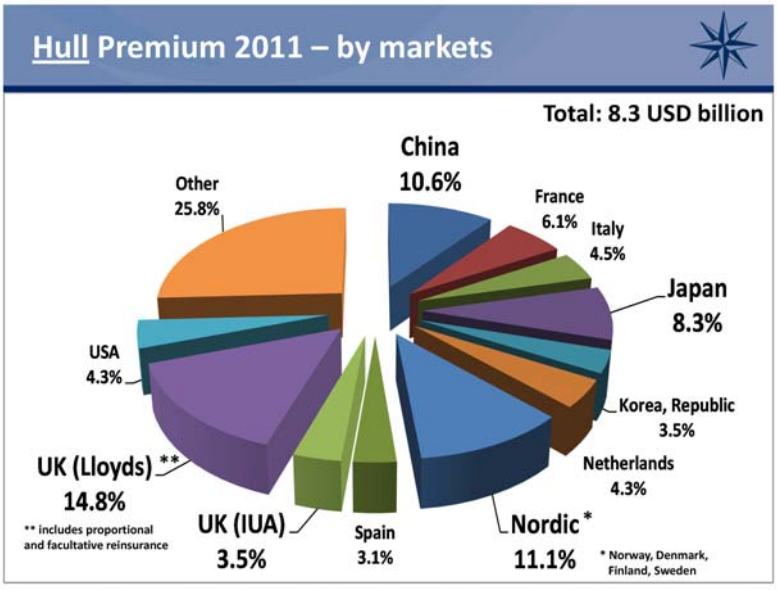


La raccolta premi 2011 del mercato Marine è stata pari a Usd 31,9 miliardi.

Il settore Merci rappresenta la fetta più ampia con il 54%; seguono, nell'ordine, il comparto "corpi" (26,2%), l'Offshore /Energy (14,2%) e il Marine Liability (5,7%).

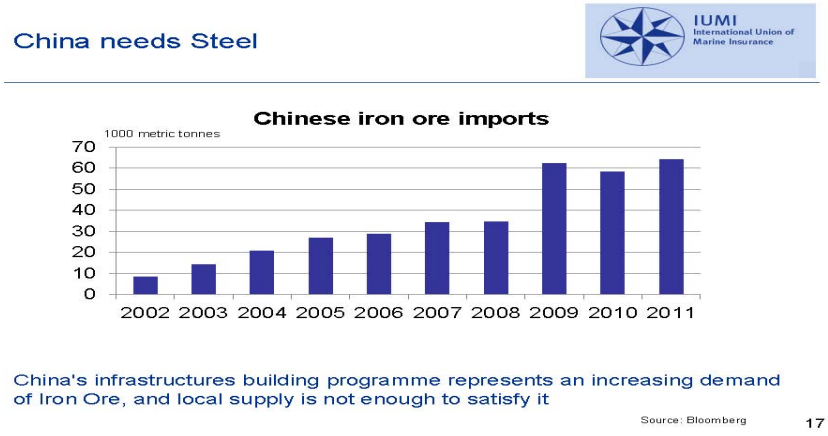
Per i due settori principali (merci e corpi) le due slide successive indicano la ripartizione per mercato.



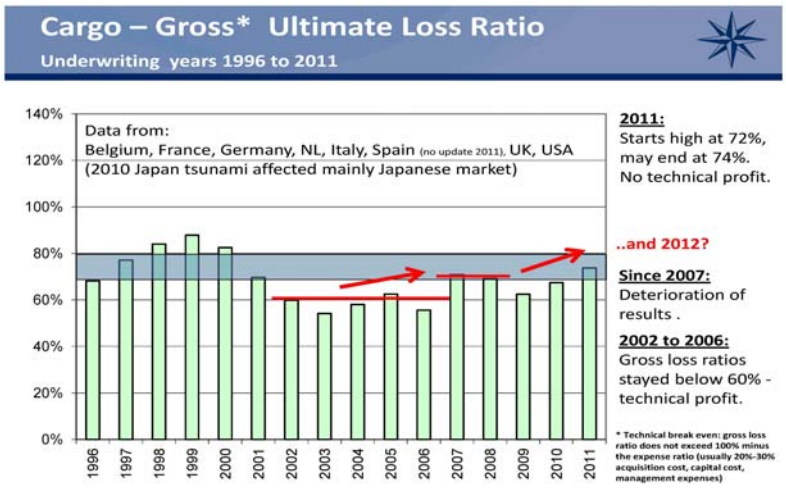


SETTORE MERCI

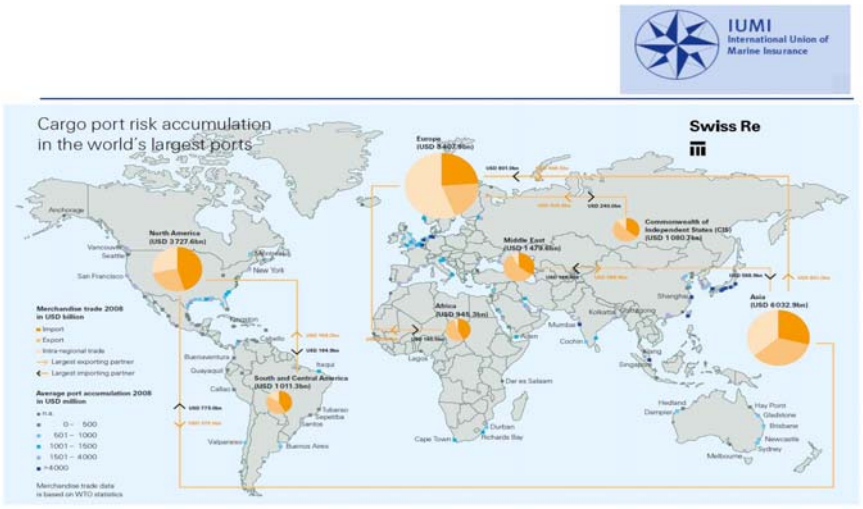
L'analisi del settore evidenzia una crescita della raccolta premi dovuta all'aumento del valore delle materie prime e alla crescita dei volumi trasportati soprattutto grazie ai Paesi emergenti.



Anche per il 2011 sono state tuttavia confermate le pesanti ripercussioni sul settore legate alla recessione europea e all'instabilità dell'economia globale. Statisticamente le riserve sinistri sono in aumento cosi come è in aumento la loss ratio.



Interessante la slide avente per oggetto lo studio dei cumuli di valori e merci nei porti, annosa e quasi irrisolvibile questione per gli assicuratori merci.



Infatti le dimensioni delle aree portuali non sono di fatto l'elemento determinante: evidenza ne è il porto di Rotterdam che, pur non essendo il più grande per dimensioni, è il più importante per valori assicurati in transito, con una media di 13,1 miliardi di Euro!

