

NINTH ANNUAL WILLEM C. VIS

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

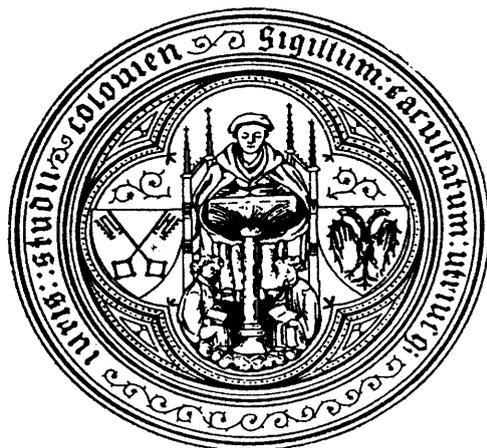
2001 - 2002

MEMORANDUM

for

Futura Investment Bank

- CLAIMANT -



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

INSTITUTE OF INTERNATIONAL COMMERCIAL LAW
PACE UNIVERSITY SCHOOL OF LAW
WHITE PLAINS, NEW YORK
USA

INTERNATIONAL CENTER FOR DISPUTE RESOLUTION
AMERICAN ARBITRATION ASSOCIATION

CASE No. MOOT 9

LEGAL POSITION

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)

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LIST OF ABBREVIATIONS

AAA-Rules	American Arbitration Association International Arbitration Rules
AC	Appeal Court
AG	Amtsgericht (German District Court)
Art. / Artt.	article / articles
BayObLG	Bayerisches Oberstes Landesgericht (Court of Appeals for Selected Matters in Bavaria)
BG	Bundesgericht (Swiss Federal Court)
BGH	Bundesgerichtshof (German Federal Court of Justice)
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen (Decisions of the German Federal Court of Justice in civil matters)
cf.	<i>confer</i> (compare)
Ch. D.	Chancery Division
Ch. C.	Chambre Civile (Civil chamber)
Cir.	Circuit
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CLOUT	Case Law on UNCITRAL Texts (Internet database), edited by the UNCITRAL Secretariat
Cass.civ.	Cassation Civile (French Supreme Court in Civil Law)
Co.	Company
comp.	compare
Corp.	Corporation
DB	Der Betrieb
D.Del.	District Court of Delaware
DM	Deutsche Mark
ed. / Ed.	Edition / Editor
e.g.	<i>exemplum gratia</i> (for example)
EDNY	Eastern District Court New York

et seq.	<i>et sequentes</i> (and following)
fn.	Footnote
F.Supp.	Federal Supplement
ICC	International Chamber of Commerce
idem	same
IHR	Internationales Handelsrecht
Int.A.L.R.	International Arbitration Law Review
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
J.Int'l Arb.	Journal of International Arbitration
Lloyd's Rep.	Lloyd's Law Report
LG	Landgericht (District Court)
ML / Model Law	UNCITRAL Model Law on International Commercial Arbitration
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
N.Y.S.2d	New York Supplement Second Edition
No.	number
NJW	Neue Juristische Wochenschrift
NJW-RR	Neue Juristische Wochenschrift – Rechtsprechungsreport
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (Regional Court of Appeal)
p. / pp.	page / pages
para. / paras.	paragraph / paragraphs
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Receivables Convention	Draft Convention on the Assignment of Receivables in International Trade
Rev. Arb.	Revue de l'Arbitrage
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen (Decisions of the predecessor of the BGH in civil matters)
RIW	Recht der internationalen Wirtschaft
SeuffA	Seuffert's Archiv

SDNY	Southern District Court of New York
SIPL	Swiss Federal Statute on International Private Law
SJZ	Schweizerische Juristen- Zeitung
supra	above
SZIER	Schweizerische Zeitschrift für Internationales und Europarecht
TranspR-IHR	Beilage Internationales Handelsrecht zur Zeitschrift Transportrecht
ULIS	Uniform Law on the International Sale of Goods
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UN-Doc.	UN-Documents
UNIDROIT	Institut International pour l'Unification du Droit Privé (International Institute for the Unification of Private Law)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (1994)
UNILEX	International Case Law & Bibliography on the UN Convention on Contracts for the International Sale of Goods (looseleaf & disk database), edited by Michael Joachim Bonell at the Center for Comparative and Foreign Law Studies, Irvington-on-Hudson, New York.
v.	<i>versus</i> (against)
VersR	Versicherungsrecht
Vol.	Volume
WM	Wertpapier-Mitteilungen
YCA	Yearbook Commercial Arbitration
ZRVgl	Zeitschrift für Rechtsvergleichung (Österreich)

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STATEMENT OF FACTS

- 01 September 1999** TAILTWIST Corp. (hereafter: TAILTWIST) signed the sales contract with West Equatoria Bobbins S.A. (hereafter: RESPONDENT). It contained the purchase of „Spin-a-Whizz“ equipment, installation and setting to work on site and a special introductory training for RESPONDENT`s personnel for three weeks. The price of \$9,300,00 was to be paid in five separate installments. 20% with order, 20% on completion of tests at work, 25% on delivery on site, 25% on completion of commissioning on site, the balance of 10% after three months satisfactory performance.
- 29 March 2000** TAILTWIST assigned to Futura INVESTMENT Bank (hereafter: CLAIMANT) the right to receive the remaining two payments.
- 05 April 2000** Notice of Assignment, containing essential information written in German. The attached payment order included a change in the country to which RESPONDENT had to make the further payments.
- 10 April 2000** Notice of Assignment received by RESPONDENT.
- 15 April 2000** Vice-President of RESPONDENT (hereafter: Mr. Black) send a fax to CLAIMANT asking for nature of document.
- 18 April 2000** Installation of equipment at RESPONDENT`s site is completed. RESPONDENT`s consultant certified that equipment had been installed and that the commissioning tests had been completed.
- 19 April 2000 (morning)** Reply of CLAIMANT, via fax and mail, stating that the earlier communication was a notice of assignment of the right of payment from TAILTWIST to CLAIMANT. English translation of notice of assignment was attached.
- 19 April 2000 (early afternoon)** Accounting department of RESPONDENT send requisite payment order to the Equatoria Commercial Bank directing payment of \$2,325,00 to TAILTWIST.
- 19 April 2000 (late afternoon)** Mr. Black sends memorandum to accounting department in order to stop any further payments to TAILTWIST until further notice.
- 20 April 2000** TAILTWIST enters insolvency proceedings and orders two of the training personnel to return immediately.
- 10 May 2000** The remaining personnel of TAILTWIST leaves RESPONDENT`s site.
- 13 June 2000** Insolvency administrator recommends to terminate all further business activities of TAILTWIST.
- 16 June 2000** Court accepts recommendation.
- 05 July 2000** Formal invalidity of payment instruction was rectified by CLAIMANT.
- 10 January 2001** RESPONDENT declares 10% reduction of price in letter to insolvency administrator because the delivered equipment is not working properly.

APPLICABLE LAW

Since CLAIMANT and RESPONDENT have provided for arbitration under the American Arbitration Association¹, the arbitral proceedings will be governed by the **UNCITRAL Model Law on International Commercial Arbitration** and the **American Arbitration Association International Arbitration Rules**.²

Furthermore the **Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958** applies to the present arbitration, since it was adopted by all parties.³

The **United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG)** is the law applicable to the contract by virtue of the parties` agreement.⁴ For all questions not governed by the CISG the contract is subject to the law of Oceania.

To issues regarding the assignment of the contractual right to payment the **Draft Convention on the Assignment of Receivables in International Trade** is applicable.

INTRODUCTION

CLAIMANT submits the following legal positions and respectfully requests the tribunal to decide accordingly: The Tribunal has jurisdiction to hear the claim brought against RESPONDENT [**First Issue**]. TAILTWIST effectively assigned the right to payment of the remaining two installments (\$3,255,000) to CLAIMANT. The latter is therefore entitled to demand payment of the fourth installment at an amount of \$2,325,000 [**Second Issue**], as well as payment of the fifth installment at an amount of \$930,000 [**Third Issue**]. Furthermore, RESPONDENT is obliged to pay interest on the above claims [**Fourth Issue**]. CLAIMANT requests the Tribunal to order RESPONDENT to bear the costs of arbitration according to Art. 31 of the AAA Rules [**Fifth Issue**].

¹ Notice of arbitration, section B IV para. 13; Claimant`s Exhibit No. 1.

² Claimant`s Exhibit No. 1.

³ Notice of arbitration, B V para. 19.

⁴ Claimant`s Exhibit No. 1.

FIRST ISSUE : THE ARBITRAL TRIBUNAL HAS JURISDICTION

The Tribunal has jurisdiction to hear this dispute. A valid arbitration agreement in the sense of Art. 7(1), (2) ML exists between CLAIMANT and RESPONDENT. The validity of the arbitration clause in the original contract between TAILTWIST Corp. and RESPONDENT is uncontested. The arbitration agreement is in writing⁵ and fulfills the requirements of Art. 7 ML. TAILTWIST effectively assigned the right to payment of the remaining two installments (\$ 3,255,000) under the contract with RESPONDENT to CLAIMANT. In its Statement of Defense, RESPONDENT has explicitly recognized that this assignment was effective.⁶ According to the provisions governing jurisdiction of the Tribunal, the arbitration agreement concluded for this claim is transferred as well [A]. There are no special circumstances which might justify an exception from the principle of automatic transfer in the case at hand [B].

A. The provisions governing jurisdiction of the Tribunal provide for an automatic transfer of the arbitration agreement

Under the rules applicable to jurisdiction of the tribunal the assignment of the claims leads to an automatic transfer of the arbitration agreement. That is so irrespective of whether the Tribunal determines its jurisdiction on the basis of specific rules of international arbitration or, in line with the more traditional view, on the basis of the law of the place of arbitration. International arbitration practice [I] as well as the UNCITRAL Model Law applicable in Danubia [II] provide for an automatic transfer of the arbitration agreement.

I. Automatic transfer of the arbitration agreement as a general principle of international arbitration law

There is a growing tendency in international arbitration to submit the validity of arbitration agreements to their own specific rules without reference to a conflict-of-law system or a designated substantive law.⁷ One such specific rule governing arbitration clauses is the general principle of automatic transfer which is well recognized in both civil and common law countries.

The French *Court de Cassation*⁸, for example, held in a recent decision in clear terms that “the international arbitration agreement, the validity of which is based exclusively on the will of the parties, is

⁵ Claimant’s Exhibit No.1.

⁶ Statement of defense, para. 4.

⁷ *SA Burkinabe des ciments et matériaux v. société des ciments d’Abidjan*, CA Paris 1^{re} Ch.C., Rev. Arb. 2001, 165 (168) ; Fouchard/Gaillard/Goldman, at paras. 435 et seq.

