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Christian Drave, Lawyer (Rechtsanwalt), Wilhelm Rechtsanwälte, Düsseldorf, www.wilhelm-rae.de

The faulty "cash disposal" – The scope of the specie insurance (Federal Court of Justice „BGH" judgment of 25 May 2011 File No. IV ZR 117/09 – HEROS I)

1. INTRODUCTION

"Cash disposal": if an armoured carrier pays the customer's money into the respective Federal Bank branch upon delivery, this procedure is usually in Germany referred to as "cash disposal" ("Geldentsorgung").

In spring 2006, the HEROS-group filed for insolvency. It had been considered market leader in the field of cash transport (Geld- und Werttransporte "GWT"). For years, leading employees had concealed liquidity gaps. By means of a pyramid scheme, they used the customers' money to clear existing deficiencies of other customers. The resulting liquidity gaps were covered by the cash disposal of the following days.

In several proceedings, damaged parties claimed against the GWT-insurers. In the meantime, the first BGH decision is available. The BGH had the possibility to comment on the *term and scope of the insured event in the specie insurance* (GWT-insurance).[1]

The BGH came to the result that under the GWT-insurance no coverage protection could be assumed.

The decision is worth criticism. Beyond the area of the special GWT-insurance, it has importance for the general marine insurance. It shows that special care must be taken when drafting a contract, in order to prevent cover gaps by synchronizing contract of carriage and insurance contract.

[1] In two further proceedings, the BGH, also on May 25th, 2011, denied the non-admission complaints against the decisions of the Higher Regional Court in Celle for basically corresponding reasons (see court file IV ZR 156/09, IV ZR 247/09).

2. FACTS OF THE CASE

The claimant is a large retail firm. It had commissioned a company of the HEROS-group to transport and disposal of cash. The contract relationship was based on a framework agreement ("transport- and handling contract") as well as an agreement about how the transports shall each be performed ("contract specifications"). Companies of the HEROS-group had contracted so-called "specie insurance" [2] with several insurance companies.

The performing HEROS-company did not pay the cash transported to the respective German Federal Bank branch into the bank accounts of the respective client, but (at first) into its own account. The resulting deficits were covered by the cash transports of the following days.

The claimant demanded from the defendant, as the leading insurer, a partial compensation for the damages as insured under the GWT-insurance entered into by the HEROS-group on behalf of the claimant.

3. THE JUDGMENT OF THE FEDERAL COURT OF JUSTICE („BGH")

The insurance senate of the BGH dismissed the claim.

3.1 Overview

It held that a „synopsis of the general terms and conditions of insurance" showed that there was „no covered insured event" at hand. Solely the cash, but not the bank money was insured. Solely the client's interest in maintaining the value of the transported cash was insured. An insured event required that a "physical access" to the goods to be transported occurred. Only the uninsured bank money is struck. An insured loss of cash within the insured period of time could not be proved by the claimant. The asserted damage was not covered and did not occur within the insurance period.

3.2 The major arguments

In the following, we have a look at the major examination points of the judgment.

3.2.1 Insured interest in the specie insurance – the client's interest in maintaining the value

The BGH examines whether the asserted damages "falls within the scope of cover".

3.2.1.1 Wording or the general terms of insurance refers to the insurance of an object

[2] This is a special type of cargo insurance. It comprises valuable goods, especially cash money, securities and precious metals.

The relevant insurance terms, as in the latest insurance policy, provide among others for:

> *"Insured object:*
>
> *Coined money, paper money,....no matter whether it is the insured's property or a third party's property, during all transports, storage, handling and other actions performed by the insured according to the contract."*

It says further:

"2. Scope of the insurance cover

2.1 Insured perils and losses

2.1.1 Covered are, as long as not differently determined under cypher 2.2:

2.1.1.1 Any losses and/or damages no matter the cause..."

According to the wording of the terms, one could see that the insurance exclusively covers physical access to insured objects. In accordance with the generally accepted legal principle, the BGH based its interpretation on the meaning which the wording would have for an average, legally uneducated insured. He though also considers that specific insurance contracts, such as in this case, are typically concluded for a specific group of persons, which means that the understandability of the members of this group forms the basis.[3]

According to the wording, the sole subject matter is the insurance of *objects*, i.e. of the transported cash as transport good during the insurance period.

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[3] The insurance terms mentioned here, were negotiated and determined from the broker's side with an insurer-consortium. In most cases the insurance contract is not concluded by the sender of specie transports. More often, the armored carrier concludes this insurance as an insurance for account of the sender and provides the documentation to the sender (see Thume in TranspR 2010, 362, 365).

3.2.1.2 Characteristics of the specie insurance: property insurance

It is not unproblematic that the BGH categorizes the insurance contract generally according to its characteristics. It is about a transport insurance on specie. This is *"no money- or monetary value-insurance"*, but as a specie insurance *just a property insurance* of goods.

Indeed, the goods to be transported must be relieved to the care of a third person (the carrier, but also several further persons dealing with the transport and transport-related handling). It is therefore opposed to an increased danger of property-access. This is not only the subject of the general marine insurance, but also of the specific GWT-insurance-contract. The interests that are subject of the specific insurance contract, are individually determined by the parties by their agreements. It appears problematic to draw conclusions from the general character of an insurance type (here: specie insurance) on the specific content and scope of the insurance cover (are further perils, e.g. third party liability of the GWT-company included as well?) in connection with a general interpretation.

