

NINTH ANNUAL WILLEM C. VIS
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
2001-2002

MEMORANDUM FOR CLAIMANT



UNIVERSITY OF HEIDELBERG

NINTH ANNUAL

WILLEM C.VIS

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COMMERCIAL ARBITRATION MOOT

2001-2002

INSTITUTE OF INTERNATIONAL COMMERCIAL LAW

PACE UNIVERSITY SCHOOL OF LAW

MEMORANDUM FOR CLAIMANT

UNIVERSITY OF HEIDELBERG

ANNA V. MÜHLENDAHL • THOMAS RICHTER

PAMELA SCHUERMANS • DANIEL SEUFERT

INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

AMERICAN ARBITRATION ASSOCIATION

Case No. Moot 9

LEGAL POSITION IN RESPONSE TO THE ISSUES

IN THE TERMS OF REFERENCE

ON BEHALF OF :

Futura Investment Bank

395 Industrial Place,
Capitol City,
Mediterraneo

CLAIMANT

AGAINST :

West Equatoriana Bobbins S. A.

214 Commercial Ave.,
Oceanside,
Equatoriana

RESPONDENT

INDEX OF AUTHORITIES.....	VII
INDEX OF CASES.....	VII
ABBREVIATION INDEX	VII
STATEMENT OF FACTS	7
APPLICABLE LAW	7
UNIT I: This Tribunal has jurisdiction to hear this claim.....	7
I. CLAIMANT can rely on the arbitration clause	7
A. The right to arbitrate is automatically transferred to CLAIMANT	7
1. CLAIMANT's right to payment is subject to the arbitration clause.....	7
2. The right to arbitrate is accessory to the right to payment	7
3. Separability doctrine cannot be invoked against the automatic transfer	7
B. Art. 10 Receivables Convention supports the automatic transfer	7
1. The right to arbitrate is comparable to a right securing payment.....	7
2. The right to arbitrate should be transferred like a right securing payment.....	7
II. Legal certainty requires that RESPONDENT is bound to arbitrate.....	7
III. RESPONDENT did not limit the transfer of the right to arbitrate	7
A. RESPONDENT did not contractually limit the transfer of the right to arbitrate	7
1. RESPONDENT could foresee the assignment	7
2. RESPONDENT did not insist upon an express clause.....	7
B. RESPONDENT did not conclude the arbitration agreement in specific consideration of TAILTWIST.	7
IV. RESPONDENT is not harmed by the transfer of the right to arbitrate.....	7
V. Written form is not required.....	7

UNIT II: RESPONDENT has to pay \$ 2,325,000 to CLAIMANT	7
I. After receipt of the letter of 5 April 2000 RESPONDENT could not be discharged by payment to TAILTWIST.....	7
A. Letter of 5 April 2000 constitutes notification.....	7
1. Assignee and receivable were identified	7
2. RESPONDENT could reasonably be expected to understand the content of the letter	7
a) A reasonable person would have expected a notification.....	7
b) A reasonable person would thus have understood the content of the letter.....	7
3. Change of state in payment instruction does not affect the validity	7
4. Notification is effective because it was received.....	7
5. Notification is binding since there is no need for confirmation.....	7
B. Conclusion: RESPONDENT has not been discharged by payment to TAILTWIST.....	7
II. After receipt of fax of 19 April 2000 RESPONDENT could not be discharged by payment to TAILTWIST.....	7
A. Fax of 19 April 2000 constitutes notification	7
1. All constitutive elements are satisfied.....	7
2. Notification is effective	7
a) Notification is effective upon receipt (morning of 19 April 2000).....	7
b) RESPONDENT could have easily stopped the payment to TAILTWIST.....	7
3. RESPONDENT is estopped from relying on notification not being effective	7
a) RESPONDENT should have asked CLAIMANT for clarification immediately upon receipt of German notification.....	7
b) RESPONDENT should have had the German notice translated.....	7
c) RESPONDENT made no efforts to revoke payment order	7
B. Conclusion: RESPONDENT has not been discharged by payment to TAILTWIST.....	7
III. RESPONDENT has to pay \$2,325,000 to CLAIMANT.....	7

UNIT III - RESPONDENT has to pay \$930,000 to CLAIMANT.....	7
I. Waiver of defence clause precludes RESPONDENT from asserting any defence	7
A. RESPONDENT never gave TAILTWIST a chance for an attempt to remedy.....	7
1. RESPONDENT failed to inform TAILTWIST about defective performance	7
2. RESPONDENT has no excuse for not informing TAILTWIST.....	7
a) RESPONDENT could have notified TAILTWIST or its insolvency administrator	7
b) TAILTWIST could have remedied although it was in insolvency proceedings.....	7
B. TAILTWIST's insolvency does not trigger the exception to the waiver of defence clause....	7
II. Since RESPONDENT failed to notify TAILTWIST in time, RESPONDENT is precluded from all defences.....	7
A. Notification was necessary for both training and machinery.....	7
B. Notification was not in vain until 16 June 2000	7
C. Notification was not within a reasonable time	7
1. Respondent was aware of any non-conformity the latest on 10 May 2000.....	7
2. TAILTWIST and RESPONDENT stipulated a short period in which RESPONDENT had to notify TAILTWIST.....	7
3. Even if the parties did not expressly stipulate a notification period, this Tribunal should determine the reasonable time to be short.....	7
a) The economic interests of TAILTWIST require a short notification period	7
b) RESPONDENT has no particular interest not to notify within a short period.....	7
4. In any event, the reasonable time should be regarded far less than one month.....	7
5. RESPONDENT should have notified the latest on 18 May 2000	7
D. CLAIMANT can rely on the requirement of notification.....	7
E. RESPONDENT has no reasonable excuse for not notifying TAILTWIST.....	7
III. Payment is due.....	7
IV. Conclusion.....	7
UNIT IV: CLAIMANT is entitled to interest pursuant to Art. 78 CISG.....	7

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ABBREVIATION INDEX

BGBI	Bundesgesetzblatt (German Federal Law Gazette)
BGH	Bundesgerichtshof (German Federal Supreme Court)
BGHZ	Sammlung von Entscheidungen des Bundesgerichtshofes in Zivilsachen (The official reporter of cases decided by the German Federal Supreme Court on civil matters)
CISG	United Nations Convention on contracts for the International Sale of Goods of 11 April 1980
CLOUT	Case Laws on UNICITRAL Texts
Clunet	Journal du droit international
ff	following
ICC	International Chamber of Commerce
LG	Landgericht (German Regional Court)
NJW	Neue Juristische Wochenschrift
No.	Number
Nos.	Numbers
NYAC	New York Convention on the recognition and enforcement of foreign arbitral awards
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (German Regional Court of Appeal)
para.	paragraph
Receivables Convention	UNCITRAL Convention on Assignments of Receivables in International Trade
RIW	Recht der Internationalen Wirtschaft
SchwBG	Schweizer Bundesgericht (Swiss Federal Supreme Court)
UML	UNCITRAL Model Law on International Commercial Arbitration
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
v.	versus (against)
VersR	Versicherungsrecht
YCA	Yearbook of commercial arbitration

STATEMENT OF FACTS

1999

1 September West Equatoriana Bobbins S.A. (RESPONDENT) buys a machinery from Taitwist Corp. (TAILTWIST) for \$9,300,000 payable in five instalments. The contract also provides for training of RESPONDENT in the operation of the machinery. RESPONDENT agrees not to assert any defences against a potential assignee of the right to payment unless TAILTWIST would not in good faith attempt to remedy any deficiency. Additionally, the contract contains an arbitration clause. RESPONDENT pays the first instalment of \$1,860,000, the second and third instalment on 6 September 1999 and 20 February 2000, respectively.

2000

29 March TAILTWIST assigns to Futura Investment Bank (CLAIMANT) the right to receive the remaining two instalments: \$2,325,000 are due upon completion of commissioning on site and \$930,000 after three months satisfactory performance.

5 April CLAIMANT sends a notice of the assignment to RESPONDENT, receipt of which is signed for on 10 April 2000.

13 April Mr. Black, responsible for the TAILTWIST contract and Vice-President of RESPONDENT, returns to his office after a business trip.

15 April Mr. Black looks at the notice of assignment and sends a fax to CLAIMANT in order to inquire as to the nature of the communication.

19 April In the morning: RESPONDENT receives the English translation of the notice of assignment. In the afternoon: After commissioning on site, RESPONDENT's accounting department instructs RESPONDENT's bank to pay the fourth instalment of \$2,325,000 to TAILTWIST. Shortly thereafter: RESPONDENT's accounting department receives a memorandum by Mr. Black not to make any further payments to TAILTWIST.

20 April The insolvency proceedings of TAILTWIST are opened. Two of TAILTWIST's training personnell are ordered back.

10 Mai Training by TAILTWIST's personnell is concluded according to schedule.

16 June The court of Oceania decides that TAILTWIST be liquidated.

5 July CLAIMANT changes the payment instruction from an account in Mediterraneo to an account in Oceania.

10 August RESPONDENT utilises the machinery for three months.

17 October The insolvency administrator of TAILTWIST confirms the assignment.

2001

10 January Asserting deficiencies in the performance of the equipment, RESPONDENT declares a reduction of the price by 10% (\$930,000) to the insolvency administrator of TAILTWIST.

16 May RESPONDENT definitely refuses to pay the remaining sum of \$3,255,000 to CLAIMANT.

Applicable Law

The arbitral proceedings will be governed by the American Arbitration Association International Arbitration Rules¹, because the arbitration clause provides that „[a]ny controversy or claim between TAILTWIST Corp. and West Equatoriana Bobbins S.A. arising out of or relating to this contract shall be determined by arbitration by the American Arbitration Association [...],“² Moreover, both parties have agreed to these rules in their statements.³

The UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law)⁴ is subsidiarily applicable to questions concerning the arbitral proceedings since it has been adopted by Danubia, the place of arbitration.

The CISG is the law applicable to the sales contract between RESPONDENT and TAILTWIST by virtue of Art. 1 (1) (a) CISG since both Oceania and Equatoriana are parties to the convention and have incorporated the Convention into their domestic law.⁵ Furthermore, the contract parties chose the CISG as the law governing the contract. Neither Oceania nor Equatoriana have declared any reservations to the Convention.⁶

The Convention on the Assignment of Receivables in International Trade (Receivables Convention) is applicable to the assignment of the right to payment according to Art. 1 (1) (a) Receivables Convention since TAILTWIST as the assignor is located in Oceania, a contracting state.⁷ Even though Equatoriana, the country in which RESPONDENT is located, is not a Contracting State to the Receivables Convention, the Receivables Convention does affect the rights of RESPONDENT. According to Art. 1 (3), the Receivables Convention "does not affect the rights and obligations of the debtor unless, at the time of the conclusion of the original contract [...] the law governing the original contract is the law of a Contracting State." This condition is fulfilled: The original contract between TAILTWIST and RESPONDENT states that in regard to any questions not governed by the CISG the contract is governed by the law of Oceania.⁸ Oceania is a contracting state. Thus, the Receivables Convention affects the rights of RESPONDENT.