Ports Accumulations

IUMI
International Union of Marine Insurance

Port	Country	Global Ranking in Metric Tonnes	Global Ranking in estimated TIV
Ningbo	China	1	3
Shanghai	China	2	2
Singapore	Singapore	3	12
Rotterdam	Netherlands	5	1
Nagoya	Japan	15	6
Antwerp	Belgium	21	4

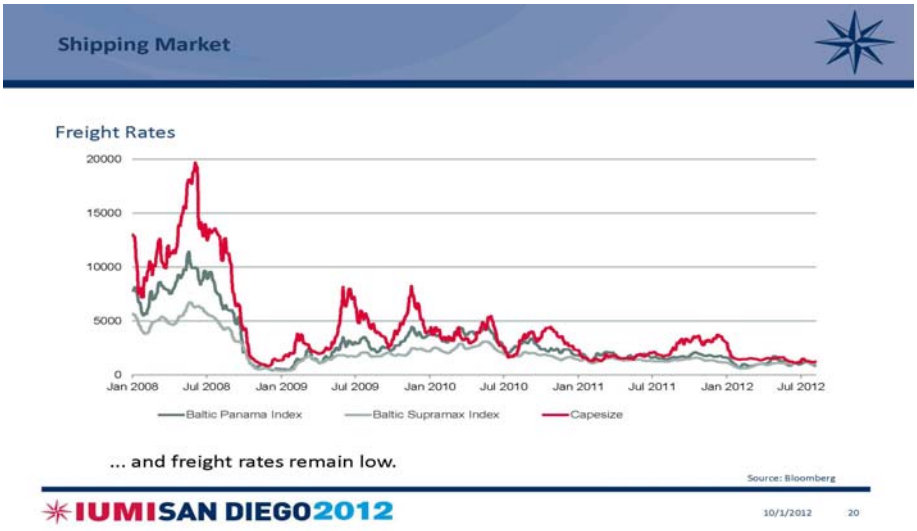
• Example: SR Estimated TIV for the Port of Rotterdam: 13.1 billion Euros on average

Source: Swiss Re Safe Havens Update 2012

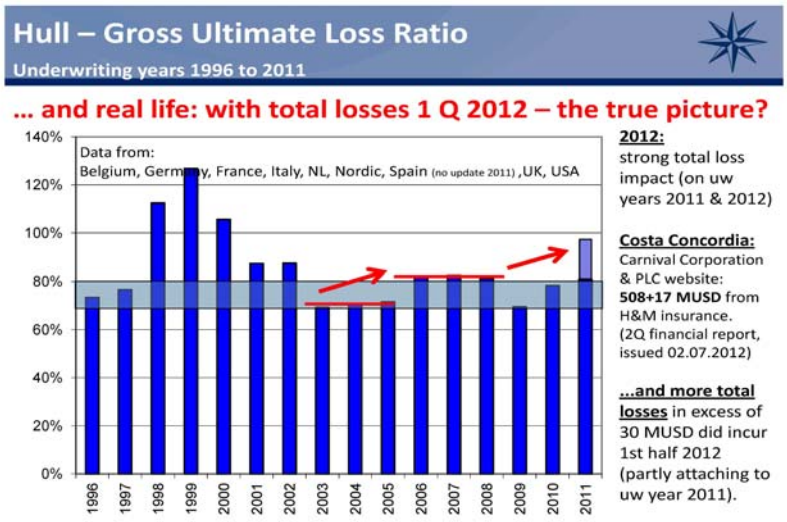
24

SETTORE CORPI

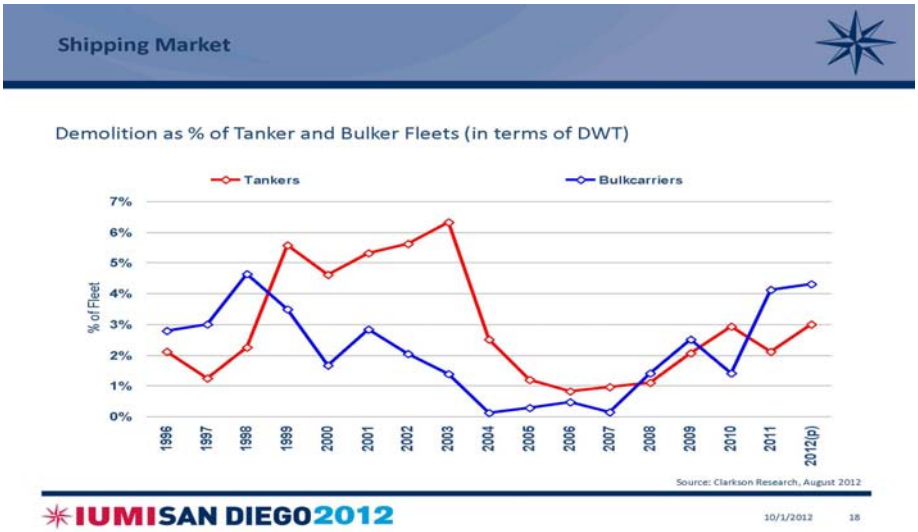
Nel settore risulta in crescita la flotta mondiale mentre è in ribasso il mercato dei noli.

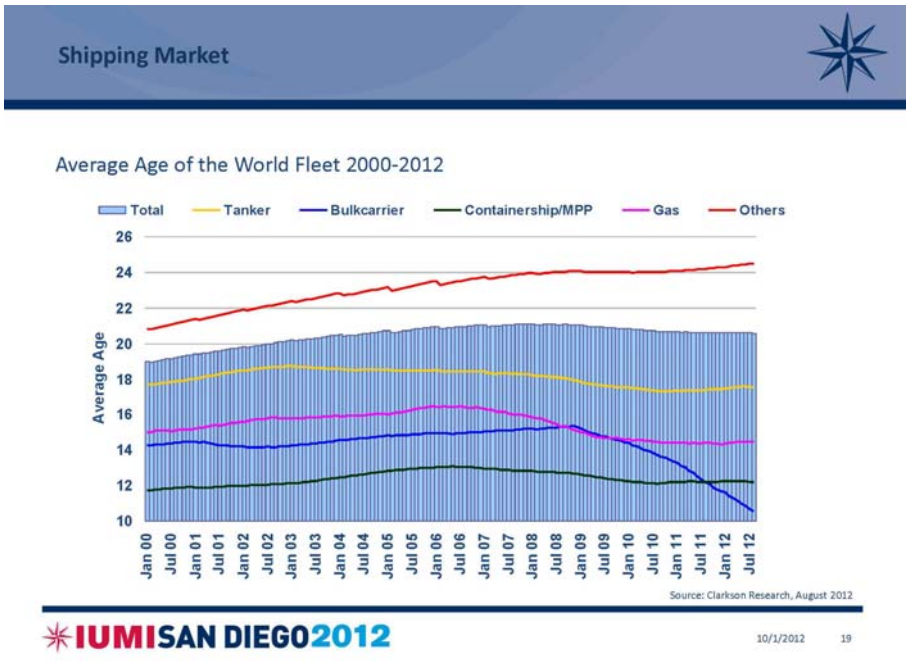


Statisticamente in aumento risulta anche la loss ratio dovuta in particolare al forte impatto delle total loss verificatesi negli ultimi due anni e, più in generale, ad una perdita tecnica che dura da 16 anni consecutivi.



Cresce la capacità della flotta mondiale cosi come la demolizione di tankers e portarinfuse con l'età media di queste ultime che in soli due anni (2010-2012) scende da 14 a 10,5 anni.





I commenti "fuori campo" degli assicuratori corpi e merci sono tutti in espressione alla stagnante situazione economica globale in piena recessione soprattutto per l'Europa in attesa della tanto auspicata ripresa economica che possa compensare il peggioramento della loss ratio del ramo.