3.2.1.3 The further insurance terms refer to objects

Resulting from the insurance terms, only the „material access" to the cash money is insured. Also the exclusions considered only determined perils, namely those which effect the material substance of the goods to be transported.

The calculation of the premium is also based solely on the scope of the transport, the storage and handling of the objects (the paper and coined money).

Also the stipulation regarding the duration of the insurance does not provide for anything different: the insured period of time commences with taking over the goodsand ends with the material delivery at the place determined by the insured (see in detail 3.2.2).

3.2.1.4 No extension of the insurance cover according to the contract

According to the „Subject matter of the insurance", the insurance cover does not only refer to transports, but also to *other actions performed by the policy holder as contractually agreed*. Thus, insurance cover exists for *other actions contractually agreed to by the policy holder*.

Accordingly, insurance cover exists for *any losses and/or damages no matter for which reason including breach of trust and/or misappropriation by the policy holder*.

The sole purpose of this regulation is to complement the all-risks-cover by two special causes of loss or damage (breach of trust and misappropriation), which would otherwise, according to the

general rules (sec. 61 VVG old version / sec. 81 VVG new version), lead to a denial of insurance cover.

This does not change the fact that the insured event always requires the loss of or damage to the goods transported. Also the criminal offences referred to (misappropriation/defalcated misappropriation) require a "*physical access*".

3.2.1.5 No extension to liability insurance

According to the insurance terms, the insurance cover comprises among others „the legal liability of HEROS towards the clients" as well as *the additional contractual liability accepted by HEROS upon the explicit permission by the leading insurer*".

According to the BGH's appraisal this does not mean that the liability of the cash transport company is included in the insurance contract as well. It should be clarified for which claims presented by the owner resulting from losses or damages to the transported goods the insurer accepts to be responsible for. Herewith, only the perils of the transport are specified, but the subject of the insurance is not extended to the liability for pure property losses.

3.2.2 No insured event during the insurance period

The BGH concludes that the claimants did not succeed in proving that the asserted damage "*is included in the contractually determined insurance cover*". A loss of cash money during the insured period was not proved.

The goods were physically transported to a Federal Bank branch and were handed over to an employee responsible for receiving those goods. The claimed "loss" occurred because the following transfer to the claimant's account was – in breach of contract – not performed. This does not represent a physical access to the insured object (cash money), but a fraudulent handling of not insured bank money after the insurance cover ended.

In this content the following is significant: The BGH refers to the *stipulations of the contract of carriage* when interpreting the scope of the insurance cover *according to the insurance contract*. [4]

The *insurance contract* determines among others:

> *„3.2 The insurance ends when the insured goods are handed over to an authorized person at a place determined in advance by the client."*

The *contract of carriage* contains among others the following clauses:

> *„Sec. 1 1. ... the transport ... lasts until the values to be transported are handed over to the receiver's care.. ..."*
>
> and
>
> *„Sec. § 2 3. The liability...ends with the orderly delivery of the objects to the respective client or those persons authorized to receive the objects"*

Such contractual determinations refer to the *physical transfer* (this means the delivery according to transportation law). Neither the contract of carriage nor the so-called list of specifications does determine in detail by which means the payment must be performed.

According to this appraisal, it was not decisive that the payment of the transported cash money was made to an account of the GWT-company and not to the account of the client. The delivery to the respective Federal Bank branch was a correct delivery according to the contract of carriage. The contract was performed. A loss of cash money during the insured time period was therefore not at hand.

4. CONCLUSION

The BGH decision leaves the question unanswered whether the decision would be different if the contract of carriage contained a stipulation that the transported cash money had to be paid into a specific bank account. The general features in the statutory provisions (see sec. 407 para. 1, sec. 412 German Commercial Code "HGB") and the agreements between sender and carrier, the parties of the freight/transportation contract, determine when a contract of carriage is performed.

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[4] See the basic principle of the decision: "About the term insured event in a specie transport insurance if the terms of the contract of carriage do not conclude that the policy holder pays the transported cash into its own account after delivery".

If the parties agree on payment modalities, the carriage and thus the contractual liability might for example end with the payment of the cash money into such account defined. The delivery according to transport law is part of the performance of the contract of carriage, being a service contract. If the payment is made into a different account, the delivery is not correct according to the contract of carriage. The transported goods are then regarded as a loss. There is both liability resulting from the contract of carriage and an insurance cover under the specie insurance.

The decision thus also has importance for the general marine insurance. It shows that detailed agreements within the contract about actual procedures, regulations of the transport contract and respective insurance cover are required in order to avoid cover gaps.

Christian Drave
Lawyer
Specialist solicitor for transport law

Wilhelm
Partnerschaft von Rechtsanwälten
Registered office: Düsseldorf - AG Essen: PR 1597
Fürstenwall 63
40219 Düsseldorf

Telephone: + 49 (0)211 687746 - 43
Telefax: + 49 (0)211 687746 - 20

www.wilhelm-rae.de
christian.drave@wilhelm-rae.de