Finally, all states involved are parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).⁹

On behalf of our client Futura Investment Bank, CLAIMANT, we respectfully request this Tribunal:

¹ Art. 1 (1) AAA Rules.

² CLAIMANT's Exhibit No. 1.

³ Notice of Arbitration, para. 13; Statement of Defence, para. 2.

⁴ Notice of Arbitration, para. 18.

⁵ Notice of Arbitration, para. 16.

⁶ Clarification No. 2.

⁷ Notice of Arbitration, para. 17.

⁸ CLAIMANT's Exhibit No. 1.

⁹ Notice of Arbitration, para. 19.

- To find that it has jurisdiction to hear this claim because CLAIMANT can rely on the arbitration agreement between RESPONDENT and TAILTWIST (Unit I);
- To order RESPONDENT to pay \$2,325,000 to CLAIMANT because RESPONDENT has not been discharged from its obligation by paying to TAILTWIST (Unit II);
- To find that RESPONDENT cannot raise any defences against CLAIMANT and therefore has to pay \$930,000 to CLAIMANT (Unit III);
- To order RESPONDENT to pay interest on the sums of \$2,325,000 and \$930,000 from the date each payment was due respectively (Unit IV).

Unit I: This Tribunal has jurisdiction to hear this claim

This Tribunal should exercise its power to rule on its own jurisdiction according to Art. 15 (1) AAA Rules and find that it has jurisdiction to decide on the merits of the instant case.

RESPONDENT and TAILTWIST validly¹⁰ incorporated an arbitration agreement in their sales contract. The right to receive payment from RESPONDENT arising out of this contract has been assigned to CLAIMANT.¹¹ Consequently, CLAIMANT can rely on the arbitration clause since the right to arbitrate automatically follows the assigned right **(I.)**. Additionally, the principle of legal certainty requires RESPONDENT be bound by the arbitration clause **(II.)**. RESPONDENT cannot object the transfer of the right to arbitrate since there is no limitation on the transfer **(III.)** and since RESPONDENT is not harmed by the change of the counterparty **(IV.)**. Finally, no written form is required for the transfer of the right to arbitrate **(V.)**.

I. CLAIMANT can rely on the arbitration clause

CLAIMANT has the right to arbitrate since this right is automatically transferred with the assigned right to payment **(A.)**. Since the right to arbitrate can be compared to a right securing payment the automatic transfer is supported by Art. 10 (1) Receivables Convention **(B.)**.

A. The right to arbitrate is automatically transferred to CLAIMANT

The right to arbitrate is automatically transferred to CLAIMANT for two independent reasons. First, the right of CLAIMANT to receive payment is subject to all the terms of the original sales contract **(1.)**. Second, the right to arbitrate is accessory to every right of the contract **(2.)** RESPONDENT cannot invoke the separability doctrine to object this automatic transfer **(3.)**.

¹⁰ The validity of the arbitration agreement between TAILTWIST and RESPONDENT is uncontested: Statement of Defence No. 2.

¹¹ RESPONDENT does not contest the validity of the assignment: Statement of Defence No. 4.

1. CLAIMANT's right to payment is subject to the arbitration clause

It is a general principle that through an assignment the assignee steps in the shoes of the assignor.¹² The rights of an assignee are hence subject to all the terms of the contract under which the assigned rights arose. One of the terms of the sales contract between RESPONDENT and TAILTWIST, under which the assigned right to payment arose, was an arbitration clause. Consequently the right of CLAIMANT, the assignee, to receive payment is subject to this arbitration clause and CLAIMANT can submit the dispute to arbitration.¹³

2. The right to arbitrate is accessory to the right to payment

According to prevailing legal practice¹⁴ and most national legal systems¹⁵ accessory rights follow the receivable in case of an assignment.

The right to arbitrate constitutes such an accessory right.¹⁶ A right to arbitrate which is not linked to any - even potential - dispute is useless. An arbitration agreement is therefore always concluded in reference to a substantive basis which might lead to these legal disputes. The substantive basis of the arbitration agreement between RESPONDENT and TAILTWIST is the sales contract. The arbitration clause determines how rights arising out of this contract be enforced. As such it is a procedural accessory of every contractual right, thus also of the right to receive payment from RESPONDENT. The right to arbitrate hence followed the right to receive payment and CLAIMANT as the rightful assignee can rely on the arbitration clause.

3. Separability doctrine cannot be invoked against the automatic transfer

The doctrine of separability cannot be invoked to deny the automatic transfer of the right to arbitrate. This doctrine was developed to ensure that arbitration takes place even though the contract that contains the arbitration agreement is void.¹⁷ Hence, the purpose of the separability doctrine is to **ensure** arbitration. Denying the trans-

¹² This principle is reflected by Artt. 10, 18, 20 Receivables Convention; *Matter of liquidation of United American Bank in Knoxville*, Court of Appeals of Tennessee, June 13, 1986, C/A 628: "It is a familiar rule requiring no citation of authority that an assignor stands in the shoes of the assignee in matters relating to the obligations and liabilities arising from an assignment."; *Insurance Company of the West v. U.S.*, U.S. Court of Appeals for the Federal Circuit, March 23, 2001, 00-5039; *Southern Mississippi v. ALFA General Ins.*, Supreme Court of Mississippi, May 26, 2000, 790 So.2d 818; *Union Recovery Ltd. Partnership v. Horton*, Supreme Court of Virginia, Nov. 1, 1996, 252 Va. 418; *in re Estate of Martinek*, Appellate Court of Illinois, Second District, Jan. 27, 1986, 140 Ill. App. 3d 621; *Smith v. Cumberland Group Ltd.*, Superior Court of Pennsylvania, Jan. 21, 1997, 455 Pa. Super. 276; *Heirs of Augusto L. Salas, Jr v. Laperal Realty Corp.*, Supreme Court of the Philippines, Dec. 13, 1999, G.R. No. 135362; *Arkwright Boston Manufacturers Mutual Insurance Co. et al. v. Ross et al.*, U.S. District Court, Southern District of Texas (Houston Division), May 8, 1990, YCA, 1992, 617; Cal.Civ.Code § 1459; § 9-318 UCC; France: Cour de Cassation, June 12, 1950, J.D.I. 77, at 1216; Germany: RGZ 146, 52, 55; Thomas/PUTZO, § 1029 No.15.

¹³ cf. U.C.C. §1-102 (36): "Rights include remedies".

¹⁴ France: Cour de Cassation, Oct. 19, 1999, Rev. Arb., 2000, 85; *Filmkunst decision*, Cour d'Appel de Paris, Jan. 28, 1988, J.D.I.,116, 1021; BGH, NJW 1980, 2023; BGH, NJW 1998, 371; USA: *Boardman v. Hayne*, Supreme Court of Iowa, Des Moines, June 1870, 29 Iowa 339; *Farmers' & Drovers' Bank v. Fordyce*, Supreme Court of Pennsylvania, Sept., 1845, 1 Pa. 454.

¹⁵ Civil Law: France: Art. 1692 Code Civil; Netherlands: Art.142 B.W., Boek 6; Belgium: Art. 1692 B.W.; Switzerland: Art. 170 (1) CO; Common Law: Bouvier's Law Dictionary, 1897, at 181; UCC, § 9-318.

¹⁶ U.S.A: *Banque de Paris v. Amoco Oil*, U.S. District Court, S.D.N.Y., Oct. 31, 1983, 573 F.Supp. 1464; *Matter of Lipman*, Court of Appeals of N.Y., Feb. 26, 1942, 289 N.Y. 76; *Matter of Lowenthal*, Court of Appeals N.Y., Dec. 16, 1921, 199 A.D. 39; LOQUIN at 1029; GIRSBERGER/HAUSMANINGER, at 138-139; GOUTAL, at 445; Chitty/GUEST at 781, FOUCHARD/GAILLARD/GOLDMAN, at 214, No. 418; MAYER, at 361.

¹⁷ GIRSBERGER/HAUSMANINGER, at 138; BORN, at 67 ff; RUBINO-SAMARTANO, at 229; LOQUIN, at 1030; cf. Art. 16 UNCI-

fer of the right to arbitrate on the grounds of this doctrine would obviously contradict its objective.¹⁸

B. Art. 10 Receivables Convention supports the automatic transfer

Art. 10 (1), stating that an accessory security right follows the assigned right "without a new act of transfer", supports the automatic transfer of the right to arbitrate. The right to arbitrate is similar to a right securing payment (1.) and should thus be transferred likewise (2.).

1. The right to arbitrate is comparable to a right securing payment

Both a right securing payment and a right to arbitrate secure the receivable in one way or another. While a right securing payment serves the assigned right from the substantive point of view, a right to arbitrate does so from the procedural.

In international disputes the recognition and enforcement of decisions is of utmost importance. Due to the New York Convention, arbitral awards are easier to enforce in foreign countries than national court decisions.¹⁹

Furthermore, a fast dispute resolution is very important for any party if large sums of money are at stake. The arbitration hearings are generally scheduled at the convenience of the parties and not according to a judge's calendar.²⁰ Additionally, the arbitration proceedings are terminated faster than court litigation because review on the merits is generally not allowed before courts.²¹ Thus, arbitration guarantees - much more than litigation before courts - that the disputes be resolved efficiently.²²

Because of these aspects the right to arbitrate guarantees CLAIMANT an easier and faster enforcement of the right to payment than court litigation. Hence, the function of the right to arbitrate is similar to and equally important as that of a right securing payment.

2. The right to arbitrate should be transferred like a right securing payment

Since the right to arbitrate has a similar objective as a right securing payment, it should be transferred in the same way. Their similar objectives already led the German Federal Supreme Court (BGH) to compare the right to arbitrate to a security interest. It held that the arbitration agreement, just as a security interest, is an attribute of the assigned right.²³ Thus, according to the BGH, the right to arbitrate is - like an accessory right securing payment - automatically transferred with the assigned right.

Even though the BGH had to decide on the basis of German law, the reasoning applies in the present case and

TRAL Model Law; Art. 15 § 2 AAA Rules.

¹⁸ LOQUIN, at 1030-1031.

¹⁹ Mediterraneo, Equatoriana, Oceania and Danubia are all party to this Convention. Thus, the award in the instant case could be enforced without impediments.

²⁰ ROBBINS § 1.03.

²¹ RUBINO-SAMARTANO, at 870; REDFERN/HUNTER, at 432, 9-32; *cf.* Art. 34 UNCITRAL Model Law; also: Art. V New York Convention.

²² BORN, at 7.

²³ BGHZ 71, at 162; also: BGHZ 68, at 356.

the conclusion remains the same.²⁴ TAILTWIST and CLAIMANT were located in different states when they concluded the contract of assignment. For international assignments the transfer of rights securing payment is addressed in Art. 10 Receivables Convention. According to Art. 10 (1) accessory rights securing payment are transferred "without a new act of transfer". Since the right to arbitrate is accessory to the right to payment and can be compared to a security right it has been automatically transferred to CLAIMANT.