FUTURE SCENARIOS OF INSURANCE MARKETS

Alessandro Morelli
Direttore Marine & Aviation AXA Corporate Solutions

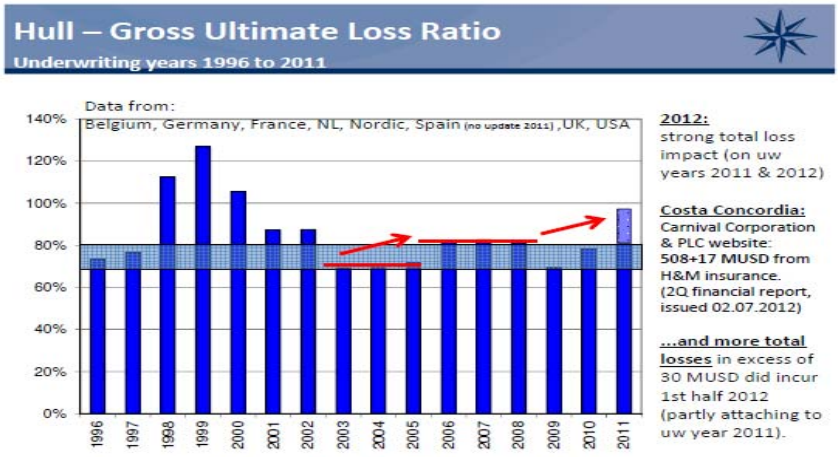
The international Hull & Machinery insurance markets are hit by a particularly severe year 2012, with a number of major claims which occurred during the year and which touched particularly 2011 underwriting year.

Costa Concordia is considered to be the largest claim of all times but other major claims occurred during the year evidenced a few critical points, in some cases linked to the technological complexity of modern vessels.

During the recent IUMI Conference in San Diego updated results of the Hull business have been provided and these, not surprisingly, evidence 2011 as another loss year, with the consequence that the H&M class of business has been producing losses to underwriters for the past 16 consecutive years.

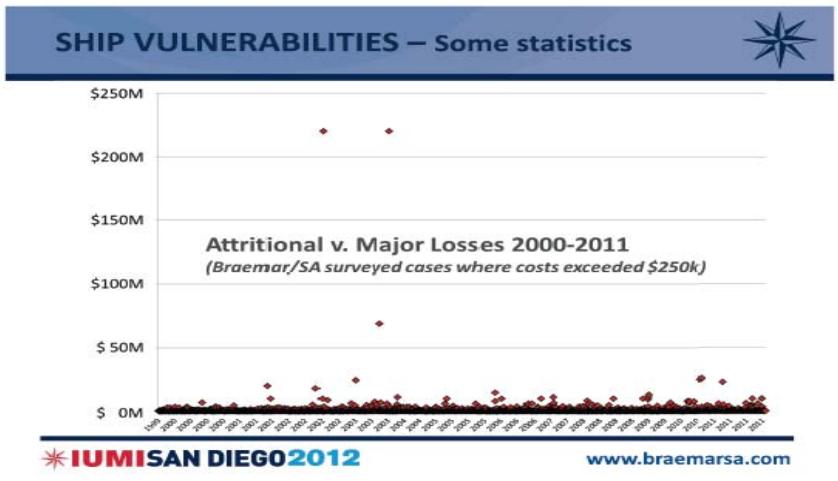
The following picture shows gross loss ratio, that is to say the ratio between paid + outstanding claims and gross premium, i.e. premium gross of all costs born by Insurers to handle their policies.

To work out the actual profit or loss you have to consider net premium so, considering an overall costs loading between 20% and 30%, it follows that break-even for Insurers is obtained when the gross loss ratio does not exceed 70%/80% (according to the different cost structures).



Such break-even line is evidenced in the picture by the light blue area, so it can be seen that since 1996 there have been very limited, if any, profit to Underwriters in 2003-2005 and 2009, whilst 2011 in particular shows - still at closing 1st half 2012, consequently exposed to further deterioration - a 99% gross loss ratio, which corresponds to a loss ratio on net premiums in the region of 130%.

One of the striking points, when looking at a more detailed analysis of the distribution of claims between attritional and major losses is that



such poor results are caused pre-eminently by the impact of attritional losses (in the period 2000/2011 only 2 claims occurred exceeding 250M and 1 exceeding 50M), with 80% of total costs coming from attritional losses and 20% only from major losses.

The 2012 experience has shown that major losses can – unfortunately - take place as well, although with lower frequence but with much higher severity, and the occurrence of major losses in this year (hitting 2011 u/y) immediately resulted in a deterioration of almost 20 percentage points in the gross loss ratio at first closing.

So quite a difficult period for H&M insurers which unfortunately corresponds to similar difficulties for shipowners as well. Times of high freight rates have gone and the current situation looks quite dramatic.

The ClarkSea index (see picture below) is a weighted average of earnings of the main types of commercial vessels (where the weighting is based on the number of vessels in each sector).

In the period 2000/2008 it shows earnings which were on average about 23.000$ per day, with peaks in 2007 and 2008 at 50.000$ per day.

The record low levels were reached in April 2009, immediately after the bursting out of the financial crisis in 2008, at a level of $7.350 per day, with current level (updated at July 2012) slightly lower than $10.000.

Consequently a situation where shipowners have to struggle with freight rates that probably do not cover running costs, whilst Insurers would need more premiums to try and improve their results to remain in the business and to cope with more stringent needs in terms of stabilization of results and of increased exposures.

The first challenge concerns increase in exposures and accumulation of risks and this concerns particularly large cruise ships and ultra large container vessels.

The largest cruise ships currently trading are considerably larger than Costa Concordia - whose occurrence magnitude nonetheless hit everybody's imagination - and can reach insured values around 1 billion US dollars.

Potential exposure can be even larger as concerns container vessels and their cargo: when the Triple E 18.000 TEU's container vessels ordered by Maersk will be trading (deliveries of these ships are expected in the period 2013/2015) the overall exposures will likely reach and maybe even pass the amount of $2 billion .

Such figure results from the addition of the hull value - which is likely to be in the region of $350M - to the cargo value - which can be estimated between $900M and $1.800M on basis of an average container value between $50.000 and $100.000.

The international markets currently provide enough capacity to absorb current risks (there is even an overcapacity which delays hardening of the market) but these capacities could not be enough in the face of the above mentioned increased exposures, well above $ 1 billion.

The second challenge which insurers will be shortly facing arises from the fact that the moment is approaching when insurers will have to take on board the requirements which will come from the adoption of Solvency II. Solvency II is a European Union scheme involving insurers (as Basilea II involved the banks) which should be enforced with effect from 1.1.2014.

It is aimed at a greater stabilization of the insurance markets and will determine the amount of capital which will be required to face insurers' exposures and balance instability factors. Amongst other things, it will require the adoption of internal models of risks assessment and will call for greater attention to the profitability of insurance operations.

Insurers will not be able to avoid fulfillment of reasonable combined ratios in the region of 95%/97% (ratios which will include all costs involved in the insurance operations), with the concept of Combined Ratio evolving into that of Economic Combined Ratio, that is to say taking into account the so called "time value", which comes from the cash flow management, and the cost of risk.

In conclusion, a difficult situation where both parties are facing serious difficulties in getting the returns they expect and need from their business, with important challenges facing particularly insurers who definitely need to improve their results. In such a situation and with a limited margin of manouvre on insurance premiums, it is not easy to find solutions which could allow insurers to improve their results, but two axis of action can be evidenced.

1) RISK MANAGEMENT AND LOSS PREVENTION

In the first place, insurers and shipowners should share and put into practice appropriate policies of risk management and loss prevention with the aim of reducing in particular the frequency of claims and eventually limit their severity.