⁸ *Banque Worms v. Bellot*, Cass. 1^{er} Ch. C., 05.01.1999, No. S. 96-20.202, Rev. Arb. 2000, 85 (86): « la clause d’arbitrage international, valable par le seul effet de la volonté des contractants, est transmise au cessionnaire avec la créance, telle que celle-ci existe dans les rapports entre le cedent et le débiteur cédé », partially translated in:

assigned together with the rights [to which it relates], in the same shape and form as those rights existed between the assignor and the original co-contractor”. The *District Court of New York* went even further and stressed that it is a “basic principle in case law” that “an assignee (...) is bound by the remedial provisions bargained for between the original parties to the contract”.⁹ These decisions exemplify the legal position held in most common law and civil law countries which also follow the *rule of automatic transfer* such as France¹⁰, Switzerland¹¹, Germany¹², Sweden¹³, England¹⁴ and the USA¹⁵, just to mention a few.

The main arguments for this rule become particularly evident in the Court decisions *C.C.C. Filmkunst*¹⁶ and *Hosiery Mfg. Corp. v. Goldston*.¹⁷

In *C.C.C. Filmkunst*¹⁸, the *Paris Court of Appeals* justifies the automatic transfer with the economic value of the arbitration clause. It held that the initial signatory of an arbitration agreement was bound by that agreement towards the assignee of film exploitation rights created by the contract containing the arbitration clause. The Court held that the assignment “necessarily implies that the assignor transfers the benefit of the arbitration clause – which forms part of the economics [of the] contract – to the assignee”.¹⁹

The argument is cogent, since both the assignee and the initial party generally have an economic interest in arbitration. For both parties arbitration has clear advantages over litigation in national courts.²⁰ Arbitration employs expertise, encourages settlement, expedites discovery and trial, and reduces the enormous costs

Fouchard/Gaillard/Goldman, p. 432; see also *SA Burkinabe des ciments et matériaux V. société des ciments d’Abidjan*, Rev. Arb. 2001, 165.

⁹ *Banque de Paris et des Pays-Bas v. Amoco Oil Company*, 31.10.1983, SDNY 573 F.Supp. 1464 (1469).

¹⁰ *SA Burkinabe des ciments et matériaux v. société des ciments d’Abidjan*, CA Paris 1^{re} Ch.C., Rev. Arb. 2001, 165; *Banque Worms v. Bellot*, Cass. Le 1^{er} civ., 05.01. 1999, No. S. 96-20.202, Rev. Arb. 2000, 85; *Société Taurus Films v. Les Film du Jeudi*, Cass. 1^{er} Ch.C., Rev. Arb. 2000, 280.

¹¹ BGE 93 I 50 (1967).

¹² RGZ 56, 182; RGZ (1935) 146, 52; BGHZ 68, 356; BGH WM 1976, 331; BGH WM 1978, 999; BGH NJW 1979, 2567; BGHZ 77, 32; BGH NJW 1980, 2022 (2023).

¹³ *MS Emja Braack Schiffahrts KG v. Wärtsila Diesel Aktiebolag*, Swedish Supreme Court 15.10.1997, Case No. “Ö 3174/95”, Nytt Jurisdixkt Arkiv 1997, 866, also in Int.A.L.R. 1999 (summary in English), N-2 and Rev. Arb. 1998, 431 (in French).

¹⁴ *Rumput (Panama) SA and Belzetta Shipping Co. SA v. Islamic Republic of Iran Shipping Lines (“The LEAGE”)* 2 Lloyd’s Rep. (1984) 259.

¹⁵ *Banque de Paris et des Pays-Bas v. Amoco Oil Company*, 31.10.1983, SDNY 573 F.Supp. 1464; *Crompton-Richmond Co. V. William Nelligan, Inc.*, 151 N.Y.S.2d 154, 157 (1956); *Lippus v. Dahlgren Manufacturing Company*, EDNY (26.9.1986) XIV YCA (1989) 758.

¹⁶ *C.C.C. v. Filmkunst*, CA Paris, 28.01.1988, 1988 Rev. Arb. 567.

¹⁷ 238 N.Y. 2d 22, 143 N.E. 779 (1924).

¹⁸ *C.C.C. v. Filmkunst*, CA Paris, 28.01.1988, 1988 Rev. Arb. 567; see also BGH NJW 1978, 1585 (1586): arbitration agreement is considered to be “a quality of the assigned right”.

¹⁹ *C.C.C. v. Filmkunst*, CA Paris, 28.01.1988, 1988 Rev. Arb. 567 (568); translated in *Fouchard/Gaillard/Goldman*, p. 432

²⁰ See *Van den Berg*, p. 1 et seq.

and burdens of judicial litigation.²¹ The neutrality of the arbitral tribunal ensures a procedure that is mutually acceptable. Due to the 1958 New York Convention enforcement of arbitral awards is facilitated.²²

For these main reasons, an arbitration agreement has a specific economic value which both parties benefit from. In order to preserve the economic balance of the two contracts the assignor concluded, the assignee as well as the initial copartner must be able to invoke the arbitration agreement.

In *Hosiery Mfg. Corp. v. Goldston*²³, this point is further emphasized by the statement that neither party is allowed to deprive the other of the advantages of arbitration. The *Court of Appeals of New York* referred the assignee to arbitration because "arbitration contracts would be of no value if either party thereto could escape the effect of such a clause by assigning a claim subject to arbitration between the original parties to a third party".²⁴

This consideration acknowledges in particular the parties' expectations. If one of the original parties assigns its rights out of the contract to a third party and the arbitration clause is not automatically transferred, arbitration contracts would become subject to one party's arbitrary decision. Parties concluding arbitration agreements rely upon the exclusion of litigation. The option for arbitration was incorporated into a legal agreement which must be binding. Being able to easily escape this agreement by assigning rights to another party would contravene its legal validity. As a consequence, there is the general rule in international arbitration that arbitration agreements automatically follow the assigned right.

II. The principle of *automatic transfer* underlies the Receivables Convention

The application of the Model Law does not lead to a different conclusion. According to the more traditional view that the law of the place of arbitration is relevant, the Model Law as part of the Danubian Law²⁵ is applicable. The ML itself does not contain any substantive provisions dealing with assignment.

It can however be deduced from Art. 34 (2) (a) (i) ML that all issues related to the validity, e.g. the conclusion and the assignment, of the arbitration clause are governed by the law to which the parties have subjected the arbitration agreement.²⁶ This choice-of-law-rule is also applicable to the transfer of the arbitration clause. The assignment of the clause is a question of its validity between RESPONDENT and CLAIMANT. In the original contract RESPONDENT and TAILTWIST have not explicitly stipulated a

²¹ Cf. for a balanced evaluation *Born*, p. 7 et seq.

²² *Roth, Wulff, Cooper*, p. 3-4 et seq; *Berger*, Arbitration, p. 726 et seq.

²³ 238 N.Y. 2d 22, 143 N.E. 779 (1924).

²⁴ *Idem*, 143 N.E. at 780.

²⁵ Notice of Arbitration, V.

²⁶ *Holtzmann/Neuhaus*, Art. 16, Commentary, p. 481; *Russel on Arbitration*, p. 72; see also Art. V (1) (a) New York Convention;

law to govern the validity of the arbitration clause so that Oceanian Law in the form of the Receivables Convention applies.

The *principle of automatic transfer*, though not explicitly regulated, underlies the Receivables Convention. It is particularly expressed in Art. 10 (1) and Art. 15 (1) Receivables Convention.

Art. 10 (1) Receivables Convention regulates the automatic transfer of security rights attached to the claim: "A personal or property right securing payment of the assigned receivable is transferred to the assignee without a new act of transfer". This provision is based on the well established doctrine of automatic transfer of accessory rights attached to the assigned right.²⁷ The automatic transfer of accessory rights has been developed in the *jus commune* originating in Roman Law. According to this doctrine, the contractual right is assigned together "with all rights and advantages".²⁸ This principle aims at granting the assignee the same legal position that the assignor had before. That means, for example, that a third person's guarantee for payment in favor of the assignor is automatically transferred to the assignee.

The principle behind Art. 10 (1) Receivables Convention is applicable to arbitration agreements as well. Both courts and legal commentators of civil law countries regard the arbitration agreement as an accessory right which attaches to the contractual right²⁹. The German *Bundesgerichtshof* (Federal Supreme Court), for example, describes the arbitration agreement as a "quality of the assigned right".³⁰ As established above, the agreement on arbitration has an economic value which is directly linked to the assigned right.³¹ Thus the right to arbitrate accessorially follows the contractual right. Its sole purpose is to resolve disputes arising from this particular contract.³²

The *doctrine of severability* does not lead to a different conclusion. According to this doctrine the main contract and the arbitration clause are treated as separate contracts in order to sustain the tribunal's jurisdiction in cases of invalidity or avoidance of the contract containing the arbitration agreement.³³ This separation, however, does not prevent the arbitration clause from being an accessory right transferred without a new act of assignment. The security rights the transfer of which is explicitly provided for in Art. 10 (1) Receivables Convention are also embodied in an dependent contracts.

²⁷ Analytical Commentary to the draft Convention on Assignment, para. 105.

²⁸ BayObLG SeuffA 63 Nr. 130.

²⁹ Germany: BGH NJW 1980, 2022 (2023); France: App. Paris (28.3.1988 and 20.4. 1988); Switzerland: BGE 93 I 50 (1967); Schlosser, p. 326; Raeschke-Kessler/Berger, p. 93.

³⁰ BGH NJW 1978, 1585 (1586).

³¹ see supra, A.1.

³² Girsberger/Hausmaninger, p. 137.

³³ Berger, p. 28; Girsberger/Hausmaninger, p. 137; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 US 395, 18 L.Ed. 2d 1270, 87 S.Ct 1801 (1967).

Art. 15 Receivables Convention aims at protecting the debtor's previous legal position. Pursuant to paragraph (1) "an assignment does not, without the consent of the debtor, affect the rights and obligations of the debtor (...)". Since neither rights nor obligations are interfered with, its legal position is kept unchanged. Consequently, the debtor does not benefit from the assignment nor does he suffer any disadvantages. If, however, the arbitration agreement did not follow the assigned claim, the debtor could escape illegitimately his obligation to arbitrate. Allowing him to choose between litigation and arbitration would enhance his rights and concurrently diminish his obligations. This would contradict the concept of the Receivables Convention that the balance of rights and obligations shall not be changed by an assignment. Being bound to the arbitration agreement neither deprives RESPONDENT of its right to arbitrate nor does it give RESPONDENT the possibility to evade this contract. This is the result intended by Art. 15 (1) Receivables Convention.