II. Legal certainty requires that RESPONDENT is bound to arbitrate

Additionally, legal certainty requires RESPONDENT to be bound by the arbitration agreement. It is common legal practice of courts to dismiss the claim of an assignee if the debtor relies upon an arbitration clause incorporated in the original contract.²⁵ Courts hold the assignee to be bound by the arbitration clause and therefore deny their jurisdiction. These decisions intend to protect the debtor.²⁶ The other party to the arbitration agreement could otherwise escape the effect of such an agreement merely by assigning its contractual rights to a third party.

According to this legal practice, RESPONDENT could have compelled CLAIMANT to arbitrate if CLAIMANT had submitted the dispute to court. Thus, RESPONDENT cannot compel CLAIMANT to go to court if CLAIMANT brings the matter before an arbitration tribunal. Otherwise the principle of legal certainty would be violated since RESPONDENT could choose arbitrarily if it wanted to settle the dispute in court or by arbitration. It would be easy for RESPONDENT to postpone the settlement of the dispute. It could always successfully contest the jurisdiction of the tribunal which CLAIMANT has appealed to first. However, CLAIMANT needs to be sure to which tribunal it can submit the case. Hence, to ensure legal certainty the arbitral tribunal must have jurisdiction in both constellations - if either RESPONDENT or CLAIMANT want to arbitrate.

In addition it was RESPONDENT who signed the arbitration agreement. If CLAIMANT as a non signatory party could be compelled to arbitrate by RESPONDENT, RESPONDENT must be bound by the arbitration clause even more so.

III. RESPONDENT did not limit the transfer of the right to arbitrate

RESPONDENT cannot assert that the transfer of the right to arbitrate was limited. Neither did RESPONDENT limit this transfer by an express contract clause (A.), nor did RESPONDENT conclude the arbitration

²⁴ Art. 10 (1) Receivables Convention corresponds to § 401 BGB, the provision applied by the BGH.

²⁵ France: Cour de Cassation, Oct. 19, 1999, Rev. Arb., 2000, 86; Paris (1re Ch Urg.), April 20, 1988, Rev. Arb., 1988, 570, at 572; U.S.A: *GMAC Commercial Credit LLC v. Spring Industries, Inc.*, U.S. District Court, S.D.N.Y., April 24, 2001, 00 Civ. 2893 (NRB); *DiMercurio v. Sphere Drake Insurance PLC*, U.S. Court of Appeals, First Circuit, Jan. 31, 2000, 202 F.3d 71; *Heirs of Augusto L. Salas, Jr v. Laperal Realty Corp.*, Supreme Court of the Philippines, Dec. 13, 1999, G.R. No. 135362; *Cone Constructors, Inc. v. Drummond Community Bank*, Court of Appeal of Florida, First District, June 10, 1999, 754 So.2d 779; *Thomson-CSF, S. A. v. American Arbitration Association*, U.S. Court of Appeals, Second Circuit, Aug. 24, 1995, 64 F.3d 773; *Banque de Paris v. Amoco Oil Company*, U.S. District Court, S.D.N.Y., Oct. 31, 1983, 573 F.Supp. 1464; *Lumbermens Mutual Casualty Company v. The Borden Company*, U.S. District Court, S.D.N.Y., April 7, 1967, 268 F.Supp. 303; *Instituto Cubano v. The MV Driller*, U.S. District Court, S.D.N.Y., Feb. 11, 1957, 148 F.Supp. 739.

²⁶ *Matter of Hosiery*, Court of Appeals of N.Y., Feb. 20, 1920, 238 N.Y. 22; *Banque de Paris v. Amoco Oil*, U.S. District Court,

agreement in specific consideration of TAILTWIST (B.).

A. RESPONDENT did not contractually limit the transfer of the right to arbitrate

RESPONDENT asserts that CLAIMANT is trying to apply the arbitration clause to a dispute that is not "contemplated" by it.²⁷ To substantiate this assertion, RESPONDENT argues that itself and TAILTWIST are named in the arbitration clause. It is unclear to us what RESPONDENT wants to express by this assertion since RESPONDENT addresses two different issues.

It could be possible that RESPONDENT wants to express that the dispute at hand is not contemplated by the scope of the arbitration agreement. Yet, the scope of this arbitration agreement is especially broad. It states that any dispute "[...] arising out of or relating to this contract shall be determined by arbitration [...]". The right to payment is a right arising out of this contract. Any dispute concerning this right is therefore within the scope of the arbitration agreement.

It could also be possible that RESPONDENT wants to assert that CLAIMANT cannot rely on the arbitration agreement since its transfer was contractually limited by explicit reference to RESPONDENT and TAILTWIST. This assertion would be erroneous as well. Since RESPONDENT could foresee the assignment (1.) and did not expressly limit the transfer of the right to arbitrate (2.), it could only be understood as to allow the transfer.

1. RESPONDENT could foresee the assignment

RESPONDENT knew that TAILTWIST would probably assign its right to receive payment. When the contract was concluded, RESPONDENT and TAILTWIST toughly negotiated a clause facilitating the assignment of the right to payment.²⁸ In these negotiations RESPONDENT must have thought of the various legal questions that might arise after an assignment. RESPONDENT - experienced in arbitration²⁹ and used to the assignment of rights³⁰ - should then have realised the effects of incorporating an arbitration clause. RESPONDENT therefore must have taken into account that the right to arbitrate automatically follows the assigned right.

2. RESPONDENT did not insist upon an express clause

Had RESPONDENT wanted to limit the transfer of the right to arbitrate, RESPONDENT should thus have insisted upon an express limitation clause.³¹ The contract however, contains no such limitation. The mere reference to the contracting parties alone does not constitute a contractual limitation. Naturally, the arbitration clause refers only to RESPONDENT and TAILTWIST because no third party could yet be named when the sales contract was concluded. A clause limiting the transfer of the right to arbitrate would have to be expressly stipu-

S.D.N.Y., Oct. 31, 1983, 573 F.Supp. 1464; SCHLOSSER, at 702.

²⁷ Statement of Defence, para. 4.

²⁸ A contractual limitation would not have prevented the transfer of the receivable according to Art. 9 Receivables Convention.

²⁹ Clarification No. 47: "Arbitration is common within the textile trade in which Bobbins is engaged [...]".

³⁰ Clarification No. 14.

lated. Such clause could have been: "This agreement to arbitrate is binding only upon the signatories hereto and not to their successors or assigns".³²

Without such an express clause, RESPONDENT could reasonably only be understood to allow the transfer.

B. RESPONDENT did not conclude the arbitration agreement in specific consideration of TAILTWIST.

RESPONDENT cannot deny the transfer of the right to arbitrate by asserting that it concluded the arbitration agreement in specific consideration³³ of TAILTWIST (*intuitu personae*).

The conditions to rely on this exception to the transfer of the right to arbitrate are rarely met, especially in commercial arbitration.³⁴ In international commercial trade, arbitration is nowadays a usual means of settling disputes.³⁵ The agreement to arbitrate in specific consideration of the co-contractor is the seldom exception. Arbitration agreements are almost never concluded for personal attributes of the counterparty but in the vast majority of cases for the advantages of arbitration.³⁶ The party appealing to this principle would have to establish a particular mutual trust between itself and the co-contractor.

These conditions might possibly be met if RESPONDENT could prove that it had a long business relationship with TAILTWIST and only concluded arbitration agreements with well acquainted business partners. However, RESPONDENT and TAILTWIST had contact only on several prior occasions³⁷ and it was common practice for RESPONDENT to insert arbitration clauses in its contracts.³⁸ It was according to this common practice that RESPONDENT concluded the arbitration agreement and not because of specific attributes of TAILTWIST. RESPONDENT simply wanted to profit from the advantages of arbitration.

There are hence no limitations on the transfer of the right to arbitrate.

IV. RESPONDENT is not harmed by the transfer of the right to arbitrate

RESPONDENT is in no way harmed by the transfer of the right to arbitrate. Thus, RESPONDENT cannot argue that it is not bound to the arbitration agreement on the grounds of debtor protection³⁹. RESPONDENT could only be harmed by characteristics of CLAIMANT that might have a negative influence on the arbitral proceedings.

³¹ ICC Proceeding No. 2626 (1977), J.D.I., 105, 1978, at 981; FOUCHARD/GAILLARD/GOLDMAN, at 427, No.712.

³² BORN, Int. Arb. and Forum Selection Agreements, at 81.

³³ FOUCHARD/GAILLARD/GOLDMAN, at 431: "If the identity of the co-contractor was not a determining factor on signature of the initial arbitration agreement, there is a presumption [...] that such agreement included the initial co-contractor's implicit acceptance of any assignment to a third party".

³⁴ LOQUIN, at 1031.

³⁵ FOUCHARD/GAILLARD/GOLDMAN, at 206, No. 480.

³⁶ *Matter of Lowenthal*, Court of Appeals of N.Y., Dec. 16, 1921, 199 A.D. 39; BGHZ, 68, 356, at 365.

³⁷ Clarification No. 13.

³⁸ Clarification No. 47.

³⁹ *cf.* Art. 15 Receivables Convention.

First, the neutrality of the place of arbitration could be in question if the assignee was located in the country where arbitration would take place.⁴⁰ However CLAIMANT is not located in Danubia, the place of arbitration.⁴¹ Second, the neutrality of the arbitrators could be affected if the assignee was acquainted with one of the pre-chosen arbitrators.⁴² However, RESPONDENT and TAILTWIST did not nominate an arbitrator in advance. Hence, this neutrality is not jeopardised. Third, RESPONDENT could be disadvantaged if CLAIMANT was situated in the country whose laws have been chosen by TAILTWIST and RESPONDENT to be applicable to the sales contract.⁴³ CLAIMANT is not located in Oceania, whose law is applicable to questions not governed by the CISG.⁴⁴

Finally, a financially weaker assignee might not be able to pay his share of the costs of arbitration.⁴⁵ RESPONDENT then would have to bear all the arbitration costs. However, CLAIMANT is a financially strong investment bank, while TAILTWIST is insolvent. Considering this, the transfer of the right to arbitrate was even to the benefit of RESPONDENT.

Consequently, RESPONDENT cannot invoke any principle of debtor protection to avoid arbitration.

V. Written form is not required

RESPONDENT cannot rely on the form requirement provided for in Art. 7 (2) UNCITRAL Model Law to deny the jurisdiction of this Tribunal. First, it is commonly held that the in writing requirement only applies to the initial conclusion of arbitration agreements but not to subsequent transfers.⁴⁶ Second, the form requirement has the purpose to protect the contracting parties. It is to ensure that the parties become aware of the consequences of their agreement.⁴⁷ Since only CLAIMANT did not sign the arbitration agreement, no one else but CLAIMANT could appeal to the lack of written form.⁴⁸ Thus, in this case the form requirement is irrelevant.

To conclude, CLAIMANT can rely on the right to arbitrate since it has been automatically transferred to it and RESPONDENT cannot object to that transfer. Thus, this Tribunal should find that it has jurisdiction to decide on the merits of the instant case.