The shipping industry overall has been focusing on these aspects for a few years and, under this respect, great value should be attributed to the New Inspection Regime(1) which has been introduced by the Paris MOU with effect from 1.1.2011 and whose data have been published during the last summer.

(1) In synthesis, the New Inspection Regime is a risk based targeting mechanism which will reward quality shipping with a reduced inspection burden (every 36 months) and will concentrate efforts on high-risk ships (expanded inspections every 6 months).
The NIR introduced 2 new concepts:
- the ship risk profile, with 3 degrees of differentiation: from low risk ships to high risk ships, considering as standard risk ships those which are neither low nor high risk
- the Company performance (where the Company is the one responsible for ISM compliance), which concurs to determine the ship risk profile.

The ship risk profile concept consequently plays a central role in the NIR and is an additional information which - if available - could assist hull or cargo underwriters in evaluating the risk.

In particular, the new concept of "ship risk profile" introduced by NIR could be an additional information which could assist insurers in assessing the quality of the risk they are proposed to underwrite, giving them the opportunity to differentiate their underwriting approach depending of the ship risk profile and the Company performance.

The ship risk profile can be worked out with a calculator available on the Paris MOU web-site on basis of a number of information which can all be found in the Paris MOU Report or on the Equasis but this entails manual and time consuming operations. Equasis publishes on its webpage - under the section "ship info" "key indicators" - information coming from port state control inspections, so I think it could be possible and useful to add - as additional information - the Ship Risk Profile and the Company performance. Equasis in principle agrees to the idea but Paris Mou is not willing to give these information, stating that they do not represent a univocal indicator of quality.

Whilst recognising that all information released by Equasis should be interpreted and not taken as such, I insisted during the last IUMI Conference in San Diego that IUMI should officially ask Paris MOU Secretariat to make the ship risk profile information available. The IUMI Executive Committee accepted to take on board this request through the newly established IUMI Political Forum, so it will be interesting to wait and see what kind of development of transparency of information will be available to this purpose.

2) LONG TERM RELATIONSHIP AND CONTINUITY

A second important aspect concerns the tightening of the relationship between insurers and their clients in view of the establishment of long term relationships. More frequent contacts and exchanges between insurers and shipowners together with their broker could help each party to better understand the other party's needs, escaping from the opportunistic approach of changing insurance market looking for the cheapest price and understanding that continuity in the relationship can help in balancing fluctuating results. Closer relationship and deeper knowledge will facilitate continuity which, in turn, will make it easier for insurers and shipowners to understand the respective difficulties and needs mentioned above and consequently make it possible to gain in flexibility, which would be required to face in the proper way the current difficult circumstances.

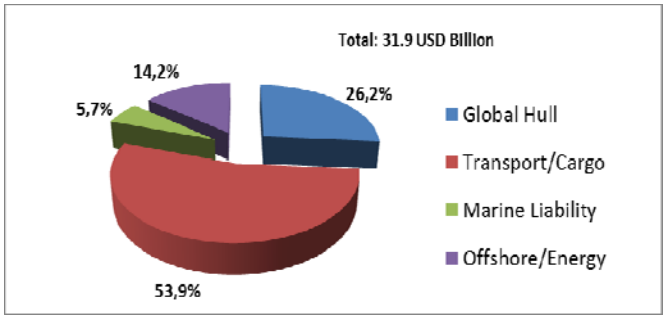
IUMI - IL MERCATO CARGO

Massimo Fiasella Garbarino
Senior Marine Underwriter, Assicurazioni Generali

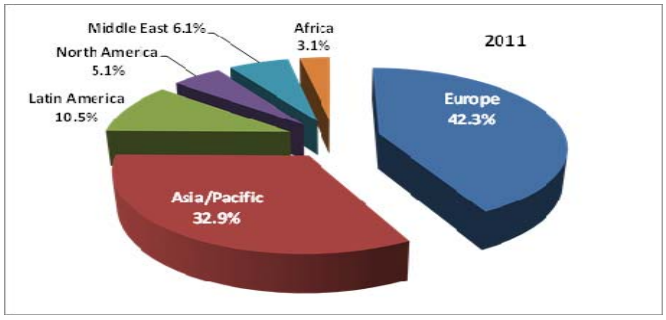
Nell'ambito della conferenza annuale IUMI 2012 di San Diego (USA), si è svolto il tradizionale incontro del Cargo Committee, composto dai rappresentanti dei principali mercati mondiali nel settore.

Il Comitato - che si riunisce due volte all'anno e rappresenta un'importante occasione di condivisione tra i maggiori player internazionali delle principali tematiche tecniche del comparto - quest'anno ha focalizzato le attività del meeting sull'analisi degli indici annuali di settore, messi a disposizione dal Facts & Figures Committee, che mostrano diversi elementi di criticità.

I premi mondiali complessivi Marine nel 2011 hanno raggiunto l'ammontare di Usd 31,9 miliardi di cui la componente Cargo resta predominate, Usd 17,2 miliardi, pari al 53,9% del totale e concentrati prevalentemente nel continente europeo (42,3%) e nell'area Asia/Pacifico (32,9%).



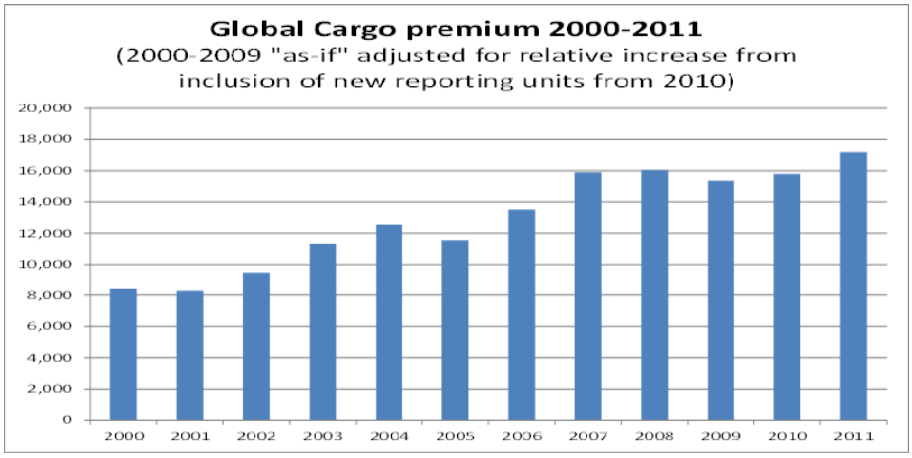
Marine Premium 2011 – by line of business



Cargo Premium 2011 – by region

Nel 2011 i premi merci complessivi sono cresciuti del 7%. Il dato ha sorpreso in quanto le aspettative, influenzate particolarmente dalla congiuntura economica mondiale, erano tutte rivolte ad uno stallo della raccolta premi.