B. No special circumstances justify an exception from the general principle of automatic transfer

In the case at hand, there is no reason to deviate from the general principle of automatic transfer. An exception from the general principle of automatic transfer can only be made under special circumstances, where the parties have explicitly or implicitly excluded the assignability of the arbitration agreement.³⁴

The original parties did not explicitly exclude the assignability of the arbitration agreement [I]. There exist no actual circumstances outside the clause which would create a personal relationship either [II]. Finally, the change of the party does not have any negative effect on RESPONDENT from an objective point of view [III].

I. Assignment of the arbitration clause is not explicitly excluded

Since a restriction is exceptional in international business, the arbitration agreement must state explicitly that successors and assignees are excluded.³⁵ If the parties wish to restrict the clause, they must clearly indicate that their agreement is of personal nature and hence shall not be transferred to a third party. That is even more so in cases, like the one at hand, where parties anticipated an assignment.

³⁴ *MS Enja Braack Schiffahrts KG v. Wärtsila Diesel Aktiebolag*, Swedish Supreme Court 15.10.1997, Case No. "Ö 3174/95", Nytt Jurisdixkt Arkiv 1997, 866; also in Int.A.L.R. 1999, N-2, Rev. Arb. 1998, 431 and YCA 1999, 317.

³⁵ *Mustill/Boyd*, p. 138; ICC Award No. 2626 (1977), in: Collection of ICC Arbitral Awards 1974-1985, p. 316; *Rubino-Sammartano*, p. 291; Switzerland: Swiss Federal Tribunal, 1st Civil Division, 09.04.1991, reprinted and translated in *Werner*, 8 J.Int'l Arb. 21-22 (1991); Appellationshof of the Canton of Berne, 04.05.1973, 111 ZbJV 200, 202 (1975); Obergericht of the Canton of Zürich, 02.03.1981, 80 ZR 191, 192 (1981); Germany: BGH NJW 1976, 852 (1978); Austria: RGZ 56, 183 (1904).

In such cases an unequivocal wording that the claim or arbitration clause are not assignable is required.³⁶ No such explicit exclusion was inserted in the contract between RESPONDENT and TAILTWIST, though they anticipated an assignment.³⁷ The mentioning of names just refers these two parties to arbitration and can by no means restrict the scope of the application.

In so far it is irrelevant that RESPONDENT, as alleged in its Statement of Defense, might have actually intended to restrict the clause to the original parties. In civil and common law systems as well as in international and transnational law statements of a party are to be interpreted from the point of view of a reasonable person in the position of the other party, who has to consider the objective meaning as well as all the circumstances.³⁸ In light of the circumstances of the case no reasonable person can assume that assignees should be excluded. The parties specifically negotiated the agreement not to assert defenses against a future assignee and regulated the legal consequences meticulously.³⁹ RESPONDENT could easily foresee that it would have to make payments to a third party and that disputes might arise.

Furthermore, the unspoken intention of one party can only be taken into account if it is shared by the other party so that there is a "meeting of minds".⁴⁰ It cannot be assumed that TAILTWIST wished to restrict the scope of application of the clause, since this would contravene its interests. The claim can be assigned much more easily together with the arbitration clause because of its higher economic value.⁴¹ A reasonable person knowing the customs in international trade would not assume a personal character of an arbitration agreement just because it contains the parties' names.

II. Actual circumstances do not suggest a personal relationship

Apart from that, the actual circumstances of the case do not suggest a personal relationship either. Generally, the arbitration clause by itself does not indicate a personal relationship.⁴²

³⁶ Cases with non-assignment clauses see Swiss Federal Tribunal, 1st Civil Division, 09.04.1991, reprinted and translated in *Werner*, 8 J.Int'l Arb. Nr. 2 (1991), p. 18 (21-22); *Tweeddale/Tweeddale*, p. 96 with reference to the unpublished case *Bawechem Ltd v. MC Fabrications* (1998); In *United States v. Panhandle Eastern Corp.*, 672 F.Supp. 149 (D.Del. 1987) the assigned was deemed not to be bound to the arbitration clause because the assignment contract excluded explicitly any transfer of obligations to the assignee. An US-American court even held that the arbitration agreement was nevertheless validly assigned where only the right but not the power to assign was excluded: United States Court of Appeals, 3rd Cir. 1999, No. 98-6297, 181 Federal Reporter, 3rd Series, pp. 435-446

³⁷ Procedural Order No. 2, para. 11.

³⁸ *Zweigert/Kötz*, p. 404.

³⁹ Procedural Order No. 2, para. 11.

⁴⁰ *Zweigert/Kötz*, p. 402; Art. 4.1 of the UNIDROIT principles, Art. 8 CISG and Art. 2:102 of the Principles of European Contract Law contain similar provisions which are based on this concept: The intention of a party to be legally bound by a contract is to be determined from the party's statement or conduct as they were reasonably understood by the other party.

⁴¹ See supra A.I.

⁴² The Swedish Supreme Court underlines that personal relationships of parties are exceptional in business and trade: *MS Emja Braack Schiffahrts KG v. Wärtsila Diesel Aktiebolag*, Swedish Supreme Court 15.10.1997, Case No. "Ö 3174/95", Nytt Jurisdixkt Arkiv 1997, 866; also in Int.A.L.R. 1999, N-2, Rev. Arb. 1998, 431 and YCA 1999, 317.

In *Shayler v. Woolf*⁴³, the *Court of Appeals* of England justified the automatic transfer by stating that “on any ordinary principle it [the arbitration clause] certainly is not a personal covenant”.⁴⁴ The Court especially emphasized that the expression “the arbitration clause is a personal covenant” in *Cottage Club Estates v. Woodside Estates Co.*⁴⁵ only referred to the facts of that particular case and “did not intend to lay down any such general proposition”.⁴⁶ Lord Greene explicitly stressed that “an arbitration clause is assignable in its nature”.⁴⁷

RESPONDENT always agrees on arbitration.⁴⁸ This shows that is rather interested in the process than in the identity of its partner. RESPONDENT therefore cannot argue that it chose to arbitrate with TAILTWIST because of an alleged personal relationship.

In order to establish that the identity of the other party was the decisive consideration for entering into the arbitration agreement, the initial party has to set forth that it laid emphasis on the assignor’s good faith and procedural loyalty.⁴⁹ Furthermore, it has to prove that the assignee does not share these qualities.⁵⁰ RESPONDENT did not argue that TAILTWIST’s integrity was the paramount reason to choose arbitration and cannot claim that CLAIMANT lacks these qualities. CLAIMANT is experienced in arbitration as well⁵¹, acts in good faith, and most importantly, is able to finance the arbitral procedure. TAILTWIST, on the other hand, is insolvent and can no longer ensure that arbitration proceedings will run smoothly. In the end, CLAIMANT is an even arbitration partner than TAILTWIST.

III. Change in party does not have negative effects on RESPONDENT from an objective point of view

Finally, RESPONDENT is not harmed by an automatic transfer of the arbitration agreement. An automatic transfer of the arbitration clause generally protects the debtor. Although the obligee has changed, the debtor is not forced to litigate but can arbitrate the assigned claim as initially intended. It can still recur to the chosen method of dispute resolution. The debtor is sufficiently protected if he is released from the duty to arbitrate in cases where the original neutral setup of arbitration conditions is disturbed⁵².

⁴³ *Shayler v. Woolf* (1946) Ch. 320; 115 L.J.Ch.D. 131.

⁴⁴ *Shayler v. Woolf* (1946) Ch. 320 (324).

⁴⁵ (1928) 2 KB 463, 466.

⁴⁶ *Shayler v. Woolf* (1946) Ch. 320 (323).

⁴⁷ *Shayler v. Woolf* (1946) Ch. 320 (323); confirmed in: *Montedipe SpA v. JTP-RO Jugotanker* (1990) 2 Lloyd’s Rep 11 (18); *Schiffahrtsgesellschaft Detler von Appen GmbH v. Voest Alpine Intertrading GmbH* (1997) 2 Lloyd’s Rep 279.

⁴⁸ Procedural Order No. 2, para. 11.

⁴⁹ *Fouchard/Gaillard/Goldman*, p. 434 .

⁵⁰ *Fouchard/Gaillard/Goldman*, p. 434 .

⁵¹ Procedural Order No. 2, para. 47.

⁵² *Girsberger/Hausmaninger*, S. 147.

The initial parties did neither choose arbitrators in advance, who used to have a personal or business relationship with CLAIMANT, nor does CLAIMANT come from the state of the seat of the arbitration proceedings. The neutral setup of arbitration conditions is not disturbed in any other way either. RESPONDENT can arbitrate with a solvent party despite TAILTWIST's insolvency and cannot claim to be harmed by arbitrating with CLAIMANT.

By referring CLAIMANT to the courts of Equatoriana RESPONDENT tries to escape its own duties in order to have the advantage of its home courts. Since RESPONDENT was not granted this advantage before when negotiating the contract with TAILTWIST, it cannot recur to the state courts simply because the obligee has changed.

SECOND ISSUE: THE RIGHT OF CLAIMANT TO DEMAND PAYMENT OF THE FOURTH INSTALLMENT

CLAIMANT is entitled to demand payment of the 4th installment at an amount of \$2,325,000 originally due to TAILTWIST under its contract of 1 September 1999 with RESPONDENT. The right to receive this payments was validly assigned to CLAIMANT by TAILTWIST effective 29 March 2000.⁵³ This assignment falls into the scope of the Receivables Convention [A]. RESPONDENT did not obtain a valid discharge by paying to TAILTWIST [B].

A. The assignment at stake falls into the scope of the Receivables Convention

All effects of the assignment are governed by the Convention on the Assignment of Receivables in International Trade.

The prerequisites for an assignment of receivables in the sense of Art. 2 (a) Receivables Convention are fulfilled. The *'Internationality'* requirement of Art. 1 (1) (a) in conjunction with Art. 3 Receivables Convention⁵⁴ is met, as all parties involved are domiciled in different states.⁵⁵ Furthermore, there is also a territorial link with a contracting state⁵⁶, as Oceania, TAILTWIST's place of business, is a party to the Convention.⁵⁷

Equatoriana, where RESPONDENT is located, has not ratified the Convention. However, by virtue of a choice-of-law clause in the contract, the Receivables Convention is also applicable to RESPONDENT in accordance to its Art. 1 (3). The parties have agreed on Oceanian Law to govern all matters of the

⁵³ CLAIMANT's Exhibit No. 3; RESPONDENT's Exhibit No. 4.

⁵⁴ *Bazinas*, p. 322, p. 324; *Böhm*, p. 23; *Ferrari*, p. 6.

⁵⁵ Notice of Arbitration, I and II.

⁵⁶ The Receivables Convention does not rely on a private international law criterion to determine its applicability: *Ferrari*, p. 10.; cf. Smith, 2.2.

contract not regulated by the CISG.⁵⁸ Since the assignment of receivables is a matter not dealt with under the CISG, the Receivables Convention as part of Oceanian Law governs RESPONDENT's rights and obligations in relation to the assignment.