Unit II: RESPONDENT has to pay \$ 2,325,000 to CLAIMANT

RESPONDENT and TAILTWIST concluded a sales contract in September 1999. The validity of this sales

⁴⁰ GIRSBERGER/HAUSMANINGER, at 146.

⁴¹ CLAIMANT is located in Mediterraneo, Notice of Arbitration No. 1.

⁴² GIRSBERGER/HAUSMANINGER, at 146.

⁴³ *Idem*.

⁴⁴ Notice of Arbitration No. 16, 17.

⁴⁵ GIRSBERGER/HAUSMANINGER, at 146.

⁴⁶ GIRSBERGER/HAUSMANINGER, at 142-3, Fisser v. International Banc, US Court of Appeals, 2nd Circuit, Aug. 1 1960, 282 F.2d 231

⁴⁷ GIRSBERGER/HAUSMANINGER, at 143.

contract is undisputed. On 25 March 2000, TAILTWIST assigned to CLAIMANT the right to receive the remaining payments totalling \$3,255,000 due under the sales contract. These payments consisted of two instalments of which the larger amounts to \$2,325,000. RESPONDENT does not contest the validity of the assignment or CLAIMANT to be the rightful assignee of the right to payment.⁴⁹

However, RESPONDENT now denies that it has the obligation to pay the instalment of \$2,325,000 to CLAIMANT. RESPONDENT claims that by paying \$2,325,000 to TAILTWIST it had been discharged from this obligation. This assertion is incorrect. The payment to TAILTWIST could not discharge RESPONDENT from its obligation to pay to CLAIMANT because RESPONDENT was notified of the assignment before it paid to TAILTWIST. Under the Receivables Convention, the law applicable to the assignment, the notification prevents RESPONDENT from being discharged by payment to TAILTWIST.⁵⁰

Receipt of both the letter of 5 April 2000 (I.) and the fax of 19 April 2000 (II.) precluded RESPONDENT from being discharged by its payment to TAILTWIST. Thus, CLAIMANT is still entitled to payment of \$2,325,000 by RESPONDENT (III.).

I. After receipt of the letter of 5 April 2000 RESPONDENT could not be discharged by payment to TAILTWIST

On 5 April 2000, CLAIMANT sent a letter to RESPONDENT indicating that the right to receive the remaining payments had been assigned from TAILTWIST to CLAIMANT. This letter constitutes what the Receivables Convention refers to as a "notification of assignment" (A.). RESPONDENT signed for the letter on 10 April 2000. It paid to TAILTWIST on 19 April 2000, nine days after receipt of the notification of assignment. According to the Receivables Convention, RESPONDENT is therefore precluded from being discharged by its payment to TAILTWIST (B.).

A. Letter of 5 April 2000 constitutes notification

The letter of 5 April 2000 is a notification because it satisfies all requirements prescribed by the Receivables Convention. It reasonably identifies the assignee and the assigned receivable (1.). RESPONDENT could furthermore understand the content of the letter (2.). The notification is valid, although RESPONDENT was instructed to pay to an account in Mediterraneo instead of an account in Oceania. Thus, RESPONDENT wrongly asserts that the notification is formally defective (3.). The notification is effective because it was received by RESPONDENT (4.).

Finally, the notification is binding since - contrary RESPONDENT's assertion - no confirmation of the assignment was needed (5.).

⁴⁸ BGHZ 71, at 166.

⁴⁹ Statement of Defence, para. 4.

⁵⁰ Art. 17 (2) Receivables Convention: "After the debtor receives notification of the assignment, subject to paragraphs 3 to 8 of this article, the debtor is discharged only by paying the assignee [...]"

1. Assignee and receivable were identified

According to Art. 5 (d) Receivables Convention, notification of the assignment means a "communication in writing that reasonably identifies the assigned receivables and the assignee". What a "reasonable" identification is has to be determined in view of the circumstances.⁵¹

With regard to the receivable assigned, the letter of 5 April 2000 contained the names of the parties to the contract dated 1 September 1999 under which the assigned right arose and the exact figure (\$3,255,000) of the remaining payments due from RESPONDENT to TAILTWIST.⁵² It is hard to imagine a more reasonable identification of the receivable. The same is true with regard to the assignee, whose name and address were printed in the letterhead and whose name occurred twice again in the five-line document.

2. RESPONDENT could reasonably be expected to understand the content of the letter

RESPONDENT asserts that it could not understand the content of the letter because it was written in German and not in English. However, this assertion cannot be upheld. It would contradict common sense to deny the ability to understand the letter solely because it was in German and not in English. Nowhere does the Receivables Convention require that a notification be in the language of the recipient. On the opposite, according to Art. 16 (1) Receivables Convention, the notification must merely be "in a language that is reasonably expected to inform the debtor about its contents". It is impossible to form a general rule which says which language meets this requirement, and there is no case law on Art. 16 Receivables Convention yet which could serve as a guideline.

In order to fill this gap, regard should be taken to the provisions of the CISG. Artt. 8 and 24 CISG deal with questions which arise when parties communicate in different languages.⁵³ These articles serve as a general rule when questions concerning the understanding or interpretation of such declarations arise.⁵⁴ Therefore, the doctrine which evolved under these articles should be applied accordingly in this case.

According to this doctrine, not the particular person (i.e. Mr. Black) is to be considered when assessing what somebody is able to understand, but a reasonable average person of the same kind.⁵⁵ Thus, it is irrelevant that Mr. Black did not understand the letter⁵⁶ - a reasonable person in his position would have understood its content.

a) A reasonable person would have expected a notification

⁵¹ Analytical Commentary, Art. 5 (unchanged), para. 63.

⁵² CLAIMANT's Exhibit No. 2.

⁵³ Schlechtriem/SCHLECHTRIEM, Art. 24, No. 16; Enderlein/MASKOW, Art. 8, para. 3.2.; Honsell/SCHNYDER/STRAUB, Art. 24 No. 30.

⁵⁴ Schlechtriem/JUNGE Art. 8 No. 7; Enderlein/MASKOW Art. 8, para. 1; Staudinger/MAGNUS, Art. 8 No. 1; HONNOLD, Art. 8 No. 107; Bianca/Bonell/FARNSWORTH, Art. 8 para. 2.1.; Honsell/SCHNYDER/STRAUB, Art. 24 No. 30.

⁵⁵ *Wright v. Loon Mountain Recreation Corp. d/b/a*, Supreme Court of New Hampshire, Aug. 22, 1995, 663 A.2d 191; *Christacos v. Blackie's House of Beef Inc.*, District of Columbia Court of Appeals, Dec. 7, 1990, 583 A.2d 191; *Potomac Assocs. V. Grocery Mfrs of America Inc.*, District of Columbia Court of Appeals, Dec. 14, 1984, 485 A.2d 199; SCHLECHTRIEM in FG for Hermann WEITNAUER 1980, at 136, 137; Schlechtriem/SCHLECHTRIEM, Art. 24 No. 16; HONNOLD, Art. 8 No. 107; Honsell/MELIS, Art. 8 No. 9; Staudinger/MAGNUS, Art. 8, No. 17.

⁵⁶ Clarification No. 28.

A reasonable person would have expected a notification of assignment. The person would have been aware of the fact that TAILTWIST would more than likely assign its right to payment. The terms of the waiver of defence clause, by which an assignment is facilitated, had been toughly negotiated. RESPONDENT itself concedes to have known that TAILTWIST "[...] anticipated that it might wish to assign the right to receive payment [...]".⁵⁷ Thus sooner or later, arrival of a notification of assignment was likely.

b) A reasonable person would thus have understood the content of the letter

Expecting such notification, a reasonable person would have understood the content of the letter.⁵⁸ The major part of it would be the same in either English or German: the names of the parties involved, the dates of the contracts - both the sales contract and the contract of assignment - the amount of the receivable assigned, and the account number to which payments should be made. All these indications do not need to be translated to be understood. Additionally, the most important word of the letter was "Zession" - highlighted in the subject heading of the letter.⁵⁹ Apart from the minor spelling difference, it is the same as the English "Cession", which itself means assignment.⁶⁰ This word alone should have alerted RESPONDENT.

An average person, comparable to and in the same position as Mr. Black would have expected an assignment. Thus, receiving a letter containing all the above mentioned indications, such a person should have recognised it as a notification of assignment.

3. Change of state in payment instruction does not affect the validity

RESPONDENT asserts that the notification was "formally defective" due to the "change in the country" to which payment had to be made.⁶¹ However, neither does RESPONDENT give an explanation what a change in the country has to do with a notification nor does RESPONDENT clarify how this change should affect the validity of a notification. When considering the Receivables Convention, no provision can be found which renders a notification formally defective due to a change in the country.

Maybe, RESPONDENT relies on Art. 13 (2 b) Receivables Convention (although this article does not address a notification). This article provides that a "payment instruction [...] may not change [...] the state specified in the original contract in which payment is to be made".

However, if RESPONDENT in fact relies on Art. 13 (2 b) Receivables Convention, RESPONDENT does not take into account that the validity of a notification does not depend on the formal effectiveness of a payment instruction.

According to the definition in Art. 5 d Receivables Convention a notification does not need to specify the place

⁵⁷ Statement of Defence, para. 18.

⁵⁸ *Southern Floridabanc Savings Association v. Professional Investments of America, Inc.*, Court of Appeals Ohio, Sept. 30, 1991, 602 N.E.2d 677; *Municipal Trust and Savings Bank v- Grant Park Community District No. 6*, Appellate Court of Illinois, June 17, 1988, 525 N.E.2d 255: "[...] we are working with [assignee] and would appreciate you making all checks due [to assignee][...]" was considered enough information to constitute an effective notification.

⁵⁹ CLAIMANT's Exhibit No. 2.

⁶⁰ Black's Law Dictionary, cession; <<http://www.dict.leo.org>>.

⁶¹ CLAIMANT's Exhibit No. 4; Statement of Defence, para. 11.

of payment. A notification containing no payment instruction is therefore effective under the Receivables Convention.⁶² Consequently, a notification containing a formally defective payment instruction must likewise be effective.

Furthermore, the Receivables Convention draws a clear distinction between the notification of an assignment and a payment instruction⁶³: Art. 13 and Art. 16 of the Receivables Convention speak of "notification of the assignment **and** a payment instruction" and "notification of the assignment **or** a payment instruction", respectively. Furthermore, Art. 13 Receivables Convention expressly states that "after notification has been sent only the assignee may send such an instruction".⁶⁴ Thus, Art. 13 does necessarily imply that a notification is separate from a payment instruction. Hence, the defect of the one does not affect the other whatsoever.

4. Notification is effective because it was received

RESPONDENT does not contest, that he received the letter of 5 April, hence it is effective according to Art. 16 (1) Receivables Convention.

5. Notification is binding since there is no need for confirmation

RESPONDENT requests this Tribunal to declare "that the notice of assignment was not binding on RESPONDENT until it was **confirmed** by the **assignor**".⁶⁵ This request however has no legal basis.

Nowhere does the Receivables Convention state that a notification of the assignment must be confirmed by the assignor to be binding upon the debtor. The only requirement set up in Art. 17 (2) Receivables Convention is that the debtor receives the notification. As has been shown above, this requirement is fulfilled.