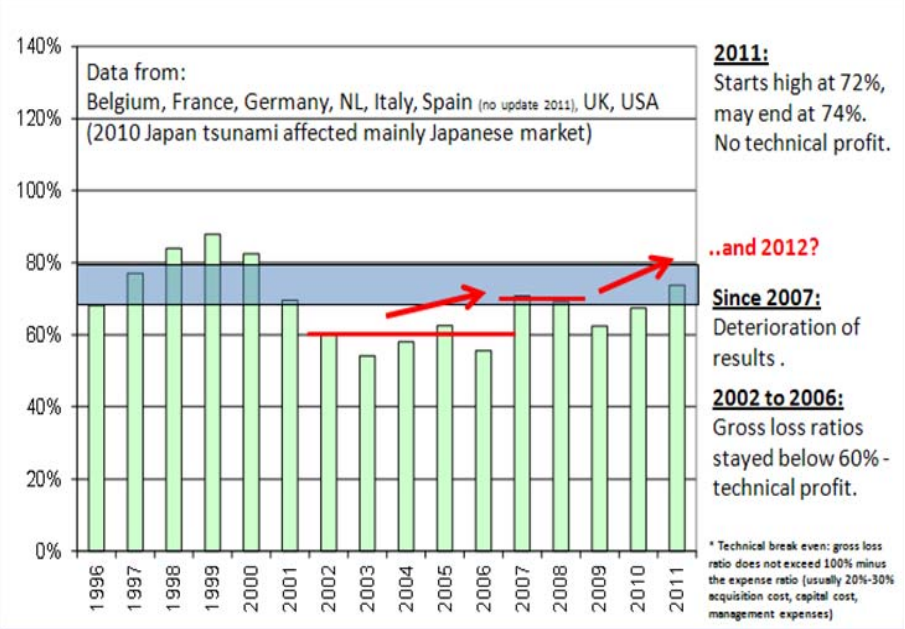
Alcuni fattori quali l'aumento dei prezzi delle materie prime, l'espansione in alcuni mercati (Usa, Far East) di programmi assicurativi stock thru-put e la forte crescita dei premi in alcuni paesi emergenti (Cina +35%) hanno ammortizzato l'influenza negativa della crisi economica che ha inciso maggiormente sullo sviluppo dei mercati Marine tradizionali.



La verifica degli andamenti di settore ha destato le preoccupazioni più forti. Dopo il quinquennio 2002/2006, chiuso positivamente con un risultato tecnico sinistri/premi stabilmente sotto il 60%, si è passati ad un progressivo deterioramento degli indici che evidenziano oggi la sostanziale assenza di un profitto tecnico. Ad eccezione del 2009, tutte le altre annualità del quinquennio 2007/2011 sono prossime ad un rapporto tecnico sopra il 70%. In particolare il 2011 mostra una Loss Ratio iniziale già al 72%; se consideriamo che le precedenti annualità segnavano L/R iniziali intorno al 65%, è assai probabile che il 2011 chiuderà con il risultato peggiore.

Le ragioni del deterioramento dei risultati 2011 si trovano certamente nell'impatto di catastrofi naturali quali il terremoto in Giappone e le inondazioni in Thailandia che, in particolare, hanno coinvolto le coperture merci a seguito della presenza di numerose polizze Stock & Transit.

Cargo - Gross* Ultimate Ratio



Altri fattori hanno contribuito alle passività del 2011 che risultano oramai congeniti in buona parte dei mercati assicurativi e condizionano da tempo gli andamenti del settore.

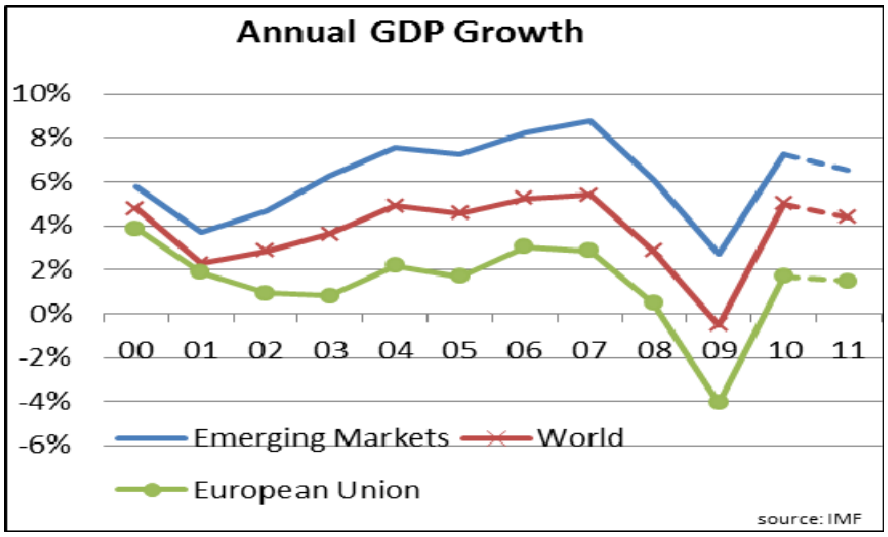
Nell'ambito delle consuete relazioni dei singoli membri del Comitato sul contesto economico/assicurativo del proprio paese, sono agevolmente emerse le principali cause del peggioramento dei risultati nel Cargo.

Tutti i mercati evidenziano un aumento del numero dei danni nonché una crescita della frequenza di furti e rapine.

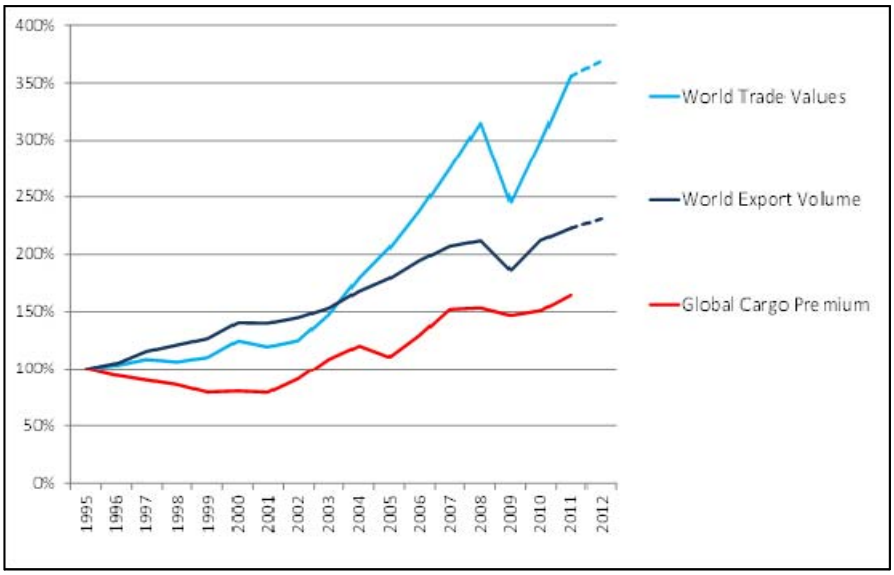
I mercati tradizionali si trovano impegnati a fronteggiare l'incremento dei costi di acquisizione e di gestione dei sinistri, con "expenses ratio" che oramai raggiungono facilmente percentuali prossime al 35%.

L'eccessiva capacità disponibile su tutti i mercati genera una forte concorrenza; la vigorosa crescita economica dei mercati emergenti ha attirato molti players internazionali, generando un eccesso di competizione con conseguente impatto negativo sul pricing.

Anche i mercati tradizionali sono afflitti della presenza di un'over capacity ed in aggiunta risentono maggiormente di un contesto economico finanziario che resta generalmente precario, instabile ed allo stato non evidenzia segnali di una controtendenza.



Cargo Premium, World Trade Volume & Trade Values



Dalle analisi condivise nell'ambito del Cargo Committee sono dunque risultate evidenti le motivazioni del complessivo e progressivo deterioramento dei risultati maturati nelle ultime annualità ed è emersa una generale constatazione che il rallentamento dell'economica mondiale aggrava la condizione, rendendo più complesso un opportuno riequilibrio del settore.

