ren Kosten sowie deren Zumutbarkeit für den Käufer einzubeziehen (RS0127288; 4 Ob 159/11b [= IHR 2012, 114]; 3 Ob 194/15y [= IHR 2016, 58]).

3.4 Die Überschreitung eines Liefertermins stellt im Allgemeinen noch keine wesentliche Vertragsverletzung dar. Anderes kann aber vor allem dann gelten, wenn ein Fixgeschäft vereinbart wurde (vgl. *Saenger* in Ferrari/Kieninger/Mankowski, Internationales Vertragsrecht[3] Art. 33 CISG Rz. 7).

Im Anlassfall wurde nach den Feststellungen zwischen den Vertragsparteien zwar kein Fixgeschäft im juristischen Sinn, aber doch ein fixer Liefertermin bis Ende September 2017 vereinbart, den die Beklagte nicht eingehalten hat. Hinzu kommt, dass sie das Fahrzeug auch in der Folge nicht liefern konnte und zwischenzeitlich bereits mehr als ein Jahr verstrichen ist. In dieser Hinsicht ist zu berücksichtigen, dass es sich beim bestellten Fahrzeug um ein Sondermodell handelt, das in einer begrenzten Stückzahl von 99 Fahrzeugen produziert wurde. Aus diesem Grund ist davon auszugehen, dass die Wahrscheinlichkeit der Lieferbarkeit mit zunehmendem Zeitverlauf weiter sinkt. Da unter diesen Umständen mit Rücksicht auf den vereinbarten Liefertermin eine auch für den Käufer eines Luxusfahrzeugs angemessene Nachlieferungsmöglichkeit nicht mehr unterstellt werden kann, ist ein weiteres Zuwarten der Klägerin nicht zumutbar, weshalb die Interessenabwägung im vorliegenden Einzelfall zu Lasten der Beklagten ausschlägt. Der Beklagten muss daher eine wesentliche Vertragsverletzung angelastet werden, die die Klägerin zur sofortigen Vertragsaufhebung berechtigt.

4.1 Als Ergebnis ist somit festzuhalten, dass die Klägerin mit ihrem Klagsvorbringen eine wirksame Vertragsaufhebungserklärung gegenüber der Beklagten abgegeben hat, die Beklagte eine wesentliche Vertragsverletzung nach Art. 25 CISG trifft und die Klägerin die Vertragsaufhebung daher nach Art. 49 Abs. 1 lit. a CISG berechtigt erklärt hat. Aus diesem Grund steht der Klägerin der geltend gemachte vertragliche Rückabwicklungsanspruch zu, weshalb die Beklagte zur Rückzahlung der geleisteten Anzahlung verpflichtet ist.

4.2 Die Beurteilung des Berufungsgerichts hält der Überprüfung durch den Obersten Gerichtshof damit nicht Stand. Bei richtiger Anwendung der dargelegten Beurteilungsgrundsätze verbleibt für die vom Berufungsgericht angeordnete Verfahrensergänzung kein Raum. Das Verbot der Überraschungsentscheidung gilt auch für den Obersten Gerichtshof. Demnach darf auch das Höchstgericht die Parteien nicht mit einer Rechtsansicht überraschen, die sie nicht bedacht haben (8 Ob 109/16m; 4 Ob 21/19w; RS0037300 [T9]). Eine solche Überraschungsentscheidung liegt hier allerdings nicht vor. Wie bereits ausgeführt, war nach dem Klagsvorbringen für einen verständigen Erklärungsempfänger bei objektiver Betrachtung eindeutig erkennbar, dass die Klägerin die Vertragsaufhebung und aus diesem Grund die Rückzahlung der geleisteten Anzahlung als vertragliche Rückabwicklung begehrt. Da über den geltend gemachten Anspruch somit endgültig entschieden werden kann, ist die vom Berufungsgericht verfügte Verfahrensergänzung entbehrlich. [...]

