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Ship litigation

Careful wordings crucial

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Editor: Liz Booth
liz@lizbooth.co.uk

Editorial enquiries: Ian Law
Tel: 020 7017 4045
Fax: 020 7017 5274
ian.law2@informa.com

Designer: Lorraine Brown

Managing Director: Steve Hotham
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The Italian **perspective**

Claudio Perrella, of LexJus Sinacta, looks at subrogation in marine insurance, providing an Italian view

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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.

"Many disputes have arisen in the last 20 years in cases where the transmission of rights appeared to be flawed"

Defences 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:

a) 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.).

b) is 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 in the last 20 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 (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 Line*).

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 favour of the party having insurable interest and in case it transpires that the indemnity was wrongly paid (ie in favour 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.

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

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

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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 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. ***MRI***


Claudio Perrella

Claudio Perrella is a partner at LS LexJus Sinacta