Da qui la consapevolezza che una più attenta disciplina tecnica nella gestione tecnica dei rischi sarà determinate per gestire e fronteggiare al meglio le complessità dell'attuale contesto economico, finanziario e assicurativo.

SUBROGATION IN MARINE INSURANCE: THE ITALIAN PERSPECTIVE

Claudio Perrella
Studio Legale LS Lexjus Sinacta, Bologna

Where insurers indemnify their insured they are entitled under Italian law to pursue a subrogated action against the third party liable for the damage/loss (article 1916 civil code).

The insurer becomes entitled to take over the interest of the assured and is subrogated to all the rights and remedies of the assured as from the time of the event causing the loss, but is not entitled to exercise rights which are not available to the insured.

Defenses against the insured are also valid against the insurer, and defendants to such actions have increasingly contested insurers' title to sue on the grounds that the insurers may not properly be subrogated in their insured's rights.

Under Italian law there are in fact two principal systems of subrogation:

- by agreement and/or assignment of rights; such agreement can be simultaneous with payment (pursuant to article 1201 c.c.) or may follow the payment by means of assignment of rights (pursuant to article 1260 c.c.)

- by operation of law, pursuant to article 1916 civil code: where the indemnity is paid pursuant to a valid contractual obligation, the insured's rights will automatically be transferred to the insurer.

VALIDITY OF THE SUBROGATION

Many disputes have arisen over the last twenty years in cases where the transmission of rights appeared to be flawed, either because the subrogation agreement was not concluded at the same time as the indemnity was paid, or because insurers were not bound to pay the indemnity under the policy, and third parties who would otherwise have been liable to the insured have been able to challenge the subrogated insurers' action (1).

It is settled case-law that the defendant is entitled to ask for the disclosure of the insurance policy in order to check whether the indemnity has been paid in favor of the party having insurable interest, and in case it transpires that the indemnity was wrongly paid (i.e. in favor of a party not exposed to the risks of transit) the subrogated insurer may fail to succeed in pursuing the recovery action.

Insurers are therefore required to check accurately whether they are going to indemnify a party entitled to receive the indemnity.

As a general rule, under Italian law title in goods automatically passes from the seller to the buyer at the conclusion of the contract of sale of specified goods; in case of sale of unspecified goods title in goods passes to the buyer once the goods are identified; when goods must be carried from one place to another identification usually takes place by delivery to the carrier or to the forwarding agent.

An exception to the rule is the carriage of parcels of goods in bulk commingled: in this case the specification takes place at the time of the actual delivery to the receiver(2).

(1) Cassazione n. 7300/1991, SIAT c. Adriatica di Navigazione; Cassazione n. 6455/1994, Levante Assicurazioni c. Fumagalli; Cassazione n. 919/1999, The Tokio Marine & Fire Insurance co. ltd. c. Japan Air Lines.

(2) Cassazione n. 8861/1996, *Fall. Agenzie generali caffè c. Soc. Messican Caffè*; Court of Appeal Genoa 4 July 2008 *Ortofrutticola Acese Srl c. UMS Generali Marine e Siat.*

The shipper/seller is entitled to receive the insurance indemnity in case it has retained ownership over the goods, or the transport has been performed at shippers' risk by virtue of an agreement derogating the general principle as to transfer of risk set out by article 1510 c.c., pursuant to which risks (and - for unspecified goods in bulk - ownership) are transferred upon delivery to the carrier.

The agreement must be clear and unequivocal: ambiguous clauses (especially those referring to allocation of transport costs) are generally considered ineffective to defer transfer of risks and ownership.

WHEN DOES SUBROGATION TAKES PLACE?

A distinctive feature of Italian law is related to the moment when subrogation takes place.

Pursuant to settled case-law(3) the subrogation takes place once the insurer has paid the indemnity and has expressed the intention to exercise the right to act as subrogated party: although a few decisions have admitted the possibility that the intention to replace the insured in the exercise of the rights vs. the third party may be expressed for the first time in the writ of summons, it is wise to send a formal notice of subrogation claiming damages before serving the writ.

Such a notice is irreversible: once sent the insured loses its title to claim; conversely, before the notice the insured retains title to claim even if it has received the payment of the indemnity.

In light of the above, in case the subrogated action may expose the insurer to exceptions and technicalities, it is common practice in Italy to agree with the insured that the action is brought in the name of the insured but on behalf of the insurer (who will therefore bear the legal costs of the action).

WHO IS ENTITLED TO SUE THE CARRIER?

Under Italian law (article 1689 civil code) liabilities under the contract of carriage are transferred to the consignee when this latter demands

(3) Cassazione n. 9469/2004, *SIAT Assicurazioni c. Gestione Industrie Confezioni.*

or takes delivery of the goods or makes a claim under the contract of carriage.

Insurers should therefore always insist on receiving an assignment of the rights arising from the contract of carriage signed by the receiver every time they indemnify the shipper/seller (or a party which does not coincide with the receiver appearing in the contract of carriage and/or the transport documents) and goods have reached destination.

An additional caution is finally recommended in consideration of the fact that under Italian law, time-bar can be avoided by sending a request for payment or a letter claiming damages (or a writ, in case the claim is subject to a stricter time limitation defined by Italian law as "decadenza") only by the party entitled to claim.

Hence, a request sent to the carrier by the shipper when goods have reached destination and have been delivered to the receiver may be ineffective.

Insurers must make sure therefore that the assignment of rights is obtained in due course, well before the expiry of the time-bar, and that the existence of an assignment prior to the service of the claim or the transmission of the claim letter is proven beyond doubt.

MARINE AVIATION & TRANSPORT INSURANCE REVIEW

OBBLIGO DEL VETTORE AEREO DI COMPENSAZIONE PECUNIARIA IN CASO DI NEGATO IMBARCO AI PASSEGGERI (Sentenza del 4 ottobre 2012 nella causa C-22/11 Finnair Oyj / Timy Lassooy)

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In materia di cancellazione dei voli, di negato imbarco e di ritardo prolungato la giurisprudenza comunitaria, sulla base della normativa vigente, ha via via determinato una maggiore responsabilizzazione dei vettori aerei.

Recentemente, l'attenzione della Corte di giustizia europea è stata focalizzata sulla fattispecie del «*negato imbarco*» ed, in particolar modo, sulla possibilità per il vettore aereo di far valere le *«circostanze eccezionali»* quale valido motivo per negare l'imbarco a passeggeri di voli successivi a quello annullato o per liberarsi dall'obbligo di compensazione.

Nel caso posto al vaglio della Corte il 28 luglio 2006, a seguito di uno sciopero del personale dell'aeroporto di Barcellona, il volo di linea Finnair Barcellona – Helsinki era stato cancellato. La compagnia aerea, pertanto, decideva di riorganizzare i propri voli in modo da permettere ad alcuni dei passeggeri del volo cancellato l'arrivo ad Helsinki con il volo delle 11.40 del giorno seguente (29 luglio 2006) ed ad altri, invece, in modo da garantire l'arrivo a destinazione per lo stesso giorno (28 luglio 2006), con un volo appositamente noleggiato dalla Finnair per le ore 21.40.

La riorganizzazione dei voli provocava, tuttavia, forti disagi per i passeggeri dei voli dei giorni successivi. Alcuni di loro che avevano acquistato il biglietto per il volo delle 11.40 del 29 luglio erano infatti stati costretti ad aspettare il giorno 30 luglio per raggiungere Helsinki con il volo di linea delle 11.40 o con il volo delle 21.40, anch'esso appositamente noleggiato per la circostanza.