Einbeziehung von AGB unter CISG

CISG Art. 6

1. The question whether standard terms became part of the contract between the parties must be determined in line with the CISG, even if the applicability of the CISG is excluded in those standard terms.

2. The parties must have explicitly or implicitly agreed to the inclusion of standard terms at the time of the formation of the contract and the other party must have had a reasonable opportunity to take notice of the terms. Moreover, the (reference to the inclusion) of the standard terms must be clear to a reasonable person of the same kind as the other party and in the same circumstances.

3. The (references to the inclusion of the) standard terms are unclear when they are made available in a language that the other party could not reasonably be expected to understand, for example because none of the representatives of the other party uses that language and the negotiations were held in a different language.

(alle nicht amtl.)

Rechtbank Overijssel, Urt. v. 30.7.2019 – CV EXPL 18-3828, ECLI:NL:RBOVE:2019:2804

Facts of the case

The dispute that underlies the present case arose pursuant to the sale of a truck by Respondent, who operates a business that is registered in the Netherlands, to Claimant, a Greek company. The truck was confiscated at the Greek border by the Greek customs authorities only two weeks after the sale, as the truck had been registered as stolen in Italy seven months prior to the sale. Claimant has subsequently avoided the contract and requested restitution of the payment price from Respondent, which provides the basis for the procedure before the Rechtbank Overijssel, along with an (additional) claim for damages. Claimant's claims are based on Art. 8, 25, 41, 49 and 82 of the United Nations Convention on Contracts for the International Sale of Goods (hereafter: CISG). However, Respondent has objected to the applicability of the CISG due to the exclusion of the CISG in Respondent's standard terms, which according to Respondent became part of the contract.

Decision

According to the Rechtbank Overijssel, the CISG is applicable in the present case as both parties are domiciled in Contracting States and the contract concerns an international sale of goods, provided that its applicability is not excluded pursuant to Art. 6 CISG. In order to determine whether Respondent's standard terms became part of the contract, which would exclude the applicability of the CISG, the Rechtbank first points out that the question whether these standard terms became part of the contract should be answered in line with the CISG (Hoge Raad dd. 28.1.2005, ECLI:NL:HR:2005:AR4837). The Rechtbank subsequently discusses the rules that are listed in CISG-AC Opinion No. 13 (Inclusion of Standard Terms under the CISG) and points out that the parties must have explicitly or implicitly agreed on the applicability of the standard terms (rule 2), as well as that the other party must have had a reasonable opportunity to take notice of the standard terms (rule 3), in order for

those terms to become part of the contract. The Rechtbank additionally highlights the requirements that the (reference to the incorporation of the) standard terms must be clear (rule 5), which is not the case if they are available in a language that the other party could not reasonably be expected to understand (rule 6).

Respondent submitted that Claimant had a reasonable opportunity to take notice of its standard terms, which were available on its website and were referred to in its emails and invoice to Claimant. Moreover, the standard terms were displayed on the wall of Respondent's office, which was visited twice by the representatives of Claimant. However, neither party disputed that (the references to the incorporation of) Respondent's standard terms were only available in Dutch, that the parties negotiated in English and that none of Claimant's representatives spoke Dutch. The Rechtbank held that Claimant could not be reasonably expected to understand the Dutch standard terms of Respondent, for which reason they did not become part of the contract and the exclusion of the CISG in those standard terms did not apply.

Comment

The mere fact that (references to the incorporation of) standard terms are only available in the (native) language of the party that uses the terms, is by itself insufficient to rule out the applicability of those terms under Dutch law, even if the other party does not understand that language. An internationally operating other party, that can be presumed to be familiar with the content of such references in the footer of emails, offers, invoices, etc. should ask to clarify the meaning of such references and the standard terms before it accepts an offer, as it can otherwise be deemed to have accepted the standard terms (Hoge Raad dd. 2.2.2001, ECLI:NL:HR:2001:AA9767). In other words, the other party cannot lean back and should ask for clarification if it does not understand the language in which the (references to the incorporation of) standard terms were drafted (*Spanjaard*, *ORP* 2019, 17, 19). Whenever the CISG applies, however, the user of the standard terms ought to ensure that the other party can understand those terms and (if necessary) that an appropriate translation, in a language that the other party can reasonably expected to understand, is available, as the decision of the Rechtbank Overijssel reflects.