B. CLAIMANT is entitled to receive payment of the 4th installment (\$2,325,000), because RESPONDENT did not obtain a valid discharge by paying to TAILTWIST

Payment of the 4th installment (\$2,325,000) is still due to CLAIMANT, because RESPONDENT did not obtain a valid discharge under Art. 17 (2) Receivables Convention by paying to TAILTWIST on 19 April 2000. Prior to that payment, RESPONDENT had been effectively notified of the assignment in the sense of Art. 16 (1) Receivables Convention [I]. The effectiveness of the notification is not impaired in case the first payment order were found to be invalid as claimed by RESPONDENT [II]. Furthermore, the notification was binding upon RESPONDENT without confirmation by TAILTWIST [III].

I. RESPONDENT received an effective notification of assignment prior to the payment to TAILTWIST

RESPONDENT's assertion that it was notified of the assignment only after having paid to TAILTWIST⁵⁹ is misguided. The payment of the 4th installment to TAILTWIST was directed by RESPONDENT in the afternoon of 19 April 2000. By that time, RESPONDENT had already received two communications concerning the assignment. It received a notification of assignment⁶⁰ in the sense of Art. 5 (d) Receivables Convention⁶¹ from CLAIMANT on 10 April 2000.⁶² This notification was effective according to Art. 16 (1) Receivables Convention despite being written in the German language [1]. On the morning of 19 April 2000, i.e. half a day before payment was made, RESPONDENT received a translation of the notification. Upon receipt of that translation RESPONDENT was in any case effectively notified. Under the receipt rule, embodied in Art. 16 (1) Receivables Convention, a notification becomes effective the very moment it is received, thus barring the debtor from paying to the assignor [2].

⁵⁷ Notice of Arbitration, V, para. 17; Procedural Order No. 2, para. 1.

⁵⁸ CLAIMANT's Exhibit No. 1.

⁵⁹ Statement of Defense, III / A, para. 11.

⁶⁰ CLAIMANT's Exhibit No. 2.

⁶¹ Procedural Order No. 2, para. 1: assigned receivables and assignee are clearly identified.

⁶² Statement of Defence, III / A, para. 7.

1. The notification is effective upon receipt on 10 April 2000 despite being written in the German language

RESPONDENT claims that the notification received on 10 April 2000 was not effective in the sense of Art. 16 (1) Receivables Convention, since it was written in the German language, which is not spoken in Equatoriana.⁶³

However, the mere fact that the German language is not spoken in Equatoriana nor at RESPONDENT's office is not decisive. The Receivables Convention does not require the notification to be written in the language of the debtor or of the original contract. The provision of Art. 16 (1), second sentence, is to be understood as a "safe harbor" rule only.⁶⁴ It provides that notifications which are made in the language of the contract are always deemed effective. It does, however, by no means contain a mandatory requirement that notification must be in the language of the contract or even any other language spoken at the other parties' place of business. Article 16 (1) Receivables Convention sets out an objective standard for determining whether the notification was "in a language that is reasonably expected to inform the debtor about its contents".⁶⁵ The reference to reasonableness constitutes an objective standard serving as a general criterion for the evaluation of the parties' behavior.⁶⁶ A reasonable businessman in the situation of RESPONDENT could easily have understood the contents of the notification, because the assignment had been anticipated by the parties during the contract negotiations.⁶⁷ Their contract even contained an explicit provision for the future assignment. In the light of these circumstances this communication could reasonably only be understood as a notice of assignment.

The notice made clear reference to the contract between TAILTWIST and RESPONDENT. It contained the names of both parties. It contained the date of the contract. It contained the amount of the assigned receivables. Moreover, it gave the name of a third party which had no prior involvement and could therefore only be an assignee, in particular since a new bank account was mentioned, again with an explicit reference to the contract between TAILTWIST and RESPONDENT. All this information could be read and understood without knowing a single word of German.

⁶³ *ibid.*

⁶⁴ Addendum to UNCITRAL Analytical Commentary (UN-Doc A/CN.9/489/Add.1), para. 2. The UNCITRAL Analytical Commentary is considered significant for the purpose of the present memorandum as it is the only work commenting on the Receivables Convention recognized by all countries who participated in its drafting. Thus, the commentary is extremely helpful to ensure international uniformity of interpretation.

⁶⁵ The legislator wanted to subject the debtor's duty to pay the assignee to an objected criterion right from the beginning of the drafting of the Receivables Convention. This objective criterion is the notification. Cf. Bazinas, in Norton/Andenas, p. 216.

⁶⁶ View shared in regard of the interpretation of the term "reasonable" in the CISG by Bonell, in Bianca/Bonell, Art. 7, 2.3.2.2., p. 81. This argumentation also applies to the Receivables Convention as both conventions have been drafted by UNCITRAL and contain the same rules of interpretation in Art. 7. Cf. Janzen, p. 370. A uniform interpretation is necessary to meet the recent unification efforts in International Law. Cf. Ferrari, p. 2.

This argument is further strengthened by the fact that the writing clearly identified the sender as an investment bank. Financing-related assignments such as the present one are well known in international trade and are a common form of business financing in Equatoria. ⁶⁸ RESPONDENT's own business operations have required the use of assignments in the past, ⁶⁹ which reveals that RESPONDENT was familiar with this financing instrument. Moreover, RESPONDENT is used to being notified of assignments, as its creditors have on many occasions assigned claims to a third party. ⁷⁰

A different treatment of the writing would have only been justified if it had been written in a language not readable at all for an English speaking person, e.g. Chinese, Arabic or Russian, which use a different system of characters. To judge a notification in German by the same standards, however, would constitute an interpretation of the Receivables Convention that is too narrow. This view is supported by the legislative history. ⁷¹ It was generally recognized in the discussions of the *Working Group* ⁷² that *any* language, which was reasonably designed to inform the debtor about the *content* of the notification should be sufficient. ⁷³ The Working Group wanted to keep the notification requirement as simple as possible. ⁷⁴

2. Notification is in any case effective since the morning of 19 April 2000 when RESPONDENT received the translation

Irrespective of the argument that the notification was effective as of 10 April 2000, RESPONDENT was in any case effectively notified when it received the English translation of the notice of assignment. RESPONDENT admits to have received this translation in the morning of 19 April 2000, whereas the money was transferred to TAILTWIST in the afternoon of the same day. ⁷⁵

According to the rule embodied in Art. 16 (1) Receivables Convention, the point of time at which a notification becomes effective is the very moment it is received by the debtor. ⁷⁶ This rule applies irrespective of whether or not the debtor could have stopped the payment to the assignor [a]. In any case,

⁶⁷ Statement of Defense, III / C, para. 18.

⁶⁸ Procedural Order No. 2, para. 14.

⁶⁹ *ibid.*

⁷⁰ *ibid.*

⁷¹ The recourse to the *travaux préparatoire* constitutes the only international setting, which is to be regarded in order to meet the requirement of Art. 7 (1) Receivables Convention until international case law and scholarly writing has developed. A similar conclusion is drawn by Honnold for the interpretation of the CISG: Uniform Law, para 90. The recourse to the *travaux préparatoires* as a means of interpretation has by now not only been adopted in civil law countries, but in common law countries as well. Cf. for the United Kingdom: House of Lords, *Fothergill v. Monarch Airlines* (1981) AC 251; for the United States of America: U.S. Supreme Court, *Air France v. Sacks*, 470 U.S. 392, 400-405 (1985).

⁷² The Working Group on International Contract Practices established by the United Nations Commission on International Trade Law (hereinafter *Working Group*).

⁷³ UN-Doc A/CN.9/447, para. 45.

⁷⁴ UN-Doc A/CN.9/455, para. 66.

⁷⁵ Statement of Defense, III / A, para. 7.

⁷⁶ Addendum to UNCITRAL Analytical Commentary (UN-Doc A/CN.9/489/Add.1), para. 2; *Böhm*, p. 86.

it was possible for RESPONDENT to redirect the payment to CLAIMANT in time [b]. The problems that arose in this context are entirely due to the negligent organization of the payment process by RESPONDENT [c].

a) The receipt rule applies regardless whether RESPONDENT could have stopped payment to TAILTWIST

RESPONDENT asserts that the translation came too late to stop the payment and that it was thus discharged by paying to TAILTWIST. This assertion contradicts the Receivables Convention's clear wording as well as its purpose.

The main goal of Art. 17 Receivables Convention is to provide certainty as to the debtor's discharge.⁷⁷ The enhancement of legal certainty and predictability as to the rights of parties involved in assignment-related transactions is a general principle of the Receivables Convention. It is already emphasized in the preamble.⁷⁸ This certainty would be severely jeopardized, if it was necessary to determine in each case under subjective and unclear circumstances whether the debtor could have stopped payment to the assignor or not.

In order to avoid such uncertainty, Art. 16 (1) Receivables Convention establishes a clear objective standard: the so called receipt rule. It stipulates that a notification of assignment is effective the very moment it is received by the debtor.⁷⁹ After such notification, the debtor may only discharge its obligation by paying as instructed in the notification or in a subsequent payment instruction.⁸⁰ If the debtor directs payment to the assignor after receipt of a notification, it takes the risk of having to pay twice.⁸¹ This result is in line with the legislator's intention: The Analytical Commentary makes it clear that "the debtor, who pays the assignor after notification, takes the risk of having to pay twice and of not being able to recover from the assignor if the assignor becomes insolvent".⁸²

b) RESPONDENT could have redirected payment to CLAIMANT on 19 April 2000

Mr. Black, the manager in charge of the contract with TAILTWIST, who had also organized the payment process, received the translation of the notification in the morning of 19 April 2000. He was aware that the prerequisite for the payment, the certification by the consultants, had already been fulfilled the previous day, and that therefore the accounting department would be directing the payment to TAILTWIST at any

⁷⁷ Addendum to UNCITRAL Analytical Commentary (UN-Doc A/CN.9/489/Add.1), para. 5.

⁷⁸ UNCITRAL Analytical Commentary (UN-Doc A/CN.9/489), para. 6.

⁷⁹ Addendum to UNCITRAL Analytical Commentary (UN-Doc A/CN.9/489/Add.1), para. 2.

⁸⁰ U.N. Doc A/CN.9/WG.II/WP.106, para. 31; *Bazinas*, p. 338; *Böhm*, p. 88.

⁸¹ UNCITRAL Analytical Commentary (UN-Doc A/CN.9/489), para. 130.