Parimenti, altri passeggeri, come il sig. Lassooy – che avevano acquistato il biglietto per il volo delle 11.40 del 30 luglio 2006 e che si erano regolarmente presentati all'imbarco – raggiungevano Helsinki solo molte ore dopo l'orario previsto, con il volo speciale delle 21.40.

Il sig. Lassooy, ritenendo che la Finnair gli avesse negato l'imbarco, proponeva ricorso innanzi ai giudici finlandesi chiedendo che la compagnia aerea fosse condannata a corrispondergli la compensazione forfettaria di Euro 400 prevista dalla normativa europea per le tratte intracomunitarie superiori a 1.500 Km.

La corte suprema finlandese adita in ultima istanza, nutrendo dubbi sulla corretta interpretazione di «*negato imbarco*», rivolgeva domanda di pronuncia pregiudiziale alla Corte di giustizia. Con tale domanda chiedeva, in particolar modo, se la nozione di «*negato imbarco*» riguardasse unicamente il negato imbarco per eccesso di prenotazioni (c.d. *overbooking*) create da un vettore aereo per ragioni commerciali, oppure se il regolamento comunitario che disciplina questa fattispecie fosse applicabile anche al negato imbarco dovuto a motivi diversi, come, ad esempio, ragioni operative. Si chiedeva inoltre, se la qualificazione «*negato imbarco*» potesse essere esclusa, oltre che per ragioni riconducibili al passeggero, anche in caso di motivi connessi a *«circostanze eccezionali».*

Con sentenza del 4 ottobre 2012 (procedimento C-22/11), la Corte ha espresso la propria opinione in merito alla corretta portata del termine «*negato imbarco*», delineando i relativi obblighi che il regolamento (CE) n. 261/2004 ed il legislatore dell'Unione hanno posto a carico del vettore aereo in caso di negato imbarco ai passeggeri.

Ai sensi dell'art. 2 del regolamento, il «*negato imbarco*» è definito come "*il rifiuto di trasportare passeggeri su un volo sebbene i medesimi si siano presentati all'imbarco, salvo se vi sono ragionevoli motivi per negare loro l'imbarco, quali ad esempio motivi di salute o di sicurezza, ovvero documenti di viaggio inadeguati*".

Partendo da tale definizione la Corte chiarisce che la nozione di «*negato imbarco*» comprende non solo le situazioni di eccesso di prenotazioni ma anche quelle connesse ad altre ragioni di carattere puramente operativo. Tale interpretazione, oltre a derivare dal tenore letterale del regolamento, tiene conto dell'obiettivo da esso perseguito, ovvero quello di garantire un elevato livello di protezione per i passeggeri. Un'interpretazione rigorosa del termine, limitata ai soli casi di *overbooking,* avrebbe infatti l'effetto di diminuire sensibilmente la tutela accordata ai passeggeri, privandoli di qualsiasi protezione anche se si trovano in una situazione a loro non imputabile.

In merito alla seconda questione la Corte afferma che la sopravvenienza di circostanze eccezionali – quali uno sciopero - che inducono un vettore aereo a riorganizzare voli posteriori, non può giustificare un *«negato imbarco»* sui voli successivi né esonerare il vettore dal suo obbligo di compensazione pecuniaria ai passeggeri per *overbooking.*

Il «*negato imbarco*», infatti, può trovare giustificazione solo se dovuto a motivi ragionevoli e riconducibili alla situazione individuale degli stessi passeggeri. Il caso in esame invece non può essere assimilato a suddette ragioni, in quanto il motivo del rifiuto non è in alcun modo imputabile al passeggero.

Rileva infatti la Corte che il legislatore dell'Unione, diversamente da quanto stabilito in caso di cancellazione del volo, non ha previsto un'esclusione dell'obbligo di compensazione per motivi connessi alla sopravvenienza di «*circostanze eccezionali*».

Tali circostanze, inoltre, possono riguardare solo un particolare volo in un particolare giorno, cosa che non avviene nel caso di negato imbarco ad un passeggero in ragione della riorganizzazione di voli conseguente a circostanze eccezionali che abbiano coinvolto un precedente volo.

Da ultimo la Corte ricorda che l'obbligo di compensazione pecuniaria non impedisce al vettore aereo di chiedere l'eventuale risarcimento a chiunque, compresi terzi, sia all'origine del negato imbarco, attenuando cosi l'onere finanziario sopportato dai vettori.

La sentenza in commento, collocandosi all'interno di un orientamento giurisprudenziale sempre più attento ai diritti e alle prerogative dei passeggeri, ha come effetto quello di ampliare le fattispecie di indennizzo a loro favore.

MARINE AVIATION & TRANSPORT INSURANCE REVIEW

THE CURRENT STATUS OF WIND JET AND THE PETITION FOR *CONCORDATO PREVENTIVO* RECENTLY FILED

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Last August the low-cost airline Wind Jet suspended all its flights and ceased all operations, causing several problems for its passengers, and prompting Enac (Italian Civil Aviation Authority) to put in place the necessary reprotection mechanisms with the cooperation of Alitalia, and Meridiana the second largest Italian airline operating domestic, European and intercontinental flights.

Livingston - the new Italian airline operating international and intercontinental flights mainly from its base at the airport of Milan Malpensa – also operated special flights for the re-accommodation for the passengers involved.

Wind Jet was founded in 2003 to operate flights from the major Italian cities and some foreign airports to Sicily. In less than a decade, from its hub in Sicily (Catania), the company became the fourth Italian airline by number of passengers.

The financial difficulties of the last years and the absence of adequate investments and/or marketing strategies brought the company to the decision to cease all flights, leaving several passengers, travel agencies, suppliers and employees, to face the risk of bankruptcy.

Only recently the airline decided to avail itself of the new debt restructuring rules introduced by the Italian Government with the Law Decree number 83 dated 22 June 2012 (the so called *"decreto sviluppo"*), which establishes important measures aimed at stimulating the Italian economy and also significant amendments to the Italian Bankruptcy Act, in order to better cope with the current financial crisis.

The Decree represents the very last step of a reform movement of the Italian bankruptcy system which began in 2004 with the aim of making the distressed Italian market more appealing for potential domestic and international investors.

The new rules have indeed the purpose to facilitate the restructuring of distressed companies through quicker access to judicial composition with creditors, interim financing and a new special form of composition aimed at ensuring the continuity of the debtor's business.

The procedure is supervised by the Court and is somewhat similar to Chapter 11 in the U.S, it has been used in prominent restructurings such as Mariella Burani Fashion Group and Fondazione San Raffaele del Monte Tabor.

Wind jet has therefore filed an application for *concordato preventivo* (composition with creditors) ex new formulation of article 161 para 6 of the Italian Bankruptcy Act, according to which the debtor is now granted a 60 to 120 days "automatic stay", while under the previous regime the automatic stay was conditional upon the filing of the restructuring plan alongside the petition.

Thanks to this new option the debtor can now file the petition and dedicate the following 60/120 days to the preparation of the plan without being distracted by the often frequent enforcement actions of creditors.

This means that Wind Jet may immediately accede to the protections offered by the *concordato preventivo* and then carry on the negotiations with its creditors benefiting from the automatic stay.

