Risk Transfer under the CISG for Gold (allegedly) Stolen in Ghana

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The Federal Supreme Court clarifies the conditions for risk transfer under the CISG and joint liability under the SCO. The Court confirms that when it comes to sales contracts involving transportation of goods, risk remains with the seller until the goods have been delivered to the carrier, and that joint liability can be established through contractual form as well as subsequent conduct.

Judgment of the Federal Supreme Court of 4 March 2024
Case Reference : 4A_459/2023

Facts

In 2012, C. (the "Buyer"), a Russian national residing in Spain, granted B. Ltd. (the "Seller"), a Switzerland-based company represented and fully owned by A, a loan of EUR 380,000. In 2013, an additional EUR 85,000 was loaned, bringing the total to EUR 465,000. The loan was subsequently converted into a sale contract under which the Seller would deliver 14 kg of gold sourced from Ghana to the Buyer ("the Sale Contract"). This gold was part of a larger 55 kg shipment, with the export documentation listing the Seller's branch office as the destination.

According to the Buyer, the Seller did not fulfill its obligation to deliver the gold as stipulated in the contract. The gold was allegedly stolen during transit in Ghana. The Buyer argued that the risk had not been transferred to him because the contract, which was not a shipment contract, constituted an obligation to deliver to a specified location. Consequently, the Buyer sought reimbursement of the purchase price.

The Seller countered by asserting that the agreement was indeed a shipment contract ('Versendungskauf') and that the Buyer was responsible for arranging transportation. It argued that it was discharged of its contractual obligations once it had handed the gold over to E. Ltd. (the "Carrier"), a carrier in Ghana.

The Court of First Instance ruled in favor of the Buyer, awarding EUR 496,700. Upon appeal, the Cantonal Court of Zurich amended this judgment, reducing the awarded sum to EUR 465,000, holding that the purchase price did not include accumulated interest.

Issue

The key issues brought before the Federal Supreme Court were:

1. Whether the risk of loss had passed to the Buyer under the CISG, and whether the Seller was liable for the undelivered gold.
2. Whether A was jointly liable alongside the Seller under a joint and several liability arrangement.

Decision

1. Risk Transfer under the CISG

Under Articles 31(a) and 67(1) of the CISG, when it comes to contracts involving the transportation of goods, risk generally passes to the buyer once the seller delivers the goods to the first carrier for transmission. However, this general rule only applies when the seller is not obligated to deliver to a specified location ("Bringschuld").

The Court dismissed the argument brought forth by the appellants (the Seller and A.) that the risk had been transferred to the Buyer upon the alleged delivery of the gold to the Carrier in Ghana. While the Court did not definitively determine whether this constituted a "Bringschuld" requiring delivery to Switzerland, it upheld the Cantonal Court's reasoning on the

issue of risk transfer based on multiple factors:

- The export documentation clearly distinguished between the portion of gold destined for the Seller and that for the Buyer;
- The commercial logic favored delivery to the Seller's Swiss branch, as the majority of the gold (41 kg out of 55 kg) was intended for the Seller, while only 14 kg was for the Buyer;
- Delivery documents specifically indicated the Seller's Swiss branch address as the destination.

Given that the appellants failed to demonstrate that the gold had been properly handed over to the Carrier for delivery to the Buyer, the Court found that the risk had not been transferred to the Buyer at the moment when the gold was allegedly stolen in Ghana. Thus, the Buyer retained the right to terminate the contract and request the reimbursement of the purchase price.

2. Joint Liability

The Court examined the issue of joint liability under Article 143 of the Swiss Code of Obligations (SCO), which requires a declaration of intent by the debtors to establish joint liability. The handwritten loan agreement of August 23, 2012 was crucial in determining the existence of such liability:

- The contract listed 'A. + B. Ltd.' as the borrowers, with the '+' symbol indicating an association between the two;
- A. had signed twice – once in his personal capacity and again as a representative of B. Ltd.

Moreover, A.'s subsequent behavior supported this conclusion, using phrases such as 'we' in communications regarding the loan, declaring the loan as personal debt in his 2013 tax return, and referring to 'my personal liability' in later correspondence. Based on these findings, the Court determined that there was mutual intent to establish joint liability, rendering both A. and the Seller liable for EUR 465,000.

3. Novation Argument

While this argument is not the primary one, it is worth noting that regarding the novation claim under Article 116 SCO, the Federal Supreme Court dismissed the appellant's contention that A.'s conversion of the loan into a sales contract was intended merely to establish a new obligation for the Seller. The Court briefly addressed this point, noting that A. bore the burden of proof for this claim. Since joint liability had already been established for the original loan and its increase, the Court found no convincing reason why the creditor would have agreed to relinquish this joint liability during the conversion process.