⁸² *ibid.*

time. The only adequate reaction would have been to use the telephone to stop the payment procedure immediately. Had he done so, he would have been able to stop the payment at once. Instead Mr. Black used the slow internal messenger service to communicate his payment suspension order to the accounting department.⁸³ This internal delivery process took two and a half hours.⁸⁴ As a consequence, the termination order was received by the accounting department when it had already directed the payment.⁸⁵

c) The way in which RESPONDENT handled the payment process was negligent

Irrespective of the possibility to stop the payment in time, the execution of the transfer was entirely due to the negligent organization of the payment process by Respondent. The mode selected had a high potential of leading to difficulties in case of the anticipated assignment [i]. Moreover, RESPONDENT missed the opportunity to adjust the payment process after receipt of the notification on 10 April 2000. Irrespective of whether this writing constitutes an effective notification at this point of time, it still carried legal significance and should have warned RESPONDENT of a change in the legal situation. Accordingly, the payment process should have been suspended until further clarification had been obtained [ii].

(i) The payment process as organized by RESPONDENT was predestined to go wrong in the case of the anticipated assignment

The payment process was organized by RESPONDENT in a way that did not take into account the anticipated assignment. It was therefore predestined to cause problems if such an assignment were to take place.

Concerning payment of the 4th installment, an automatic payment process was set up. Instructions were given to the accounting department that payment should be made directly after the consultants had certified the implementation of the 4th stage of the contract. No further authorization of the payment by the manager in charge of the deal was necessary.⁸⁶ Control over the payment was handed over to the accounting department while notification of an assignment was still to be received by the manager in charge of the deal.⁸⁷ Such a separation of competences was predestined to lead to significant delays in case the payment had to be redirected to an assignee. This organization was negligent, as an assignment had already been anticipated by the parties in the negotiations of the original contract.⁸⁸ Considering its multi million Dollar

⁸³ RESPONDENT's Exhibit No. 3.

⁸⁴ Procedural Order No. 2, para. 30.

⁸⁵ Statement of Defence, III / A, para. 8.

⁸⁶ Procedural Order No. 2, para. 31.

⁸⁷ Procedural Order No. 2, para. 27.

⁸⁸ Statement of Defence, III / C, para. 18.

volume, which was not common for RESPONDENT,⁸⁹ the deal with TAILTWIST should have been given RESPONDENT's prime attention. Instead, the way in which the payment process was set up was bound right from the start to cause difficulties in case an assignment would occur.

(ii) RESPONDENT should have suspended payment until further clarification had been obtained

The communication received by RESPONDENT 10 April 2000 contained all necessary information concerning the assignment, regardless whether it constituted an effective notification under the Receivables Convention or not. RESPONDENT understood that this communication carried legal significance. This could not remain without consequences for the further organization of the payment process.⁹⁰

That Mr. Black considered the communication as legally significant is evidenced by the fact that he inquired about it on 15 April 2000 immediately after he became aware of the writing.⁹¹ It was not an adequate reaction to merely inquire without suspending the payment process until the answer arrived. The translation was sent to RESPONDENT within only three working days.⁹² It would not have constituted an unreasonable delay nor any inconvenience had RESPONDENT suspended the payment for this short period of time. As the payment did not become due before 18 April 2000,⁹³ there were no legal consequences to be feared by RESPONDENT. Furthermore, the situation could have been instantly clarified had RESPONDENT contacted CLAIMANT by phone.

II. Effectiveness of notification is not impaired in case of an invalid payment order

RESPONDENT claims that the notification was ineffective, because it contained a payment instruction that changed the state to which payment was to be made.⁹⁴ Art. 15 (2) (b) Receivables Convention

⁸⁹ Procedural Order No. 2, para. 46.

⁹⁰ In a similar case, the debtor received a notification of assignment written in a language not spoken by him. The Higher Regional Court of Hamm (Germany) held that the debtor could not ignore the legal relevance of the writing as it contained the relevant invoice numbers and the amount of the assigned receivables. OLG Hamm, 11 U 206/93, UNILEX D.1995-2.

⁹¹ RESPONDENT's Exhibit No. 1.

⁹² CLAIMANT received the inquiry Saturday, 15 April 2000 and sent the translation to RESPONDENT by fax on Wednesday, 19.04.2000.

⁹³ Statement of Defense, III / B, para. 12.

⁹⁴ Statement of Defense, IV, para. 24.

stipulates that the state specified in the original contract in which payment is to be made may not be changed.⁹⁵

Contrary to RESPONDENT's assertions, the effectiveness of the notification is not impaired in case the payment order was found to be invalid. There is a clear distinction between notification and payment instructions in the Receivables Convention.⁹⁶ Throughout all three paragraphs of Art. 16, separate reference is made to "notification of the assignment *or* a payment instruction [...]". Thus, the Convention stipulates that the effectiveness of the one is judged independently of the other. This is also supported by the legislative history: Having thoroughly discussed the matter,⁹⁷ the *Working Group* based the discharge of the debtor on the notification rather than on the payment instructions. It recognized a difference of both in time and purpose.⁹⁸ It is only the notification that triggers a change in the way in which the debtor may discharge its debt.⁹⁹ As a consequence, the debtor cannot be discharged by paying in accordance with the original contract, while ignoring a payment instruction that is at variance with Art. 15 (2) Receivables Convention.¹⁰⁰

III. Notice of assignment was binding without any confirmation by the assignor

RESPONDENT asserts that the notification was not binding, because it was not confirmed by TAILTWIST, the assignor.¹⁰¹ This constitutes a misinterpretation of the Convention's system of debtor protection. The notification was at all relevant times binding on RESPONDENT in the sense of effectively changing the way RESPONDENT might discharge its debt.

While it is true that Art. 17 (7) Receivables Convention gives the debtor the right to request adequate proof concerning the assignment, this does not mean that the notice of assignment only becomes effective after proof has been given. On the contrary, the notification is effective from the moment it is received, even if it is without proof. Art. 17 (7) provides that *only* in case the requested proof is not provided within reasonable time, the debtor might discharge its debt by paying to the assignor. However, RESPONDENT never requested such proof from CLAIMANT nor has it submitted that it ever intended to do so.

⁹⁵ CLAIMANT has issued a second payment order dating 05.07.2000, which changed the country to which payment was to be made to Oceania again (RESPONDENT's Exhibit No. 5). The Receivables Convention ensures in its Art. 17 (3) that the assignee can change or correct its payment instructions (Addendum to UNCITRAL Analytical Commentary (UN-Doc A/CN.9/489/Add.1), para. 10).

⁹⁶ UNCITRAL Analytical Commentary (UN-Doc A/CN.9/489), para. 124.

⁹⁷ UN-Doc A/CN/447, para. 74 et seq.; UN-Doc A/CN.9/456, para. 70 et seq. and para. 132 et seq.

⁹⁸ UN-Doc A/CN.9/WG.II/WP.105, para. 22.

⁹⁹ UN-Doc A/CN/WG.II/WP.106, para. 34.

¹⁰⁰ UN-Doc A/CN.9/456, para. 134.

¹⁰¹ Statement of Defense, IV, para. 24.

As a result, Respondent can only discharge its debt by paying to Claimant in accordance with the assignment.

THIRD ISSUE: THE RIGHT OF CLAIMANT TO DEMAND PAYMENT OF THE FIFTH INSTALLMENT

CLAIMANT is entitled to demand payment of the 5th installment. Under the CISG, which governs the contract [A], no defenses are available against this claim [B].

A. Applicability of CISG

The contract between RESPONDENT and TAILTWIST is governed by the CISG as the parties have explicitly submitted it to the Convention by contractual agreement.¹⁰² Such an agreement on the applicable law is binding on the arbitration tribunal.¹⁰³ Moreover, the conditions governing the applicability of the CISG contained in Arts. 1- 3 of the Convention are fulfilled. The contract is an international contract in the sense of Art. 1 (1) CISG, containing an agreement on the sale of goods to be manufactured, Art. 1 (3) CISG. Furthermore, the exclusion of Art. 3 (2) CISG does not apply, as TAILTWIST's obligations do not primarily consist in the supply of labor and services. Although some elements of the contract qualify as services, only a small fraction of the price is linked to them (\$80,000)¹⁰⁴ while the main part of the price (\$9,220,000) has to be seen as consideration for the goods. This clearly renders the sale of the goods the preponderant part of the contract.¹⁰⁵ Consequently, the CISG is applicable to the whole contract including the non-sale elements (i.e. labor and services). Where, as in the present contract, sale and non-sale elements are closely interwoven so that they cannot be seen as forming two different contracts, the Convention applies to the entire contract.¹⁰⁶

¹⁰² See CLAIMANT's Exhibit No. 1.

¹⁰³ See Art. 28 ML and Art. 28 AAA-Rules.

¹⁰⁴ This is the price stipulated for the training: see CLAIMANT's Exhibit No. 1.

¹⁰⁵ A comparable view was also taken by a German Court of Appeal in a recent case where the obligations of the seller also included production, installation and commissioning of a production-line. Personnel of the seller had to remain for six weeks on the site of the buyer. The Court held that the value of the services represented only a small fraction of the value of the goods (total price was DM 1,200,000) and that therefore the exclusion of Art. 3 (2) did not apply: see OLG München v. 03.12.1999 RIW 2000, 712; see also LG Mainz v. 26.11.1998 CLOUT Nr. 346. See also *Honnold*, who gives an example which is comparable to the present case: Art. 3 para 60.1.

¹⁰⁶ See *Honnold*, Art. 3 para 60.1.; *Piltz* UN-Kaufrecht III para 69; *Achilles* Art. 3 para 4; *Karollus C.* p.22; *Soergel/Lüderitz-Fenge* Art.3 para 4.

B. RESPONDENT cannot assert defenses against CLAIMANT

The right to payment of the fifth installment (\$930,000) was validly assigned to CLAIMANT.¹⁰⁷ Contrary to its submissions, RESPONDENT cannot assert any defenses against this claim. *Firstly*, RESPONDENT is already precluded from asserting defenses against CLAIMANT because it contractually agreed to waive the right to assert defenses against assignees of TAILTWIST [I]. *Secondly*, irrespective of the waiver clause, RESPONDENT has lost the right to rely on any deficiencies in performance of the contract since it did not comply with the notice requirement of Art. 39 CISG [III].

I. No right to assert defenses against CLAIMANT because of the waiver clause

RESPONDENT validly waived its right to assert defenses against assignees of RESPONDENT.¹⁰⁸ The relevant part of the contract provides that if TAILTWIST should assign the right to the payments due from RESPONDENT the latter “*agrees that it will not assert against the assignee any defense it may have against TAILTWIST arising out of defective performance of this contract, unless TAILTWIST does not in good faith attempt to remedy the deficiency.*” Consequently, RESPONDENT is precluded from asserting any defense against CLAIMANT [1]. Furthermore, RESPONDENT cannot claim that TAILTWIST did not attempt to remedy the alleged deficiencies as no notice of them was given to TAILTWIST [2]. RESPONDENT’s submission that because of the insolvency proceedings TAILTWIST would not have been able to attempt to remedy the deficiencies even if notice had been given is incorrect and can therefore not excuse the failure to give notice [3].