If it was RESPONDENT's intention to express that the assignment had to be adequately **proven**, then it might be relying on Art. 17 (7) Receivables Convention.

According to Art. 17 (7) Receivables Convention, RESPONDENT could have requested "the **assignee** to provide within a reasonable period of time adequate proof" that the assignment has been made. Thus, RESPONDENT should have asked CLAIMANT, if anybody, to provide proof of the assignment. Furthermore, Art. 17 (7) says that the debtor is "**entitled to request**" adequate proof. Hence, unless RESPONDENT explicitly asks, confirmation by CLAIMANT is not necessary. Since RESPONDENT never explicitly requested that CLAIMANT provide such proof, no confirmation was needed. A mere "intention to inquire"⁶⁶ of Mr. Black cannot trigger the duty to confirm the assignment.

As a conclusion, the notification by CLAIMANT is binding on RESPONDENT without any confirmation.

⁶² Art. 5 (unchanged), para. 64: "[...] a notification containing no payment instruction is effective [...]".

⁶³ Analytical Commentary Art. 15 (now Art. 13), para. 124.

⁶⁴ When drafting the Receivables Convention, the Working Group on International Contract Practices followed a proposal made by the USA to draw the clear distinction between payment instruction and notification now incorporated in it. Cf. U.N. Commission on International Trade Law, A/CN.9/WGII/WP.100 (1998).

⁶⁵ Statement of Defence, para. 24.

⁶⁶ Statement of Defence, para. 8.

B. Conclusion: RESPONDENT has not been discharged by payment to TAILTWIST

The letter of 5 April 2000 constitutes an effective and binding notification of assignment. The letter arrived on 10 April 2000, nine days before RESPONDENT paid to TAILTWIST. Mr. Black looked at it on 15 April 2000, four days before RESPONDENT paid to TAILTWIST. In any event, RESPONDENT received the notification before it paid to TAILTWIST. RESPONDENT could therefore no longer be discharged by its payment according to Art. 17 (2) Receivables Convention.

II. After receipt of fax of 19 April 2000 RESPONDENT could not be discharged by payment to TAILTWIST

The letter of 5 April 2000 being a valid notification by itself, RESPONDENT was additionally notified of the assignment a second time on 19 April 2000. On that day RESPONDENT received the translation of the letter of 5 April 2000 by fax. This translation constituted a notification (**A.**). RESPONDENT paid to TAILTWIST also after receipt of this notification of assignment. RESPONDENT could therefore no longer be discharged by paying to TAILTWIST (**B.**).

A. Fax of 19 April 2000 constitutes notification

The fax of 19 April 2000 meets all formal requirement set up in the Receivables Convention (**1.**). RESPONDENT received the fax before it paid to TAILTWIST by sending a payment order (**2.**). Even if this Tribunal holds the notification not to have become effective before RESPONDENT paid to TAILTWIST, RESPONDENT is estopped from relying thereon (**3.**). Had RESPONDENT reacted adequately upon receipt of the letter of 5 April 2000, the fax of 19 April 2000 would have arrived earlier.

1. All constitutive elements are satisfied

The fax of 19 April 2000 contained a translation of the letter of 5 April 2000 and thus had exactly the same content. The fax clearly identified both the assignee and the assigned receivable. RESPONDENT cannot deny the validity of the notification on the grounds of a defective payment instruction. For just the same reasons as have been shown above, the change of state in the payment instruction has no effects on the validity of the notification. Furthermore, there was no need for confirmation.

2. Notification is effective

When Mr. Black read the fax in the morning of 19 April 2000, RESPONDENT is deemed to have received the notification. At this point the notification became effective according to Art. 16 (1) Receivables Convention (**a**). This Tribunal might hold that for a notification to become effective, mere receipt is not sufficient. The Tribunal might find that in addition to the formal receipt of the notification, RESPONDENT must have had the actual possibility to stop the payment. However, even then this Tribunal should find the notification to have become

effective. After receipt of the notification of assignment, RESPONDENT could have easily stopped the payment to TAILTWIST (b).

a) Notification is effective upon receipt (morning of 19 April 2000)

Pursuant to general rules in international commercial trade an organisation has notice of a fact at the time it receives a notification.⁶⁷ An organisation receives a notification whenever it is delivered to its place of business and it can reasonably be expected that the organisation had the possibility to take notice of the communication.⁶⁸ Even if one requires that the person responsible for the contract receives the notification⁶⁹ this requirement is met in the present case.

It cannot be contested that Mr. Black - vice president of RESPONDENT and in charge of the TAILTWIST contract - acted as a receiving agent when reading the fax in the morning of 19 April 2000.⁷⁰ Thus, RESPONDENT is deemed to have received the notification that morning. RESPONDENT sent the payment order directing payment to the account of TAILTWIST in the early afternoon of 19 April 2000, hours after having received the notification of assignment.⁷¹ According to Art. 17 (2) Receivables Convention, once the debtor has received the notification of assignment the debtor can no longer be discharged by paying the assignor. RESPONDENT received the notification before it paid to TAILTWIST.

b) RESPONDENT could have easily stopped the payment to TAILTWIST

If this Tribunal holds that in addition to the formal receipt of the notification, the debtor must have the actual possibility to stop the payment, it should still find the notification to have become effective.

RESPONDENT had in fact such possibility. There was enough time for RESPONDENT to stop the dispatch of the payment order. Any company duly organised would have easily managed to stop the payment under the given circumstances. Only because of gross failures within RESPONDENT's internal organisation did RESPONDENT fail to do so.

Having read the notification of assignment, Mr. Black should have immediately contacted the accounting department to ensure that all payments to TAILTWIST be stopped. He could have easily done so by a simple

⁶⁷ *TranCentral, Inc. v. Emery Worldwide Airlines*, Court of Appeals of Minnesota, Sept. 25, 2001, 2001 Minn. App., Lexis 1078; *Commercial Savings Bank v. City of Jackson*, Court of Appeals of Ohio, Sep. 12, 2000, 00CA007 Lexis 4186; *Commercial Bank "Hansacombank" v. Republic National Bank of New York*, U.S. District Court S.D., Feb. 9, 1999, 97 Civ. 8636, Lexis 1290; BGH WM 63, 250; Schlechtriem/SCHLECHTRIEM, Art. 24 No. 12; Enderlein/Maskow/STROHBACH, Art. 24 No. 4; Bianca/Bonell/FARNSWORTH, Art. 24 No. 2.4; Honsell/SCHNYDER/STRAUB, Art. 24 No. 20; UCC § 1-202 (26).

⁶⁸ *First National Bank of Antioch v. Guerra Construction Company, Inc., et al*, Appellate Court of Illinois, March 24, 1987, 505 N.E.2d 1373; *Commercial Savings Bank v. The City of Jackson*, Court of Appeals of Ohio, Sep. 12 2000, 00CA007 Lexis 4186; RGZ 99, 23; RGZ 142, 402, 407; Herber/CZERWENKA, Art. 24 No. 2; Bianca/Bonell/FARNSWORTH, Art. 24 No. 2.4; Schlechtriem/SCHLECHTRIEM, Art. 24 No. 10; HONNOLD, Art. 24 No. 179; Staudinger/MAGNUS, Art. 24 No. 15; Honsell/SCHNYDER/STRAUB, Art. 24. No. 20; Soergel/LÜDERITZ/FENGE, Art. 24 No. 4.

⁶⁹ *Millkin National Bank of Decatur v. Peter Schwabe Corp.*, Appellate Court of Illinois, Dec. 7, 1988, 531 N.E.2d 1074; *Bank of Salt Lake v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, Supreme Court of Utah, April 29, 1975, 534 P.2d 887; *Chase Manhattan Bank (N. A.) v. State of New York*, Sept. 14, 1976, 357 N.E.2d 366; BGH NJW 65, 965; BGH Urt. v. 8.12.76 - VIII ZR 248/75; OLG Karlsruhe, Urt. v. 20.7.1984; Staudinger/MAGNUS, Art. 24 No. 23; Honsell/SCHNYDER/STRAUB, Art. 24 No. 39.

⁷⁰ Statement of Defence, para. 7.

phone call, an email, by sending a messenger or even going there himself. Had he done so, the payment to TAILTWIST would not have been made.

Instead, Mr. Black followed the "usual procedure"⁷² in a situation which involved a contract of major importance for RESPONDENT: he dictated a memorandum which had to be typed by his secretary, to be signed by him again, to be placed in the out-going mailbox, and to be delivered by the internal messenger service.⁷³ After delivery, it finally had to be taken notice of by the accounting department. This laborious procedure took several hours, too many to prevent the payment.

CLAIMANT has no explanation why Mr. Black followed this procedure, especially since Mr. Black noted in his memorandum that the payment "will soon be due"⁷⁴. It would have been a command of common sense for every reasonable person in Mr. Black's situation, to immediately contact the accounting department on the fastest possible way. Had Mr. Black reacted reasonably, RESPONDENT could have easily stopped the payment to TAILTWIST. CLAIMANT is not the one to bear the risk of RESPONDENT's stoneage internal communication and lack of organisation.⁷⁵

Thus, the notification has in either way - whether or not the actual possibility to stop the payment is required - become effective before RESPONDENT paid to TAILTWIST.

3. RESPONDENT is estopped from relying on notification not being effective

Should this Tribunal hold that RESPONDENT did not have enough time to stop the payment after receipt of the fax, it should nonetheless find that RESPONDENT is estopped from relying thereon.

The only reason why the second notification arrived on 19 April 2000 lies upon RESPONDENT. The fax of 19 April 2000 would have arrived earlier or would have even become unnecessary if RESPONDENT had reacted adequately upon receipt of the letter of 5 April 2000.

Even if RESPONDENT only recognised the names and the figures and did not draw the conclusion that the letter was a notification, the information for itself should have alerted RESPONDENT.⁷⁶ It could at least deduce that one of its major business partners and a high amount of money were involved. Furthermore RESPONDENT should have recognized of the document since it had to sign an acknowledgement of receive.

⁷¹ Statement of Defence, para. 9.

⁷² Clarification No. 30.

⁷³ Clarification No. 30.

⁷⁴ RESPONDENT's Exhibit No. 3.

⁷⁵ *Michelin Tires (Canada) Ltd. v. First National Bank of Boston*, U.S. Court of Appeals, Dec. 4, 1981, 666 F.2d 673 (ruling that an organisation is charged with notice of information in its possession when "reasonable communications routines would disseminate that information to the appropriate individuals").

⁷⁶ *Bay Area Factors v. Target Stores, Inc.*, US District Court for the District of Minnesota, Dec. 2, 1997, 987 F.Supp. 734: Had the account debtor been confused by any ambiguity, the account debtor should have requested more specific information; *Robert Parker's Truck and Trailer Repair, Inc., d/b/a v. Ben P. Speer*, Court of Appeals of Texas, Dec. 11, 1986, 722 S.W.2d 45: "'Actual notice' embraces those things that a reasonably diligent inquiry [...] would have disclosed"; *William V. Woodward et. al. v. Isidor Ortiz et. al.*, Supremecourt of Texas, Feb. 7, 1951, 237 S.W.2d 286; *Madonna v. Tuxedo Enterprises Inc. and Mayrich Construction Corp.*, US District Court E.D.N.Y., Aug. 22, 1997, 975 F. Supp. 448: "[...] the debtor [...] may not disregard the notice but must request the assignee to furnish 'reasonable proof' [...]".