Key takeaway

In international sales contracts under the CISG, the explicit specification of delivery terms is essential to determine the time of risk transfer. The Court reiterated that in case of 'bringschuld' obligation exists, the risk remains with the seller until the goods reach the designated delivery point.

The joint liability of individuals and corporate entities under the SCO may arise from both explicit contract language and the broader context of the parties' conduct. Signing documentation in both personal and corporate capacities can lead to personal liability.

Comments

This judgment provides insights into two key aspects: risk transfer principles under the CISG and joint liability under the SCO.

Regarding risk transfer, the Court's analysis emphasizes two elements under Article 67(1) CISG:

1. The actual physical handover of goods to the first carrier;
2. Evidence that this handover was specifically intended for delivery to the buyer in accordance with the contract.

The burden of proof falls squarely on the seller,[1] who must provide concrete evidence that demonstrates both the physical handover and its intended purpose. Courts have established that 'delivery' requires the carrier to physically take charge of the goods, which includes its proper loading onto the means of transport.[2] Even when goods are physically

handed over to the carrier, risks may not transfer if the seller fails to provide proper transportation documentation within contractual deadlines. A mere copy of the seller's documentation indicating delivery to unspecified persons is insufficient proof.[3] In contrast, when proper documentation is provided and the buyer is duly notified, as demonstrated in a recent Dutch case, courts will recognize the transfer of risk upon delivery to the first carrier.[4] This aligns with the general principle that the party claiming the benefit of risk transfer must prove the facts giving rise to such transfer (Art. 8 SCC).

The outcome in this case would have been identical whether the Court applied the CISG or the domestic provisions of the Swiss Code of Obligations. Article 67(1) CISG and Article 185(2) SCO, both establish similar rules for risk transfer in sales involving carriage, requiring delivery to the carrier and imposing comparable evidentiary standards.

This dispute could have been avoided through appropriate Incoterms rules. The incorporation of either DPU (Delivered at Place Unloaded) or DDP (Delivered Duty Paid) terms would have provided clear allocation of risks and responsibilities throughout the gold shipment from Ghana to Switzerland because these rules explicitly place delivery obligations on the seller until the destination is reached. However, recent case law emphasizes that merely designating an Incoterm is insufficient; sellers must fulfill all related documentary obligations for effective risk transfer.[5]

Turning to the second key issue, the Court's analysis of joint liability under Article 143 SCO reflects the principles of solidarity under Swiss law. A solidary obligation means that the creditor can demand the entire performance or part of it from each joint debtor individually (Art. 144(1) SCO), and all debtors are bound by it until the entire claim is satisfied (Art. 144(2) SCO). This mechanism aims to strengthen the creditor's position by making multiple assets available to satisfy the debt. Importantly, joint liability does not create a single claim against multiple debtors. Rather, there exist as many identical claims as there are debtors, with the complete performance by one debtor releasing all others.

The Court's interpretation aligns with established principles that such agreement need not use specific terminology like 'joint and several' or 'joint debtors'. Instead, in line with Article 18 SCO, what matters is the actual intention of the parties. Where this cannot be determined, circumstances must be interpreted according to the principle of trust.

The Court found several elements establishing joint liability. While noting that the '+' symbol connecting the debtors' names was a significant indicator, it was far from the sole determining factor. The Court examined multiple elements, including: the dual signature of A. (both in his personal capacity and as a corporate representative), his subsequent tax declarations treating the loan as personal debt, his subsequent correspondence referring to 'personal liability,' and the use of the plural pronoun ('we') in communications regarding the agreement's modification.

The Court's analysis is particularly instructive in two respects. First, it confirms that the mere fact of jointly concluding a contract is insufficient to establish solidarity – unequivocal behavior indicating such intent is required. Second, it demonstrates how multiple contextual elements, while perhaps individually insufficient, can collectively establish joint liability.

Other sources presenting the case

N/A

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[1] Landgericht Darmstadt, Germany, 21 March 2013, Internationales Handelsrech 2014, CISG-online 2446.

[2] See e.g. Landgericht Bamberg, Germany, 23 October 2006, CISG-online 1400.

[3] Landgericht Darmstadt, Germany, 21 March 2013, Internationales Handelsrech 2014, CISG-online 2446. The court held that mere copies of seller-generated documents indicating delivery to unspecified persons are insufficient proof. Proper documentation must include the carrier's stamp and specifically identify the authorized person who received the goods. This demonstrates the high standard of proof required for effective transfer of risk under the CISG.

[4] Rechtbank Rotterdam, Netherlands, 9 March 2022, CISG-online 5868.

[5] Audiencia Provincial de Barcelona, Spain, 25 October 2018, CISG-online 5352. The court emphasized that under CIP terms, the seller must not only arrange insurance but also provide the buyer with the necessary documentation to claim directly from the insurer, the absence of which the risk transfer may not be effective despite the Incoterm designation.

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