1. Significance of waiver clause

As a consequence of the waiver clause, the assertion of RESPONDENT’s defenses is restricted to the original contractual relationship. Irrespective of whether there are defenses available in this relationship, their assertion against assignees like CLAIMANT is in any case excluded. The broad wording of the waiver clause, which refers to “any defense [...] arising out of defective performance”, evidences that the waiver is not restricted to remedies available under the CISG such as the right to price reduction in Art. 50. Accordingly, the term “any defense” must be interpreted as including any right of the debtor based on deficient performance that may withstand the assignee’s claim to receive payment, be it statutory or contractual. Consequently, the waiver also prohibits reliance on the contract provision according to which RESPONDENT can withhold payment if there has been no three month period of satisfactory

¹⁰⁷ See *supra*, Second Issue, Introduction.

¹⁰⁸ See CLAIMANT’s Exhibit No. 1.

performance. Irrespective of the legal nature of that clause, it functions as a defense based on defective performance, too.

Any different interpretation would contravene purpose of the waiver clause. By ensuring that the assignee will not face defenses when claiming payment, the waiver clause enables the assignor to receive better terms for the assignment.¹⁰⁹ This function would be seriously undermined if the debtor could withhold payment after the anticipated end of the three month period by claiming that performance had not been satisfactory. This would mean that in all cases where defective performance of the contract constituted unsatisfactory performance of the equipment, the debtor would be allowed to refuse payment despite the clear wording of the waiver clause. The waiver would be rendered useless for the majority of deficiencies which could occur in the performance of the contract.

Such a broad exception to the waiver clause was clearly not intended by the parties. The only exception was made for cases in which TAILTWIST did not in good faith attempt to remedy the alleged deficiency.

2. RESPONDENT itself deprived TAILTWIST of the possibility to cure deficiencies

RESPONDENT argues that it is not precluded from asserting defenses against CLAIMANT because TAILTWIST did not in good faith attempt to remedy the deficiencies. RESPONDENT, however, cannot rely on this exception in the waiver clause as no information of the alleged deficiencies was given to TAILTWIST. By virtue of this omission RESPONDENT deprived TAILTWIST of any chance to remedy the deficiencies. Although not expressly mentioned in the waiver-clause, a notice requirement is the logical condition for reliance on the exception. Without having information about deficiencies, TAILTWIST could not attempt in good faith to remedy them. Furthermore, the duty to communicate information needed by the other party to fulfill its obligations is contained in numerous articles of the CISG and can be seen as a general principle underlying the Convention.¹¹⁰ The conclusion that the exception is governed by a notice requirement is not contested by RESPONDENT who even admits that the "obvious response would normally have been that RESPONDENT would have notified TAILTWIST of the problems and would have expected the arrival of TAILTWIST personnel[...]"¹¹¹. To allow RESPONDENT to rely on the fact that TAILTWIST did not attempt to remedy the deficiencies despite its failure to give notice would violate the principle of *venire contra factum proprium*¹¹² which underlies the convention as a general

¹⁰⁹ See UNCITRAL Analytical Commentary Addendum para 19.

¹¹⁰ See *Honnold* Art. 7 para 100; *Soergel/Lüderitz-Fenge* Art. 7 para 10; *Staudinger/Magnus* Art. 7 para 48; *Achilles* Art. 7 para 8; *Bianca/Bonell/Bonell* Art.7 para 2.3.2., 2.3.2.1.; *Karollus* p.17.

¹¹¹ See Statement of Defense para 21.

¹¹² This principle prohibits to set oneself in contradiction to its own behavior.

principle.¹¹³ Article 80 CISG, in which this principle is also contained¹¹⁴, even explicitly provides that a party may not rely on the failure of the other party to perform, to the extent that such failure was caused by its own act or omission. How could TAILTWIST have remedied if not informed by RESPONDENT?

3. TAILTWIST would have been able to remedy the deficiencies - notice was not useless

Contrary to RESPONDENT's allegations, a notice was not redundant as a result of the opening of the insolvency proceedings. The opening of the insolvency proceedings on 20 April 2000 did not deprive CLAIMANT of its ability to remedy deficiencies. This ability was only lost after the court had acceded to a request by the insolvency administrator to terminate all business activities on 16 June 2000 [a]. As the period in which notice is due is to be determined in accordance with Art. 39 CISG [b], notice has to be given within a reasonable period of time [c]. This period was already exceeded in relation to all deficiencies *before* TAILTWIST lost its ability to cure deficiencies on 16 June 2000 [d]. This means that during the whole period in which the notice should have been sent, TAILTWIST had been able to cure deficiencies. Consequently, RESPONDENT cannot claim that TAILTWIST did not remedy the deficiencies because of the insolvency proceedings.

a) Ability to cure deficiencies not lost before 16 June 2000

RESPONDENT claims that TAILTWIST would not have attempted to remedy the deficiencies as a consequence of the insolvency proceedings. Despite bearing the burden of proof for this circumstance¹¹⁵, RESPONDENT does not provide any evidence for this allegation. CLAIMANT submits that the opening of the insolvency proceedings did not affect TAILTWIST's ability and willingness to fulfill its contractual obligations. It did not mean that all business activities would cease to continue automatically. The Insolvency Law of Oceania explicitly provides that contracts stay in force despite the opening of insolvency proceedings.¹¹⁶ They are only terminated if a court decides so.¹¹⁷ Furthermore, business goes on until the insolvency administrator requests the court to terminate all business activities and the court

¹¹³ See Staudinger/*Magnus* Art. 7 para 25,43; Soergel/*Lüderitz-Fenge* Art.7 para 10; Bianca/Bonell/*Bonell* Art. 7 2.3.2.2.; Schlechtriem/*Herber* Art.7 para 37; Schlechtriem/*Ferrari (german version)* Art. 7 para 50; *Achilles* Art.7 para 8; Internationales Schiedsgericht-Bundeskammer der gewerblichen Wirtschaft, Wien 15.6.1994; RIW 1995, 591= Unilex E. 1994-13.

¹¹⁴ See Staudinger/*Magnus* Art. 80 para 2.

¹¹⁵ RESPONDENT bears the burden of proof for this allegation as each party has to prove those circumstances which support their legal position: see OLG Innsbruck 01.07.1994, 4 R 161/94 Unilex; LG Frankfurt 06.07.1994, 2/1 O 7/94 Unilex; Schlechtriem/*Ferrari, (german version)* Art. 4 para 50 post; Staudinger/*Magnus* Art. 4 para 67.

¹¹⁶ See Procedural Order No. 2 para 23.

¹¹⁷ See Procedural Order No. 2 para 23.

accepts this request.¹¹⁸ It was not until 13 June 2000 that the insolvency administrator thought it to be necessary to make such a request to the court. Only after the court acceded to this request on 16 June 2000, TAILTWIST ceased to be an operating concern.¹¹⁹ Accordingly, business activity and fulfillment of the contract before that date were still possible. This is clearly evidenced by the fact that the training of RESPONDENT's personnel was still being conducted three weeks after TAILTWIST had entered into insolvency proceedings.¹²⁰ This fact also shows TAILTWIST's willingness to fulfill its contractual obligations.

Contrary to RESPONDENT's allegation, there is no indication that TAILTWIST would not have used any opportunity to remedy deficiencies. CLAIMANT had a right of recourse against TAILTWIST under the contract of assignment in the case RESPONDENT would not pay.¹²¹ If notified in time, TAILTWIST would have had the possibility to ensure that RESPONDENT is bound to pay to CLAIMANT just by attempting in good faith to remedy the deficiencies. It is likely that TAILTWIST would have used this opportunity to prevent CLAIMANT from exercising its right of recourse. Economically, it would have been the choice between paying for the personnel which is necessary to fix the problems or facing a claim of \$930,000. This situation is not influenced by the insolvency proceedings. Although it may be the insolvency administrator who decides about TAILTWIST's activities from 20 April 2000 onwards, he is, as is any insolvency administrator, under a duty not to devalue the assets of the insolvent. It is therefore reasonable to assume that he would have acted in an economically reasonable way by ensuring that TAILTWIST attempts to remedy the deficiencies. He could have even postponed the request to the court in order to gain more time to do so.

b) Time when notice has to be given is to be derived from Art. 39 CISG

The duty to give notice is a logical requirement under the waiver clause and is not contested by RESPONDENT.¹²² No specifications were made in the contract as to the period in which such a notice has to be given. It can be concluded that the parties in so far did not intend to derogate from the CISG. According to the CISG, notice of deficiencies has to be given within "reasonable time", Art. 39 (1) CISG.

¹¹⁸ See Statement of Defense para 19; see also Procedural Order No. 2 para 21.

¹¹⁹ See Statement of Defense para 19.

¹²⁰ See Statement of Defense para 14.

¹²¹ See Procedural Order No. 2 para 17.

¹²² See B (I) (2).

c) Meaning of the term "within reasonable time" in the present case

CLAIMANT submits that in the present case only a short period can be seen as reasonable. There is unanimity about the fact that the meaning of "reasonable time" has to be determined in accordance with the individual circumstances of the case.¹²³ Although often a period of one month is used as a starting point¹²⁴ the periods accepted in case law¹²⁵ and academic commentary¹²⁶ vary significantly. There are even cases where only a couple of days or even hours can be seen as reasonable.¹²⁷

In order to determine the individual circumstances, particular attention must be paid to the contract and agreement between the parties as this is the most important aspect of their relations under the CISG regime.¹²⁸ Under the present contract, several aspects indicate a shortened period. Firstly, payment of the last installment was only to be made after a certain period of satisfactory performance. Consequently, it was in TAILTWIST's interest to remedy any deficiency as quickly as possible to make sure that the payment would become due without delay. Moreover, it was also in RESPONDENT'S best interest to give a swift notice. This was the only way to ensure satisfying performance of the equipment, which as production equipment of a significant caliber must play an important role in its business.

Furthermore, there was the danger that without a swift notice the damage would increase significantly. This is another factor which shortens the time available under Art. 39 CISG.¹²⁹ There was the serious risk that the deficiencies in the training and in the performance of the machinery would lead to a loss of production, to damage to the products or even to the machinery as RESPONDENT itself submits.¹³⁰ Additionally, there was the risk that without giving a speedy notice RESPONDENT would lose the only

¹²³ See *Andersen* p. 156; *Honnold Arts.* 39, 40, 44 para 257; *Staudinger/Magnus Art.* 39 para 42; *Schlechtriem/Schwenzer Art.* 39 para 16; *Soergel/Lüderitz/Schüßler-Langeheine Art.* 39 para 3.

¹²⁴ This view was introduced by *Schwenzer*, who opines that a convergence of national views is necessary to prevent excessive divergences in interpretation (see *Schlechtriem/Schwenzer Art.* 39 para 17) and found support in a number of recent decisions of German courts, including the Supreme Court: BGH DB 2000, 569; BGHZ 129, 75 = *Unilex* 1995-9; *Stuttgart IPRax* 1996, 139 = *Unilex* 1995-21.