Thus, RESPONDENT should have immediately asked CLAIMANT for clarification (a), or should have had the letter translated (b). Additionally, RESPONDENT made no efforts to revoke the payment order (c).

a) RESPONDENT should have asked CLAIMANT for clarification immediately upon receipt of German notification

If RESPONDENT could not understand the content of the letter of 5 April 2000, RESPONDENT had the duty to promptly ask CLAIMANT for an explanation. Under normal circumstances that would have been the day delivery of the notification was signed for, i.e. 10 April 2000.⁷⁷ Only because there was nobody in charge of the TAILTWIST contract, RESPONDENT failed to send such inquiry. RESPONDENT tries to exculpate this failure by saying that Mr. Black was absent. However, it is irrelevant why RESPONDENT failed to inquire about the letter, since it is not upon CLAIMANT to ensure that RESPONDENT pays attention to its incoming mail. (And even when Mr. Black returned he failed to look at the notification for another two days.⁷⁸ When he finally sent the fax, it was a Saturday. Even banks in Mediterraneo do not work on Saturdays.)

If RESPONDENT had inquired on 10 April or even on 13 April 2000 (the day Mr. Black returned to his office), the translation would have arrived at an earlier date accordingly.

b) RESPONDENT should have had the German notice translated

Alternatively, RESPONDENT should have had the notice translated. On several past occasions had RESPONDENT sent German mail - which was much less important than the notification - to a translation service.⁷⁹ Such mail was only of an informal character - mere inquiries regarding the products made by RESPONDENT. Yet, the important notification of assignment was not sent to a translation service, although RESPONDENT knew that it involved one of its major business partners and a sum of \$3,255,000.⁸⁰

Had RESPONDENT provided a substitute responsible for the Tailtwist contract while Mr. Black was absent, the substitute would have sent the letter to a translation service according to common sense. He would have got an immediate reply and the payment to TAILTWIST would have never been made. Unduly operating without such substitute, RESPONDENT failed to obtain a translation. The consequences of such failures must be born by RESPONDENT.

c) RESPONDENT made no efforts to revoke payment order

RESPONDENT did not even try to revoke the payment order, although it might have been possible under certain circumstances. Even if the account of RESPONDENT was debited and the payment order was sent by RESPONDENT's bank to TAILTWIST's bank⁸¹, that does not necessarily mean the payment could not have been revoked. It would be necessary to inquire the specific payment procedures employed by the involved banks

⁷⁷ Statement of Defence, para. 7.

⁷⁸ Clarification No. 28.

⁷⁹ Clarification No. 10.

⁸⁰ Although the secretary who opened the letter did not fully understand it, she knew that it involved TAILTWIST, cf. Clarification No. 27.

in order to discover if the payment had already been completed. If it was not completed, RESPONDENT could have revoked the payment. RESPONDENT did not address this matter in its statement of defence. Apparently, it did not even consider that it might be able to revoke the payment.

B. Conclusion: RESPONDENT has not been discharged by payment to TAILTWIST

RESPONDENT was effectively notified of the assignment on 19 April 2000. It could therefore no longer be discharged by its payment to TAILTWIST. Even if this Tribunal holds the notification was not effective, RESPONDENT is estopped from relying thereon. Likewise RESPONDENT could not be discharged.

III. RESPONDENT has to pay \$2,325,000 to CLAIMANT

Both, the letter of 5 April and the fax of 19 April 2000 constituted effective notifications respectively.

Alternatively, RESPONDENT is estopped from relying on the fact that the fax arrived too late, because it was only delayed due to RESPONDENT's own behaviour.

After receipt of the notification RESPONDENT could no longer be discharged of its obligation by paying to TAILTWIST.

Hence, CLAIMANT is entitled to receive \$2,325,000 from RESPONDENT.

Unit III - RESPONDENT has to pay \$930,000 to CLAIMANT

TAILTWIST has assigned to CLAIMANT rights to receive payment to the total amount of \$3,255,000. This sum includes the last instalment of \$930,000 after three months of satisfactory performance of the equipment.⁸² RESPONDENT however refuses to pay, alleging that the training provided by TAILTWIST was insufficient and the equipment did not meet the expectations.⁸³ RESPONDENT therefore claims to be entitled to a price reduction amounting to \$930,000.⁸⁴ We will show that he is not.

RESPONDENT has to pay the full sum of \$930,000 to CLAIMANT. First, because there is an undisputed waiver of defence clause in the contract which precludes RESPONDENT from asserting any defences against CLAIMANT (I.). Second, RESPONDENT cannot rely on any alleged non-conformity because it did not give TAILTWIST a notification thereof within a reasonable time (II.).

I. Waiver of defence clause precludes RESPONDENT from asserting any defence

In the sales contract RESPONDENT and TAILTWIST stipulated the following waiver of defence clause:

⁸¹ Clarification No. 32.

⁸² Statement of Defence, para. 20.

⁸³ CLAIMANT's Exhibit No. 5.

"If Taittwist should assign the right to the payments due from West Equatoriana Bobbins [RESPONDENT], the latter agrees that it will not assert against the assignee any defences it may have against Taittwist arising out of defective performance of this contract, unless Taittwist does not in good faith attempt to remedy the deficiency."⁸⁵

This waiver of defence clause strictly bars RESPONDENT from raising against CLAIMANT any defence it may have against TAILTWIST under the sales contract for defective performance.⁸⁶ To this general rule, there is only one exception stipulated in the clause: Only if TAILTWIST does not in good faith attempt to remedy any defect. Since this situation is not given, the waiver of defence clause fully applies.

RESPONDENT never gave TAILTWIST a chance for an attempt to remedy any deficiency because RESPONDENT never informed TAILTWIST thereof. As TAILTWIST was thus ignorant of any deficiency, it naturally could not have attempted to remedy (A.). Alternatively, insolvency of TAILTWIST does not trigger the only exception to the waiver of defence clause. Hence, CLAIMANT can rely on this clause (B.).

A. RESPONDENT never gave TAILTWIST a chance for an attempt to remedy

RESPONDENT cannot argue that the waiver of defence clause is excluded by contending that TAILTWIST had not in good faith attempted to remedy any alleged deficiency. Such attempt would have required that TAILTWIST had been aware of any defect. TAILTWIST was not aware of the alleged deficiencies because RESPONDENT omitted to inform it (1.). RESPONDENT has no excuse for this omission (2.).

1. RESPONDENT failed to inform TAILTWIST about defective performance

When RESPONDENT became aware that the machinery did not entirely meet its expectations, it should have contacted TAILTWIST to inform about the problems. However, RESPONDENT did not do so until 10 January 2001.⁸⁷ Until then, TAILTWIST was totally unaware of any problems with either the machinery or the training. Therefore, it had no reason at all to attempt to solve them.

RESPONDENT cannot argue that the complaint it addressed to the two people of TAILTWIST who remained on site after 20 April 2000 was an appropriate information.⁸⁸ The two people were not authorised to act as receiving agents for TAILTWIST, and it would be erroneous to argue they were. In a similar case, the German Federal Supreme Court (BGH) held that a complaint addressed to a mechanic of the seller who was assembling the machinery at the buyer's works was not sufficient to be regarded as a notification under the CISG.⁸⁹ The

⁸⁴ Statement of Defence, para. 16.

⁸⁵ CLAIMANT's Exhibit No. 1.

⁸⁶ Thus, TAILTWIST and RESPONDENT deviated from the principle that the debtor may assert all defences against the assignee he may have against the assignor. For this principle cf. Art. 18 Receivables Convention.

⁸⁷ Statement of Defence, para. 19: court order to liquidate TAILTWIST from 16 June 2000.

⁸⁸ Clarifications No. 35.

⁸⁹ BGH March 25, 1992, RIW 1992, p. 584, at. 585; Cf. also Staudinger/MAGNUS, Art. 39, No. 54, Schlechtriem/SCHWENZER, Art. 39, No. 14; OLG Karlsruhe in Schlechtriem/MAGNUS, Int. Rspr. z. EKG u. EAG, p. 267; OLG Bamberg, Feb. 23, 1979, RIW 1979, p.566 at 567; HEILMANN, p. 304.

BGH maintained that the mechanic was not the right addressee. His only function was to assemble the machinery - it was not to transmit business communication from the buyer to the seller and vice versa.

Likewise, TAILTWIST's training personnel were not the right addressees for informing TAILTWIST. RESPONDENT must have known that their only job was to provide the training. Of course, RESPONDENT was free to tell them that it regarded their training to be insufficient. However, such criticism may only be seen as an attempt to encourage them to improve the training of their own accord. It cannot be regarded to have been an appropriate information TAILTWIST to react upon and start solving the problems.

2. RESPONDENT has no excuse for not informing TAILTWIST

The reasons which RESPONDENT presents for not informing TAILTWIST cannot be accepted as a reasonable excuse. Contrary to RESPONDENT's allegation that there was no addressee anymore to whom an information could be given, there were even two such addressees (1.). Second, informing TAILTWIST would not have been in vain, because TAILTWIST would have been able to attempt to solve RESPONDENT's problems (2.).

a) RESPONDENT could have notified TAILTWIST or its insolvency administrator

The insolvency proceedings pending since 20 April 2000⁹⁰ were no reason why RESPONDENT could not have notified TAILTWIST of any alleged defect. TAILTWIST continued their business operations until mid-June 2000 under the address known to RESPONDENT⁹¹. Thus, RESPONDENT could have sent any communication to that address. If RESPONDENT really believed that TAILTWIST was no longer reachable, RESPONDENT could have been expected to at least make a reasonable inquiry, e.g. by means of a simple phone call. After all, RESPONDENT informed TAILTWIST's insolvency administrator who acted on behalf of TAILTWIST on 10 January 2001. There is no reason why, eight months before, RESPONDENT could not have addressed the administrator likewise.

b) TAILTWIST could have remedied although it was in insolvency proceedings

Informing TAILTWIST or the insolvency administrator would have been reasonable because - contrary to RESPONDENT's contention - TAILTWIST was able to attempt to remedy the alleged deficiency. It was not until 16 June 2000 that the court ordered that TAILTWIST be liquidated.⁹² RESPONDENT seems to believe that a company terminates all its activities from the moment insolvency proceedings are opened. This belief is wrong. Companies may continue their business operations as long as there is no court order to liquidate the company. Hence, for a period of two months after the opening of the insolvency proceedings, TAILTWIST could have attempted to remedy if RESPONDENT had only given it a chance. Certainly, CLAIMANT would have exercised all its influence on TAILTWIST to make sure that any defects be remedied in good faith, because

⁹⁰ Statement of Defence, para. 14.

⁹¹ Statement of Defence, para. 1.

