Stumbling blocks with Swiss Export Risk Insurance

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Key takeaways

- **The Swiss Export Risk Insurance (SERV) insures export transactions of Swiss exporters against losses attributable to the realization of certain export risks. In this way, it makes an important contribution to the competitiveness of the Swiss economy.**
- **The payment of an indemnity under supplier credit, pre-shipment risk or contract bond insurance (three of the six products SERV offers for exporters) requires, among other things, that the insured claim be legally valid, due, and free of defenses and objections.**
- **If SERV has reasonable doubt about the legal validity, due date, and the absence of any defense or objection to the insured claim, and if legal recourse in the country of destination does not prove impossible or unreasonable, SERV may request that the policyholder provide evidence by way of a court judgment.**
- **Exporters who are insured with SERV should continuously document their activities well from the beginning. The cardinal performance obligations, in particular the provisions for delivery and acceptance of the goods or services as well as the origin of the payment obligation with the customer, should be formulated as clearly and objectively verifiable as possible.**

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Introduction

Swiss Export Risk Insurance (SERV) was introduced in 1934 as the Export Risk Guarantee (ERG) and replaced it in 2007. SERV intends to make it easier for the Swiss export industry to participate in international competition and to promote Switzerland as a business location. SERV is based on the Federal Law on Swiss Export Risk Insurance (SERVG) of December 16, 2005.

SERV insures deliveries and services of Swiss exporters abroad (export transactions) against payment arrears or other losses resulting from receivables from foreign debtors. In doing so, the state should not compete with the private insurance industry: SERV is committed to the principle of subsidiarity. It does not insure risks if sufficient insurance offers are available for them on the free market (Art. 6 para. 1 lit. d SERVG). To delimit the boundaries between marketable and non-marketable risks, SERV must follow the practice of the European Union (Art. 5 para. 3 of the Regulation on SERVG, SERV-V), as published, in particular, in the communications of the European Commission.

Requirements for the proof of a realized risk

Insurance conditions at a glance

SERV is a federal institution under public law with its own legal personality (Art. 3 para. 1 SERVG). This is decisive for the legal nature of the contractual relationship between SERV, as the insurance company, and the exporter, and as the policyholder. SERV usually grants insurance by order after the exporter has submitted his insurance application. The terms and conditions of insurance are further detailed in the general terms and conditions, e.g., for supplier credit insurance ("GTC-L"). SERV, however, may also conclude a contract under public law if this serves to protect its interests (Art. 15 para. 1 SERVG). Disputes between the parties are not to be judged by the civil courts but by the Federal Administrative Court in the first instance. In the absence of corresponding standards under public law, the (contractual) claims are to be judged analogously, according to the rules of the Code of Obligations (OR).

According to the conclusive catalog in Art. 12 para. 1 SERVG, insurable risks include political risks (letter a); transfer difficulties and payment moratoria (letter b); force majeure (letter c); risks from surety bonds (letter e); foreign currency risks, under certain conditions (letter f); and the del credere risk, provided that the risks of loss according to letters a-c are also insured with SERV at the same time (letter d). Insurance coverage may be granted whether the risks materialize prior to delivery (manufacturing risk) or after delivery (credit risk) (Art. 12 Par. 2 SERVG). SERV regulates the definition of the manufacturing and/or credit risk insured in the individual case directly in the insurance contract, provided the insurance is concluded in this form (cf. Art. 15 para. 1 SERVG).

The contracts of the insured underlying transaction are examined only in justified and exceptional cases outside of an insured event (Art. 11 SERV-V). For applicants and policyholders, the law provides duties of information and due diligence, and SERV may refuse to provide benefits if either of these is violated (Art. 18 SERVG).

If the insured risk materializes, payment of an indemnity under either the supplier credit, manufacturing risk or the contract bond insurance is subject to the insured claim's being legally valid, due and free from defenses and objections (see e.g., Sec. 5.1.1 GTC-L). In addition, all other requirements of liability law must, of course, also be met.

If the claim applied for indemnification or a joint liability of a third party documented in the insurance policy is disputed, SERV may request that proof of existence, maturity, and absence of defenses and objections be provided by a judgment of the competent court. The same applies if the existence of legal impediments is known (see e.g., no. 5.3 of GTC-L). Payment of compensation is excluded as long as the policyholder has not fully proven the existence of the conditions for compensation (see e.g., No. 5.4 of the GTC-L).

Decision of the Federal Administrative Court

A recent decision of the Federal Administrative Court (ruling of 24 January 2023, B-2722/2019) specifies the requirements for proving both the existence and maturity of the insured claim. The case in question concerned a relatively complex transaction involving the supply and installation of communication equipment for maritime navigation in Omani territorial waters and its operation over several years.

In 2007, the exporter applied to SERV for indemnification under the supplier credit insurance because its contracting partner had failed to meet its payment obligations under the export transaction. After various clarifications, SERV rejected the coverage in May 2008.

One point of contention before the Federal Administrative Court concerned the question whether the requirements were met regarding the first payment in the basic contract between the exporter and its contracting party (the insured underlying transaction).

With regard to the applicable terms and conditions of insurance (GTC-L), the Federal Administrative Court first held that contracts under administrative law are, in principle, to be interpreted in the same way as contracts under private law, according to the rules of good faith (principle of reliance). The primary means of interpretation is the wording of the contract, whereby merely a purely grammatical or formalistic interpretation is not permitted. The interpretation of the contract must take into account the overall context, the purpose of the contract, the interests at stake, and the history of its origins.

The court concluded that, considering both the teleological and systematic contexts, providing both section 5.3 GTC-L and section 5.4 GTC-L may be interpreted in such a way that SERV is able to make a binding (usually judicial) determination that the insured event exists. 5.4 GTC-L may be interpreted in such a way that SERV can generally demand a binding (usually judicial) determination of the existence, the due date or the absence of a defense, or an objection to the insured claim if the submitted documentation raises justified doubts about the policyholder's factual representation. In addition, it must be assumed that the policyholder is effectively able to take legal action in the foreign country and may reasonably be expected to do so.

In the case under review, the basic contract provided for delivery of the installations in several phases. The basic contract did not clearly stipulate whether a claim for partial payment was to arise after successful acceptance of phase 1. In addition, the policyholder suing SERV was not

able to sufficiently prove that the acceptance of phase 1 had taken place without reservation.

Thus, SERV was allowed to invoke reasonable doubt as to the legal validity, due date, and no defense or objection to the insured claim. Furthermore, it was found that legal recourse in the country of destination (Oman) neither needed to be considered impossible nor unreasonable. Thus, the court did not find it objectionable that SERV demanded proof from the plaintiff policyholder in the form of a court judgment, based on section 5.3 of the GTCL.

Next steps

Exporters who wish to insure themselves with SERV are well advised to formulate the contractual provisions as clearly as possible and in an objectively verifiable manner. Particularly central are the provisions on the origination of the payment obligation, the exporter's performance obligations, and the acceptance requirements for the goods or services supplied, since disputes that may lead to SERV coverage often revolve around these very salient points. This close attention to these provisions can be challenging in the case of contracts for work on complex projects. In addition, the insured exporter should continuously document its activities well from the beginning. Otherwise, there is a risk that SERV will refuse to provide the service, and the exporter will not be able to provide the required evidence in a way that is legally binding.

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No legal or tax advice

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