¹²⁵ *For periods between one and two weeks see:* ICC Court of Arbitration SZIER 1995, 281 = *Unilex* E.1989-1 (1989); Köln RIW 1994, 972 = *Unilex* E.1994-6; Karlsruhe B 1998, 393 = RIW 1998, 235; Koblenz *Unilex* E.1998-17; Thüringer OLG TranspR-IHR 2000, 25, 28 f; ÖstOGH 15.10.1998 (öst)JBL 1999, 318, 320 = *Unilex* E.1998-17.2; ÖstOGH 27.8.1999 (öst)ZRvgl 41 (2000), 31; Handelsgericht des Kantons Zürich 30.11.1998 SZIER 1999, 185, 186;

for periods of up to one month see: BGH DB 2000, 569; *Stuttgart IPRax* 1996, 139 = *Unilex* E.1995-21; BGHZ 129, 75 = *Unilex* E.1995-9 (obiter); AG Augsburg *Unilex* E.1996-2.3; Köln VersR 1998, 1513, 1515; München SZIER 1999, 199; France: Cour d'appel Grenoble 13.9.1995 *Unilex* E. 1997-2;

for the regular rejection of notices after one month see: LG Stuttgart *Unilex* E.1991-6; LG Berlin *Unilex* E.1992-17; Saarbrücken *Unilex* E.1993-2.1; LG Hannover *Unilex* E.1993-25.1; Düsseldorf DB 1994, 2492 = *Unilex* E.1994-5; BGHZ 129, 75 = *Unilex* E.1995-9; Schweiz: Obergericht Luzern 8.1.1997 SJZ 1998, 515 = *Unilex* E.1997-2.

¹²⁶ *Schlechtriem/Schwenzer Art.* 39 para 17 (one month); *Schlechtriem*, Internationales UN-Kaufrecht para 154 (eight days); *Herber/Czerwenka Art.* 39 para 9 (eight days); *Piltz*, § 5 para 59; *Staudinger/Magnus Art.* 39 para 49 (14 days).

¹²⁷ See OLG Düsseldorf *Iprax* 1993, 412 = *Unilex* E.1993-2; OLG Karlsruhe RIW 1998, 235 = *Unilex* D.1997-9.1; OLG Saarbrücken *Unilex* E.1998-11.3.

¹²⁸ See *Andersen* p. 156.

¹²⁹ See *Soergel/Lüderitz/Schüßler-Langeheine Art.* 39 para 3; *Andersen* p. 162; *Honnold Arts.* 39, 40, 44 para 257.

possibility to get the deficiencies cured and to avoid consequential damage. It is unlikely that any other party could have given the training and assistance TAILTWIST was able to give.¹³¹ Consequently, knowing that TAILTWIST was in insolvency proceedings, RESPONDENT should have tried to get as much assistance as possible as quickly as possible before this option was irretrievably lost.

In the light of such serious consequences, the period for notice is significantly shorter than a whole month. Under such circumstances, a reasonable person can be expected to notify the seller as soon as possible after discovery of the deficiencies.

d) Reasonable period exceeded before ability to remedy is lost on 16 June 2000

RESPONDENT claims that three different deficiencies had occurred in the performance of the contract: Only two instead of four instructors had been sent **[i]**; the training given by these two was insufficient **[ii]**; performance of the equipment had not been satisfactory **[iii]**. In all of these cases the period for giving notice was expired before TAILTWIST lost its ability to cure deficiencies.

(i) Insufficient number of instructors

Firstly, RESPONDENT alleges that TAILTWIST did only provide an insufficient number of instructors. RESPONDENT was aware of the fact that there were only two instructors since 20 April 2000. From that day on, the period of “reasonable time “ of Art. 39 started to run. Consequently, it was already exceeded when TAILTWIST ceased to be an operating concern eight weeks later on 16 June 2000.

(ii) Deficiencies in the training

Secondly, RESPONDENT claims that the training given by the insolvency administrators was "grossly insufficient"¹³² and "totally unsatisfactory"¹³³. The fact that RESPONDENT made "various statements"¹³⁴ to TAILTWIST's personnel shows that it was aware of the deficiencies in the training at a very early point in time, i.e. before the end of the training period on 10 May 2000. This constitutes a period between five and eight weeks until 16 June 2000. As only a period significantly shorter than four weeks can be seen as

¹³⁰ See Statement of Defense para 15, 20.

¹³¹ See Procedural Order No. 2 para 41.

¹³² See CLAIMANT's Exhibit No. 5.

¹³³ See Statement of Defense para 14.

¹³⁴ See Procedural Order No. 2 para 35.

reasonable in the present case¹³⁵, the period for giving notice was in any case expired before TAILTWIST lost its ability to remedy.

CLAIMANT points out that the "statements" made to TAILTWIST's training personnel are not sufficient to comply with the notice requirement. Notices of defects must be directed to the seller or to someone entitled to receive such notices for him.¹³⁶ It is not sufficient to direct the notice to someone who happens to be somehow involved in the execution of the contract.¹³⁷ RESPONDENT has not shown that the instructors were entitled to receive such notices. If someone not authorized to receive notices is used by the buyer as a messenger, the buyer bears the risk that the notice does not reach the seller.¹³⁸ Furthermore, RESPONDENT has not shown that the statements were in any way specific enough to constitute a notice. General expressions of dissatisfaction are insufficient for the purposes of the CISG.¹³⁹ Consequently, the statements made to the training personnel cannot be seen as compliant with the notice requirement.¹⁴⁰

(iii) Deficiencies in the performance of the equipment

Finally, RESPONDENT asserts that the equipment did not perform as stipulated in the contract. These deficiencies in performance had become evident after the end of the training period, i.e. from 10 May 2000 onwards.¹⁴¹ This constitutes a period of five weeks until 16 June 2000. Again, the "reasonable time" in which a notice was due is expired before TAILTWIST lost its ability to remedy deficiencies.

RESPONDENT cannot allege that it was not before the "end of June" that the conclusion was reached that they "would not be able to make whatever adjustments might be necessary to achieve the desired level of production"¹⁴². Irrespective of the question whether the buyer is able to remedy the deficiencies himself, the reasonable period of Art. 39 begins when the buyer has discovered or ought to have discovered the lack of conformity.¹⁴³ As the deficiencies in performance became evident after the end of the training

¹³⁵ See supra B (I) (3).

¹³⁶ See Staudinger/*Magnus* Art. 39 para 53; *Achilles* Art.39 para 7; Witz/*Salger* Art.39 para 10; AG Alsfeld 12.05.1995; NJW-RR 1996, 120=Unilex E.1995-15.2.

¹³⁷ See LG Kassel v. 15.02.1996 WiB 1997, 208, 209.

¹³⁸ See Schlechtriem/*Schwenzer* Art. 39 para 14; *Achilles* Art. 39 para 7; *Karollus* p. 126; Witz/*Salger* Art.39 para 7; OLG Frankfurt a.M. 13.07.1994; NJW-RR 1994, 1264 =Unilex E. 1994.19.

¹³⁹ See Schlechtriem/*Schwenzer* Art. 39 para 7; Witz/*Salger* Art.39 para 8; BGH 04.12.1996, NJW-RR 1997,691; Staudinger/*Magnus* Art. 39 para 21; Soergel/*Lüderitz/Schüßler-Langeheine* Art. 39 para 8; Secretariat Commentary Art. 37 para 4; Herber/*Czerwenka* Art.39 para 7; *Piltz* §5 para 68; Kantonsgericht Nidwalden 12.11./03.12.1997, TranspR-IHR 1/99, 10.

¹⁴⁰ For a comparable case, although decided under Art. 39 ULIS, see: BGH v. 25.03.1992, RIW 1992, 584, 585.

¹⁴¹ See Procedural Order No. 2 para 39.

¹⁴² See Procedural Order No. 2 para 39.

¹⁴³ See Schlechtriem/*Schwenzer* Art. 39 para 19; *Karollus* p.126; Soergel/*Lüderitz/Schüßler-Langeheine* Art.39 para 5.

period¹⁴⁴, RESPONDENT had actual knowledge of them from the 10 May 2000 onwards. From this day on, the period started of Art. 39 began to run.

Under the present circumstances the buyer cannot be allowed an additional period of time to assess whether the deficiencies are caused by a defect of the machinery itself or the way it is operated, as it has been suggested for cases involving complex machinery¹⁴⁵. The deficiencies in performance are in themselves a lack of conformity as there had been detailed specifications in the contract as to the performance of the equipment.¹⁴⁶ It is therefore irrelevant if they are caused by a defect of the equipment itself or the way it is operated.

Furthermore, TAILTWIST was not only bound to deliver equipment without defects but also the training necessary to operate it properly. TAILTWIST was therefore in any case responsible for deficiencies in performance regardless on which of the two possibilities they were based.¹⁴⁷ Additionally, no further knowledge was needed to specify the lack of conformity in the notice sufficiently. In case of technical equipment, the buyer can only be required to describe the symptoms, not to specify their causes.¹⁴⁸

No other result is reached if the three month period of satisfactory performance after which the final installment has to be made would be seen as an examination period. If, like in the present case, the buyer has actual knowledge of the lack of conformity, the period for giving notice runs irrespective of whether the period for examining the goods has already expired.¹⁴⁹

II. Failure to give notice sufficient to preclude RESPONDENT from asserting defenses

Independently of the waiver clause, RESPONDENT is already precluded from asserting any defenses as a consequence of its non-compliance with Art. 39 CISG [1]. This in itself precludes RESPONDENT from asserting defenses against TAILTWIST, the original party of the contract, and consequently, from asserting them against third parties like CLAIMANT. RESPONDENT can neither claim to be exempted from the notice requirement because of the insolvency proceedings [2] nor rely on Art. 40 [3] or excuse his failure to notify under Art. 44 CISG [4].

¹⁴⁴ See Procedural Order No. 2 para 39.

¹⁴⁵ See Schlechtriem/ *Schwenzer* Art. 38 para 17.

¹⁴⁶ See Procedural Order No. 2 para 34. If there is a “lack of conformity” in the sense of Art. 39 CISG has to be determined in accordance with Art. 35 CISG. Article 35 (1) provides that first regard must be had to the characteristics of the goods laid down in the contract, see Schlechtriem/Schwenzer Art. 35 para 6.

¹⁴⁷ See Statement of Defense, where RESPONDENT realizes itself: “It is not clear to RESPONDENT whether the problem lies in the equipment or in the inadequate training given to RESPONDENT’s personnel by TAILTWIST. In either case, the result has been the same.”.

¹⁴⁸ See Schlechtriem/ *Schwenzer* Art. 39 para 9; *Achilles* Art.39 para 3; *Piltz* UN-Kaufrecht V, para 254.