CLAIMANT has a vital interest in receiving the payment. Such could have been to pay TAILTWIST for remedying any defect, which might have cost less than \$930,000. Therefore, RESPONDENT cannot argue that notifying TAILTWIST would have been in vain from the outset.

B. TAILTWIST's insolvency does not trigger the exception to the waiver of defence clause

Even if RESPONDENT's assertions were true and TAILTWIST could not have attempted to remedy because of the insolvency, the waiver of defence clause would still apply. TAILTWIST's insolvency is not equivalent to a refusal to "in good faith attempt to remedy". The insolvency does therefore not trigger the exception to the waiver of defence clause. This interpretation of the clause and of its exception follows the view a reasonable person⁹³ of the same kind and in the same situation⁹⁴ as the contracting parties would have:

First, under the waiver clause, RESPONDENT should only be entitled to raise defences with regard to defects, if TAILTWIST did not attempt to remedy **in good faith**. TAILTWIST would not have been in good faith had it, e.g., deliberately refused to remedy for no good cause. In such a situation, the exception to the waiver clause would have protected RESPONDENT. However, after the court had ordered that TAILTWIST be liquidated, it was no longer upon TAILTWIST to decide whether or not to attempt to remedy. This situation has to be clearly distinguished from a refusal to remedy as addressed by the waiver clause.

Furthermore, taking into account all the circumstances of the contract, a reasonable person would not interpret the insolvency of TAILTWIST as a failure to attempt to remedy in good faith: The waiver of defence clause, including its exception, was toughly negotiated between TAILTWIST and RESPONDENT.⁹⁵ TAILTWIST desired the waiver of defence clause to sell the receivable for better terms on the credit finance market. It anticipated that such a clause would be sought after because any buyer of a receivable desires broad protection against potential claims from the debtor.⁹⁶ When the parties negotiated the waiver of defence clause, they were aware of this purpose. They knew as well that any limitation to the global scope of the waiver of defence clause would be unusual and would affect the price of the receivable. Therefore, any limitation to the waiver would have had to be expressly stipulated. For the same reason, any stipulated limitation has to be interpreted narrowly. However, the parties did only stipulate the above cited exception. Since they did not include any provision concerning insolvency, insolvency is not covered by this exception and the waiver of defence clause is fully applicable.

To conclude, the waiver of defence clause precludes RESPONDENT from asserting any defence against its

⁹² Statement of Defence, para. 19.

⁹³ C/f Art. 8 (2) CISG also applicable for the interpretation of contracts: SOERGEL, Art. 8, Rz. 10; Staudinger/MAGNUS Rn. 7; Bianca/Bonell/FANSWORTH Art. 8 Bem. 3.1; Enderlein/Maskow/STROHBACH Art. 8 Bem. 1, 2.3; HONNOLD Rn. 105.

⁹⁴ Staudinger/MAGNUS, Art. 8, No. 17.

⁹⁵ Statement of Defence, para. 18.

⁹⁶ In fact, such clauses are common use in international sales contracts, because receivables can be sold for much more if the contract contains a waiver of defence clause: Analytical Commentary on the draft Convention on Assignment of receivables in International Trade, Art. 21, 19.

obligation to pay \$930,000 to CLAIMANT. The waiver of defence clause is not excluded, because TAILTWIST could not even attempt to remedy any defects due to RESPONDENT's failure to notify. Alternatively, insolvency is not equivalent to a refusal to attempt to remedy in good faith, and does not trigger the only exception to the waiver of defence. Thus, RESPONDENT's defences as to any deficiency of either machinery or training are irrelevant.

II. Since RESPONDENT failed to notify TAILTWIST in time, RESPONDENT is precluded from all defences

In the alternative, even if this Tribunal found that CLAIMANT cannot rely on the waiver of defence, RESPONDENT could not invoke the non-conformity of the training and the machinery. Since RESPONDENT failed to notify TAILTWIST of any non-conformity within a reasonable time, it is precluded from reducing the purchase price according to Art. 39 CISG. Likewise, RESPONDENT is not entitled to proceed to a set-off based upon damages, should it amend its counterclaim to this regard.⁹⁷

Under the CISG, a claim based upon a non-conformity of the goods generally requires a notification within a reasonable time to the seller according to Art. 39 (1).⁹⁸ In such notification, the buyer has to address each non-conformity specifically.⁹⁹ If he fails to notify within a reasonable time, or if he fails to notify at all, he loses the right to rely on the lack of conformity and therefore loses all claims based upon such non-conformity.¹⁰⁰ On the instant facts, RESPONDENT should have notified TAILTWIST of both insufficient training and defective machinery (A). Contrary to RESPONDENT's contention, TAILTWIST could have remedied until 16 June 2000. Notifying TAILTWIST would therefore have been appropriate (B). RESPONDENT should have done so within a reasonable time (C). Since TAILTWIST had no reason to believe that its performance was non-conforming, TAILTWIST can rely on RESPONDENT's duty to notify (D). Finally, RESPONDENT has no reasonable excuse for not notifying TAILTWIST (E).

A. Notification was necessary for both training and machinery

TAILTWIST's contractual obligations consisted of the delivery of the machinery and of training RESPONDENT's personnel in the operation, adjustment and maintenance of this machinery.¹⁰¹

Now RESPONDENT might argue that to rely on non-conformity in the training, notification was not necessary. It might argue that Art. 39 (1) CISG only addresses "[...] the lack of conformity of the goods [...]" and that

⁹⁷ According to Art. 4 AAA Rules, RESPONDENT may amend its counterclaim during the arbitral proceedings.

⁹⁸ Staudinger/MAGNUS, Art 39 CISG, No. 1; HONNOLD, No. 255; Schlechtriem/SCHWENZER, Art. 39, No. 6; Bianca/Bonell/SONO, No. 2; HERBER/CZERWENKA, Art.39, No. 2.

⁹⁹ Staudinger/MAGNUS, Art 39 CISG, No. 22; Schlechtriem/SCHWENZER, Art. 39, No. 6; REINHART, Art. 39, No. 6.

¹⁰⁰ REINHART, Art. 39, No. 2; Staudinger/MAGNUS, Art. 39, No. 1; BAASCH ANDERSEN, p. 6 f; FERARRI, Franco, p.154f; OGA, 27.8.99, 1 Ob 223/99x; Secretariat Commentary on Article 37 of the 1978 Draft; KUOPPALA, (4.6.), <http://www.cisg.law.pace.edu/cisg/biblio/kuoppala.html>.

¹⁰¹ CLAIMANT's Exhibit No.5.

training could not be considered a good.¹⁰² Of course, training is no "tangible or movable piece of property", as goods are commonly defined.¹⁰³ However, in this case it would be a mere formalism to contend that therefore no notification was necessary. On the instant facts, defective training required a notification just as a defect in the machinery would, because the training cannot be separated from it. Without the training RESPONDENT would not be able to operate, adjust and maintain the machinery. Thus, the machinery would be useless. Defective training would have reduced the value of the machinery to the same extent as a defect of the machinery itself. Accordingly, even RESPONDENT says that "The result would have been the same in either case."¹⁰⁴ Therefore, it naturally follows that TAILTWIST should have been notified of the defective training just as it should have been notified of a defective machinery.

B. Notification was not in vain until 16 June 2000

RESPONDENT wrongly believed that because of the opening of the insolvency proceedings (20 April 2000) TAILTWIST was generally unable to remedy.¹⁰⁵ For this erroneous belief RESPONDENT regarded a notification useless. As we have already shown above, if TAILTWIST had received a notification, it could have attempted to remedy all alleged non-conformities until 16 June 2000, when TAILTWIST limited its business activities after a court order. Thus, a notification would have been reasonable until 16 June 2000.

C. Notification was not within a reasonable time

RESPONDENT was aware of any non-conformity on 10 May 2000 the latest. When considering whether the notification was within a reasonable time, this day marks the begin of any calculation (1.). The "reasonable time" in which RESPONDENT had to notify TAILTWIST is determined by the stipulated payment procedures (2.). Even if this Tribunal does not hold that the parties stipulated a short notification period, it should take into account the effects of the payment procedures when determining a reasonable period. It should thus find that no period longer than ten days was reasonable (3.). Thus, RESPONDENT should have notified TAILTWIST on 18 May 2000 the latest, which RESPONDENT failed to do (4.).

1. Respondent was aware of any non-conformity the latest on 10 May 2000

RESPONDENT asserts that only in the end of June did it finally realise that it was unable to adjust the machinery on its own, after experimenting with the machinery for more than one month.¹⁰⁶ Of course, this date cannot be considered the starting point of the "reasonable time" period during which RESPONDENT had to notify TAILTWIST of any non-conformity according to Art. 39 (1) CISG. The "reasonable time" already starts to run when the buyer first becomes aware of any non-conformity, and not only when the buyer knows for sure that he

¹⁰² ENDERLEIN/MASKOW, Art. 30, No. 1; Soergel/LÜDERITZ/BUDZIKIEWICZ/SCHÜBLERLANGHEINE, Art. 30, No.4; HONSELL, Art. 30, No. 16.

¹⁰³ Cf. GARNER, A Dictionary of Modern Legal Usage, "goods".

¹⁰⁴ CLAIMANT's Exhibit No. 5.

¹⁰⁵ Statement of Defence, para. 21.

¹⁰⁶ Statement of Defence, para. 15.

is unable to remedy the non-conformity on his own.¹⁰⁷

RESPONDENT was aware of any non-conformity far earlier than in the end of June. It argues that from 20 April 2000 on, the training provided by TAILTWIST was insufficient because then TAILTWIST ordered back two people out of the four who carried out the training.¹⁰⁸ The two remaining people, RESPONDENT maintains, were unable to carry out the training as the sales contract provided for. Hence, from 20 April 2000 on RESPONDENT was aware of the non-conformity of the training.

With regard to the machinery, RESPONDENT maintains that it did not work properly after 10 May 2000, when the training ended and the two remaining people of TAILTWIST had left. RESPONDENT indicates that it is unclear if the machinery did not work properly because of a mechanical failure or because of the insufficient training which precluded RESPONDENT from correctly operating the machinery.¹⁰⁹ If it was due to the insufficient training, the starting point for the notification period to run would have been 20 April 2000. Even if it was due to a mechanical failure, the starting point would have been 10 May 2000 the latest.

2. TAILTWIST and RESPONDENT stipulated a short period in which RESPONDENT had to notify TAILTWIST

Art. 39 (1) CISG does not itself determine the "reasonable time" in which the buyer has to notify the seller of a non-conformity. However, RESPONDENT and TAILTWIST included such determination into the sales contract. They stipulated that the final instalment (\$930,000) was payable only after three months satisfactory performance of the machinery.

If there occurred a defect in the machinery within the three months period, TAILTWIST would have to remedy it. Afterwards, the three months period would start to run again from the beginning. Thus, RESPONDENT would not have to pay \$930,000 as long as there was no continuous three months satisfactory performance.