The requirements for the incorporation of standard terms are not specifically addressed under the CISG, but rather derived from the interpretation of the rules that govern the formation and interpretation of the contract in general. The CISG Advisory Council, an international group of experts that aims to promote the uniform application and interpretation of the CISG, has sought to clarify when standard terms are validly incorporated into the contract in CISG-AC Opinion No. 13, which is widely applied by the Dutch courts (e.g. Rechtbank Gelderland dd. 14.10.2015, ECLI:NL:RBGEL:2015:7269/Rechtbank Midden-Nederland dd. 20.1.2016, ECLI:NL:RBMNE:2016:412). However, cases that involve language issues are rare (see only Rechtbank Gelderland dd. 6.11.2013, ECLI:NL:RBGEL:2013:4341). Nonetheless, the decisions in the latter case and in the present case before the Rechtbank Overijssel illustrate that almost all other rules for the incorporation of standard terms under Opinion No. 13 become virtually redundant if the other party cannot reasonably be expected to understand the language in which the (references to the incorporation of the) standard terms were drafted. Close attention should therefore be paid to the issue of language when drafting standard terms, in order to prevent the possibility that the standard terms are disregarded, including a potential exclusion of the CISG contained therein.

It is imperative to realize that the determination of the language(s) that the other party can be reasonably expected to understand is subjective in the sense that it takes place the context of a particular transaction. The relevant factors may include the language of the contract, negotiations or communications between the parties, as well as the language commonly used in the place where the other party has its usual place of business. According to the CISG Advisory Council, no preferential status should be afforded to 'world languages', i.e. widely spoken languages such as English or Spanish. For example, Claimant might decide to make its standard terms available in English pursuant to the decision of the Rechtbank Overijssel. However, if Claimant would negotiate the sale of a truck with a German buyer in German, and the latter cannot reasonably expected to understand either Dutch or English, the standard terms must again be disregarded. In the light of the above considerations, a party that wants to ensure that its standard terms are incorporated into the contract should make (translations of) its standard terms available in the language(s) in which it negotiates/communicates with other parties and refer to the incorporation of those terms in the appropriate language, which is ostensibly the easiest manner to gauge the language that the other party can be reasonably expected to understand.

Zusammenfassung von Tess Bens, LL.M.

Vertriebsrecht

Culpa in contrahendo auch bei Vertragsverlängerung / Es gibt keinen selbständigen Investitionskostenerstattungsanspruch

BGB §§ 242, 314 Abs. 2

1. Die Grundsätze über den Abbruch von Vertragsverhandlungen können auf den Fall der Nichtverlängerung eines bereits bestehenden Vertrages angewandt werden. Besteht ein triftiger Grund (an den keine zu hohen Anforderungen zu stellen sind) für die Nichtverlängerung, entfällt ein Schadensersatzanspruch.

2. Ein selbständiger Investitionskostenerstattungsanspruch ist nicht anzuerkennen, da sich kein allgemeiner Rechtssatz des Inhalts aufstellen lässt, dass der Geschäftsherr, der eine andere Person mit dem Vertrieb seiner Produkte beauftragt hat, aus dem Vertriebsvertrag verpflichtet ist, dieser anderen Person die Amortisation von Investitionen zu ermöglichen, die diese im Interesse und auf Aufforderung des Geschäftsherrn tätigt. *(alle nicht amtl.)*

OLG München, Urt. v. 27.3.2019 – 7 U 1001/18
(LG München, Urt. v. 21.2.2018 – 41 O 6955/14)