These new features may have the effect of granting debtors additional leverage in the restructuring negotiations given that, once the petition is filed, the stakeholders will have an incentive to react in order to achieve a restructuring within the assigned timeline. Otherwise, in fact, the alternative scenario will likely be a bankruptcy filing.

At the end of the automatic stay period the debtor is now allowed to switch from a *concordato preventivo* to a proceeding under Article *182bis* Italian Bankruptcy Act (the *"182bis Proceeding"*), by filing a restructuring agreement.

After the filing of either a *concordato preventivo* proposal or an agreement under a *182bis Proceeding*, the automatic stay runs until completion of the proceeding, that is confirmation by the Court of either the *concordato preventivo* or the *182bis Proceeding*.

Following the filing of the petition the debtor can now be authorized by the Court to terminate pending agreements or alternatively to suspend execution thereof for a 60-day term which can be extended only once.

Under the new rules, the debtor may also immediately request Court authorization to seek for collection of the financing necessary to fund its ongoing operations during the proceeding, provided that an independent expert certifies that the new money is consistent with the plan and instrumental to a better satisfaction of the creditors.

From the date of filing for a *concordato preventivo* or a *182bis Proceeding* until completion of the proceedings, the debtor is no longer required to recapitalize the company to cover possible losses affecting the corporate capital.

In light of the new provisions (above summarized) Wind Jet filed a petition for *concordato preventivo* before the Court of Catania which recently (on 13 September 2012) granted Wind Jet a deadline of 120 days to submit the proposal to creditors, the restructuring plan and the relevant documents.

MARINE AVIATION & TRANSPORT INSURANCE REVIEW

ottobre 2012 - numero 4 p. 29

NO MORE DECLARATORY PROCEEDINGS IN MULTIMODAL TRANSPORTS

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INTRODUCTION

Most of Italian underwriters have undoubtedly been faced in the past with the unpleasant surprise of declaratory proceedings being issued against their insured before the Dutch court. In a recent judgment, the Dutch supreme court has put an end to this option in case of multimodal transport whereby Rotterdam (or another place in the Netherlands) is only an intermediate stop during the door-to-door transport through different transport modalities.

THE INTERPRETATION OF WILFUL MISCONDUCT AND DECLARATORY PROCEEDINGS

The Netherlands is considered one of the most carrier-friendly jurisdictions in Europe. This is caused by the fact that the Dutch Supreme Court has ruled in two judgments of 2001 (which have since then also been reconfirmed by the Supreme Court) that a carrier only acts with conscious recklessness in case:

– chances that the risk inherent in the act of the carrier will manifest itself are considerably greater than chances that it will not,
– *and* that the carrier was aware of this risk inherent in his act,
– *and* that the carrier did not let his awareness stop him from acting as he did.

All three tests have to be met and in addition to this the first test should be interpreted objectively. This means that the objective chance of for instance a theft from the elected parking area should be 60 or 70%. In practice, this test is almost never met, even when clear safety instructions are seriously breached.

In low-weight/high-value cargo damages, carriers (or rather their liability insurers) have subsequently sought opportunities of bringing their cases before the Dutch court.

The opportunity was found in the so-called declaratory proceedings. In Italy this procedural "trick" also exists. The court is then asked to "accetta e dichiara" the liability of the carrier.

SUPREME COURT JUDGMENT OF 1 JUNE 2012

The Icelandic fish trader SIF Ltd. instructed the Icelandic carrier Eimskip to carry a container of salted fish from Reykjavik, Iceland, to Napels. The carriage would take place via two modalities: from Reykjavik to Rotterdam, the Netherlands, by sea on board the vessel Godafoss, and then by road from Rotterdam to Napels. For the road transport, the Italian (interestingly, the judgment specifically mentions that the carrier was "Neapolitan") carrier Del Vecchio S.r.l. During the transport by road, the container was lost, allegedly as a result of an armed robbery. SIF and its subrogated underwriter IF Skadeförsäkring AB commenced proceedings before the Rotterdam court. After the first instance court accepted jurisdiction. The Appeal Court of The Hague rejected jurisdiction and the proceedings were brought before the Supreme Court.

In its judgment of 1 June 2012, the Supreme Court answered the following two questions: do the jurisdiction provisions of the CMR convention apply to multimodal transport and, if not, do they apply nevertheless in case road transport is part of a multimodal transport and the damage has occurred during the international road stretch? Both questions are answered in the negative by the Supreme Court.

Regarding the first question, the Supreme Court held that the CMR convention was never intended to directly apply to multimodal transport. To substantiate this judgment, the Supreme Court relies on the signature protocol to the convention which confirmed the intention of the Member States to draft a specific convention applying to multimodal transport. In addition, the Supreme Court points out that Article 2 CMR brings one type of multimodal transport (rorotransport) within the scope of the CMR and concludes that all other types are thereby excluded.

Lastly, the Supreme Court states that its judgment is in line with a judgment of the German Supreme Court which is considered persuasive.
It is, the Supreme Court admits, not in line with a judgment of the UK Court of Appeal but this judgment is considered to be less persuasive,

mainly because the UK Court of Appeal failed to interpret the CMR convention autonomously.

Under the principle of legal certainty, the Court also held that the CMR convention does not apply in case the damage occurred during the international road stretch within the scope of a contract of multimodal transport. The Supreme Court thereby takes into consideration that parties often have different views on the question during which part of the transport the damage occurred. The Supreme Court considers it undesirable that the outcome of this debate would influence the question where proceedings are to be commenced. This creates a level of uncertainty for claiming parties that should to be avoided, according to the Supreme Court.

CONCLUSION

In the relevant matter, the proceedings were commenced by the parties that suffered a loss. But the judgment is also of importance for declaratory proceedings. In case of contracts of multimodal transport whereby transport takes place via the Netherlands, for instance through the port of Rotterdam or the airport of Amsterdam, no jurisdiction of the Dutch court can be established.

Another question, which is of course highly relevant, is whether the liability regime of the CMR convention applies under Dutch law to the international road carriage which is effected within the scope of the contract for multimodal transport. The Dutch Civil Code provides for a so-called “kameleon-system”, which means that, in case of multimodal transport subject to Dutch law, to each part of the multimodal transport the specific rules for that modality apply. If for instance, the damage occurred on sea, the provisions on liability of the sea carrier apply.

If the damage occurs during the international transport by road, it can be argued that at least the liability provisions of the CMR convention should apply, i.e. Article 17 etc. CMR. There are also judgments of lower court however in which the court held that Dutch road law applies, which provides for a low limitation of € 3.40 which it is only broken in case of wilful misconduct or conscious recklessness of the carrier itself (board of management of the company). This last question has not been answered in the judgment of 1 June 2012, as it only regarded the question of jurisdiction.

MARINE AVIATION & TRANSPORT INSURANCE REVIEW

AGENDA

School in Aviation Management Ed. 2012
Forlì, 25 - 27 ottobre 2012 presso ENAV Academy
Bologna, 15 - 17 novembre 2012 presso aeroporto, locali SAB
http://www.enav.it/portal/page/portal/PortaleENAV/Home/Academy?CurrentPath=/enav/it/academy/summer_school

Il Progetto “Adriatic Gateway” nel contesto delle Reti TEN-T
Roma, 30 ottobre 2012
MIT, viale dell’Arte 16 (*partecipazione gratuita*)
http://www.adriaticgateway.it/1/news_2369881.html

Convegno Trasporti Cineas
27-28-29 novembre 2012
Milano, Politecnico



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