The primary purpose of this stipulation was to safeguard that RESPONDENT could quickly dispose of a properly running machinery. In order to bring about an end to the three months period and hence to finally receive the \$930,000, TAILTWIST would have undertaken to remedy any defect as fast as possible. Therefore, the stipulation served the interests of RESPONDENT.

However, if an error had occurred, RESPONDENT would have to immediately notify TAILTWIST thereof. Otherwise it would be easy for RESPONDENT to extend the three months period indefinitely and thus never having to pay to TAILTWIST: RESPONDENT could wait to notify TAILTWIST until the three months were almost over, then notify TAILTWIST and finally insist that another three months elapse again before it has to pay. This misuse would of course be unacceptable.

Thus, along with the benefit, the stipulation also laid upon RESPONDENT the duty to notify TAILTWIST as

¹⁰⁷ Soergel/SCHÜBLER-LANGEHEINE, Art. 39 Rn. 5; Staudinger/MAGNUS Art 39 Rn 29; KUOPPALA, (4.4.1.3); Schlechtriem/SCHWENZER, Art. 39, No. 19; ACHILLES, Art. 39, No.8.

¹⁰⁸ Statement of Defence, para. 14.

¹⁰⁹ Statement of Defence, para. 14; CLAIMANT's exhibit No. 5.

fast as possible after an error occurred. RESPONDENT could have easily done so in a few days. We respectfully request this Tribunal to determine one week as a reasonable time in which RESPONDENT should have notified TAILTWIST. This time has also been held reasonable in decisions and by authorities.¹¹⁰

3. Even if the parties did not expressly stipulate a notification period, this Tribunal should determine the reasonable time to be short

Even if this Tribunal holds that the parties did not expressly stipulate a notification period, it should, when considering the circumstances, determine the "reasonable time" to be one week. Art. 39 (1) CISG protects the economic interests of the seller. Thus, TAILTWIST needed to be notified within a short period after an error occurred in order to plan and calculate its future business (a.). RESPONDENT, on the other hand, had no opposing interests which justified an extension of the notification period (b.). Finally, Art. 39 (1) CISG facilitates the seller's burden of proof. Thus, RESPONDENT should have notified TAILTWIST within a short period.

a) The economic interests of TAILTWIST require a short notification period

The purpose of the requirement to notify within a reasonable time is to protect the economic interests of the seller.¹¹¹ If the buyer has not notified the seller within a reasonable time, the seller may rely on the full conformity of the delivered goods and thus not to be confronted with claims from the buyer any longer. This enables him to plan and calculate his business for the future.¹¹² If there occurred any defects, the seller has therefore a vital interest to be notified within a time as short as possible. In these normal situations, the seller needs a notification within a short time in order not to be distracted from his **future** business. On the instant facts, TAILTWIST's interest to be notified within a short time was even stronger. TAILTWIST needed a notification within a short time in order to receive the money from its **past** business and finally complete that business.

b) RESPONDENT has no particular interest not to notify within a short period

Under Art. 39 CISG these interests of the seller prevail over those of the buyer.¹¹³ The buyer may only rely on a longer period if this is justified by particular circumstances.¹¹⁴ However, RESPONDENT has not alleged to have had any interest why it should not notify TAILTWIST within a short period. On the contrary, RESPONDENT would have benefited from notifying TAILTWIST within a short time. The fact that RESPONDENT regarded a notification to be useless at all cannot be mistaken as a reason to extend the period for notification. RESPONDENT knew that TAILTWIST was in financial difficulties. Therefore, it should even be taken for granted that RESPONDENT would notify TAILTWIST as soon as possible in order to have the defect reme-

¹¹⁰ Schlechtriem/SCHWENZER, Art 39, No. 17; SCHLECHTRIEM, int. UN-KR No. 154; HERBER/CZERWENKA, Art. 39, No. 9; Pilz, Int. Kaufrecht § 5 Rn 59 4- 7 working days; REINHART, Art. 39, No. 5: only a few days; ENDERLEIN/MASKOW, Art. 39, No. 3; OLG Bamberg, RIW 1979, p.566 at 567; LG Mönchengladbach of 22 May 1992: one week after discovery; OGH, 27.8.99.

¹¹¹ Staudinger/MAGNUS, Art. 39, No. 3; Enderlein/Maskow, Art. 39, No. 5.

¹¹² Cf. WHITE/SUMMERS, § 11-10 (p. 613): "There is some value in allowing sellers, at some point, to close their books on goods sold in the past and to pass on to other things."

¹¹³ Staudinger/MAGNUS, Art.39, No. 3, Bianca/Bonell/SONO, Art. 39, No. 1.3.

¹¹⁴ Staudinger/MAGNUS, Art.39, No. 4;

died as long as TAILTWIST was still able to.

4. In any event, the reasonable time should be regarded far less than one month

It is sometimes argued that, as a rule of thumb, one month should generally be regarded to be a reasonable time¹¹⁵. This Tribunal should refrain from adopting this period. The purpose of the term "reasonable time" is to provide a flexible scale which takes into account all circumstances of the particular case¹¹⁶. There are as many different reasonable times as there are different cases. Thus, the tendency to generalise the length of the reasonable time contradicts the purpose of the flexible wording of Art. 39 (1) CISG.

On the instant facts, all circumstances indicate that a period much shorter than one month would have been reasonable. Eventually, RESPONDENT was aware of the financial difficulties and should have considered the insolvency of TAILTWIST. Therefore, RESPONDENT should have notified TAILTWIST as fast as possible to secure that TAILTWIST remedied any defect as long as it was able to.

5. RESPONDENT should have notified the latest on 18 May 2000

The latest possible day for the notification period to begin was 10 May 2000 (a Wednesday). If this Tribunal holds that the parties stipulated a short notification period of one week, RESPONDENT should thus have notified TAILTWIST on 18 May 2000 the latest (a Thursday). This would have been long before 16 June 2000 when the court ordered TAILTWIST be liquidated. However, RESPONDENT failed to notify TAILTWIST by eight months, because a notification did not arrive until 10 January 2001. This was far too late for a notification to have arrived within a reasonable time.

D. CLAIMANT can rely on the requirement of notification

At no time had TAILTWIST reason to believe that its performance would not be in conformity with the contract. Therefore, RESPONDENT cannot rely on Article 40 CISG to avoid the consequences of its failure to notify within a reasonable time. RESPONDENT itself submits that any problems with the machinery occurred only after TAILTWIST's personnel had left RESPONDENT's works.¹¹⁷ RESPONDENT has not shown how TAILTWIST could have become aware of any defects in the machinery thereafter.

Likewise, TAILTWIST had no reason to believe that the training of RESPONDENT's staff would not satisfy RESPONDENT. When TAILTWIST ordered back two instructors on 20 April 2000, it still believed in good faith that the remaining personnel could nevertheless render sufficient training. For the rest of the training period, TAILTWIST had no reason to change this belief because RESPONDENT never complained to TAILTWIST that two people could not provide for adequate training.

It is established by case law that the buyer bears the burden of proof if he relies on Art. 40 CISG and maintains

¹¹⁵ Schlechtriem/SCHWENZER, Art. 39, Rn. 17; BAASCH ANDERSEN, p. 10; CISG Database Case: OLG München of 11 March 1998; LG Heidelberg, 2 October 1996; CLOUT Case 289 OLG Stuttgart, 21 August 1995.

¹¹⁶ Schlechtriem/SCHWENZER, Art. 39, No. 16; Bianca/Bonell/SONO, Art. 39, No.

¹¹⁷ Statement of Defence, para. 15.

that the seller had knowledge or could not have been unaware of a defective performance.¹¹⁸ If RESPONDENT alleges that TAILTWIST did not in good faith believe its training was sufficient, RESPONDENT will have to supply proof accordingly. So far, RESPONDENT has not undertaken to do so. Thus, RESPONDENT cannot invoke Art. 40 CISG.

E. RESPONDENT has no reasonable excuse for not notifying TAILTWIST

RESPONDENT has no reasonable excuse for its failure to timely notify TAILTWIST. RESPONDENT has merely asserted that there was no addressee and that a notification would have been futile at all. However, we have already shown that there was in fact an addressee to whom a notification could have been sent. We have furthermore established that a notification to TAILTWIST would not have been useless indeed. Consequently, RESPONDENT cannot invoke Art. 44 CISG to claim a price reduction without notifying TAILTWIST of any defect.

Moreover, RESPONDENT's pretexts would not meet the high requirements of a "reasonable excuse" according to Art. 44 CISG. It is clear from the drafting history of this Article¹¹⁹ that it does not address the circumstances of this case. The purpose of this Article is to protect buyers who lack technical resources for duly examining the goods. They shall not lose their remedies only for technical shortcomings. It is clear that this was not the case for RESPONDENT.

As a conclusion, due to its failure to notify TAILTWIST within reasonable time, RESPONDENT has lost its defences as to defective performance under Art. 39 (1) CISG.

III. Payment is due

Finally, the \$930,000 have become due. RESPONDENT did not give TAILTWIST the possibility to remedy any of the defects it now alleges. Therefore, RESPONDENT is precluded from asserting that for the \$930,000 to be payable, the machinery should have satisfactorily performed for a period of three months. Hence, with regard to the due date of payment, RESPONDENT must be treated as if the machinery had in fact satisfactorily performed for that period, starting on 10 May 2000. Thus, the payment had become due on 10 August 2000.

IV. Conclusion

To conclude, this Tribunal should find that RESPONDENT has to pay \$930,000 to CLAIMANT. The waiver of defence clause alone precludes RESPONDENT from asserting any defences against this obligation. Regardless of the waiver of defence clause, RESPONDENT precluded itself from any defences for its failure to notify TAILTWIST within a reasonable time.

¹¹⁸ OLG Karlsruhe, 25.6.1997 Unilex No.1 U 280/96, Translation in: University of Pittsburgh – The Journal of Law and Commerce, 19 J.L. & Com. 245.

¹¹⁹ Schlechtriem/ HUBER, Art. 44, No. 2; HONNOLD, Secretariat's commentary, p. 648, 718, 728, 743.

Unit IV: CLAIMANT is entitled to interest pursuant to Art. 78 CISG

RESPONDENT failed to pay the two instalments to CLAIMANT, hence CLAIMANT is entitled to interest according to Art. 78 CISG from the time the payment was due respectively.¹²⁰ The fourth instalment (\$ 2,325,000) was due on 5 July 2000, the day CLAIMANT rectified its defective payment instruction. The fifth instalment (\$ 930,000) was to be paid on 10 August 2000 since the three month period of satisfactory performance was over.

CLAIMANT is thus entitled to interest on both instalments from the day on each was due respectively.

Request for Relief

In view of the above submissions, may it please this Tribunal:

first, to find that it has jurisdiction on the merits of the instant case;

second, to find that RESPONDENT has to pay \$3,255,000;

third, to find that RESPONDENT has to pay interest at a rate to be determined by this Tribunal;

fourth, to find according to Art. 31 AAA Rules that RESPONDENT bears the costs of this arbitration.

Heidelberg, in December 2001

¹²⁰ Schlechtriem/EBERSTEIN/BACHER, Art. 78 No. 11; Staudinger/MAGNUS, Art. 78 No.10.