¹⁴⁹ See Schlechtriem/ *Schwenzer* Art. 39 para 19; see also *Piltz* § 5 para 61; *Heilmann*, p. 313.

1. No right to assert defenses against TAILTWIST because of Art. 39 CISG

RESPONDENT has lost the right to rely on the defective performance of the contract as a consequence of his noncompliance with Art. 39 CISG. RESPONDENT did not notify TAILTWIST either of the deficiencies in training¹⁵⁰ or of the lack of conformity of the machinery. The only information provided by RESPONDENT was contained in a letter in which it declared price-reduction. This letter, however, had not been sent before January 2001, i.e. more than six month after the deficiencies were discovered. Irrespective of the question whether the information contained in the letter was specific enough¹⁵¹, this was in any case too late to be within a reasonable period of time.¹⁵²

In case the buyer does not notify the seller of a lack of conformity within a reasonable period of time, he loses his right to rely on this non-conformity and the goods are deemed to be accepted as far as this deficiency is concerned.¹⁵³ Consequently, RESPONDENT can neither rely on defenses under the CISG nor on any other defenses based on the non-conformities. In particular, he can not rely on these non-conformities in the context of the contract provision under which payment of the final installment only becomes due after three months of satisfactory performance.

2. Insolvency of TAILTWIST does not exclude application of Art. 39

RESPONDENT cannot allege that it was under no obligation to give notice because TAILTWIST would not have been able to remedy the deficiencies in performance anyway. Neither in case law nor academic commentary any suggestions exist which would support the position that notice under Article 39 has only to be given when the seller is able to cure the alleged deficiencies.

This position is well supported by the purpose of this Article. It fulfills several functions¹⁵⁴, all of which intend to protect the seller¹⁵⁵. *Firstly*, Art. 39 ensures legal security.¹⁵⁶ The provision “is intended to establish certainty for the seller in regard to those accounts which he can consider to be closed at any

¹⁵⁰ RESPONDENT will not be able to allege that the deficiencies in training did not require a notice because the wording of Art. 39 only mentions a lack of conformity of "goods" not of "services". This is solely a consequence of the fact that the convention was drafted primarily in respect of the sale of goods. In cases like the present one however, where by virtue of Art. 3 (2) CISG the Convention applies to a contract containing service elements, the wording of Art. 39 is not an obstacle to its application to services.

¹⁵¹ The information given is restricted to “training was grossly insufficient” and equipment did not operate in a “fully satisfactory manner”: see CLAIMANT’s Exhibit No. 5.

¹⁵² For the determination of reasonable time in the present case see supra (B) (I) (3) (c).

¹⁵³ See Herber/*Czerwenka* Art. 39 para 14; *Honnold* Arts. 39, 40, 44 para 259; *Staudinger/Magnus* Art. 39 para 57.

¹⁵⁴ See generally Secretariat Commentary Art. 37 para 4: “The purpose of the notice is to inform the seller what he must do to remedy the lack of conformity, to give him the basis on which to conduct his own examination of the goods, and in general to gather evidence for use in any dispute with the buyer over the alleged lack of conformity.”

¹⁵⁵ See *Andersen* p. 79; *Bianca/Bonell/Sono* Commentary Art. 39 p. 309; *Honnold* Arts. 39, 40, 44 para 255; *Schlechtriem/Schwenzer* Art. 38 para 4; *Soergel/Lüderitz/Schüßler-Lange-Heine* Art. 39 para 2; *Staudinger/Magnus* Art. 39 para 3; see also *Secretariat Commentary* Art. 37 para 4.

particular time”.¹⁵⁷ *Secondly*, Art. 39 aims to give “the seller an opportunity to prepare for any negotiation or dispute with the buyer concerning the lack of conformity and to take the necessary steps in that regard [...]”¹⁵⁸. Thus, Art. 39 allows the seller e.g. to secure evidence at an early point in time before it becomes more difficult.¹⁵⁹ *Finally*, and beside the two other functions, Art. 39 has also the purpose to set “the seller in a position in which he may, if possible, remedy the lack of conformity by delivering the missing goods or a substitute or by repair [...]”.¹⁶⁰

CLAIMANT has shown already that TAILTWIST would have been able to make use of the last function by curing the deficiencies if notified in time.¹⁶¹ However, even if the Tribunal should not agree with the arguments brought forward in that context, notice under Art. 39 is not redundant as the first two functions are still relevant even after TAILTWIST has lost its ability to cure deficiencies. Thus, the insolvency administrator presumably is still interested in securing evidence of any alleged deficiency. The insolvency proceedings do not automatically preclude from disputing claims.¹⁶² In any case, the insolvency administrator was interested in legal certainty as far as claims arising from deficient performance of any of TAILTWIST’s contracts are concerned. Only on the basis of reliable information he is in a position to make the decisions necessary in the insolvency proceedings. With two functions in any case still applying, no exemption from Art. 39 can be justified.

3. Art. 40 CISG does not prevent reliance on Art. 39

CLAIMANT submits that RESPONDENT will not be able to employ Art. 40 as a defense concerning its failure to give notice. According to Art. 40 the seller is not entitled to rely on the provisions of Arts. 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer. TAILTWIST, however, did not know of any facts to which the alleged lack of conformity relates nor could it not have been unaware of them.¹⁶³

¹⁵⁶ See *Andersen* p. 79; *Schlechtriem/Schwenzer* Art. 38 para 4; *Staudinger/Magnus* Art. 39 para 3.

¹⁵⁷ See *Schlechtriem/Schwenzer* Art. 38 para 4.

¹⁵⁸ See *Schlechtriem/Schwenzer* Art. 38 para 4.

¹⁵⁹ See *Andersen* p. 79; *Honnold* Arts. 39, 40, 44 para 255; *Schlechtriem/Schwenzer* Art. 38 para 4; *Staudinger/Magnus* Art. 39 para 3; in a recent judgement a German court held this even to be the preeminent function of Art. 39 by stating that the purpose of the provision was not only the general interest of the industry to have a quick settlement of legal issues, but also first and foremost the seller’s opportunity to undertake measures to defend himself from claims such as damages: see LG Kassel 15.02.1996 NJW-RR 1996, 1146 = *Unilex D.1996-3.2*.

¹⁶⁰ See *Schlechtriem/Schwenzer* Art. 38 para 4.

¹⁶¹ See *supra* (B) (I) (3).

¹⁶² See *Mantillo-Serrano* p. 51.

¹⁶³ Besides, RESPONDENT would bear the burden of evidence for these circumstances: see *Antweiler*, p. 137; *Heuzé* para 310; *Schlechtriem/Schwenzer* Art. 40 para 12; *Ziegler* p. 101.

TAILTWIST did not know and could not have been aware of any facts which relate to the deficiencies in performance of the equipment and in the training. Furthermore, the fact that TAILTWIST only provided two instead of the anticipated four instructors does not fulfill the conditions of Art. 40 CISG. It is already doubtful if the contract provided that the training should be conducted by four instructors. Only during oral discussions prior to the conclusion of the contract it was stated that the team of instructors should consist of four.¹⁶⁴ This number had not been fixed in the contract. Even if the number of four instructors had indeed become part of the contract, it can not be assumed that TAILTWIST's conduct falls within the scope of Art. 40. This article only encompasses non-conformities which the seller in bad faith did not disclose to the buyer. In the case at hand, TAILTWIST did by no means conceal the fact that the training was to be conducted by only two instructors. Moreover, TAILTWIST did not act in bad faith. In the context of Art. 40 the seller acts in bad faith if he performs its obligations in such a way which he can not reasonably expect the buyer to accept as performance under the contract.¹⁶⁵ In the present case the seller had the obligation to provide adequate training that would enable RESPONDENT's personnel to run the equipment at the capacity stipulated in the contract. There is no evidence to the effect that the two instructors would not have been able to provide this training. Even RESPONDENT admits that while it might have been difficult for two instructors, it would not have been impossible. Hence, there was the realistic possibility that RESPONDENT would accept the performance offered as performance under the contract. Acting on this assumption, TAILTWIST was accordingly not in bad faith. As a result, RESPONDENT can not invoke Art. 40 CISG to escape its duty under Art. 39 CISG.

4. No excuse possible under Art. 44

As a precaution, CLAIMANT would like to assert that RESPONDENT cannot rely on Art. 44 CISG. RESPONDENT will not be able to prove the existence of any reasonable excuse for its failure to give notice.

The seriousness of buyer's breach of duty is the most important criterion under Art. 44¹⁶⁶: "Leniency is called for only if the breach is relatively minor."¹⁶⁷ Such minor breaches, however, can only be held to exist if, for example, the buyer did notify the seller but failed to specify the lack of conformity sufficiently or if a notice was only slightly late.¹⁶⁸ According to this principle, no leniency can be granted in the present case.

¹⁶⁴ See Procedural Order No. 2 para 35.

¹⁶⁵ See *Achilles* Art. 40 para 1.

¹⁶⁶ See Schlechtriem/*Huber* Art. 44 para 6; Staudinger/*Magnus* Art. 44 para 11; Soergel/*Lüderitz/Schüßler-Langeheine* Art.44 para 3; *Achilles* Art.44 para 3; Witz/*Salger* Art.44 para 6.

¹⁶⁷ See Schlechtriem/*Huber* Art. 44 para 6.

¹⁶⁸ *Ibid.*

No other result is reached in the light of the legislative history of Article 44.¹⁶⁹ Several representatives, mainly from the developing countries, feared that the consequences imposed by Art. 39 were too drastic.¹⁷⁰ Buyers from developing countries would lose the rights resulting from deficient performance only because of a lack of experience in discovering defects or because of unfamiliarity with examination and notice requirements.¹⁷¹ RESPONDENT, however, is neither unfamiliar with complex machinery nor with notice requirements. On the contrary, RESPONDENT himself admits that the obvious response to the problems would have been “that RESPONDENT would have notified TAILTWIST of the problems”¹⁷².

Similarly, the fact that RESPONDENT assumed itself exempted from the notice requirement because of the insolvency proceedings cannot serve as an excuse. Although it is generally possible to accept subjective circumstances which result from a minor negligence of the buyer as a reasonable excuse under Art. 44¹⁷³, no such circumstances are given in the present case. RESPONDENT obviously assumed that the insolvency proceedings would prevent TAILTWIST from taking measures in regard to the deficiencies and that it therefore was under no duty to notify. RESPONDENT could easily have avoided this error. RESPONDENT could have taken into account that the term "insolvency proceedings" can have various meanings. As a general term (i.e. not in the context of a specific national law) it covers circumstances as various as judicial administration, rehabilitation, receivership, bankruptcy or liquidation.¹⁷⁴ Not in all of these cases are the activities of the insolvent restricted to liquidation, at least not right from the beginning. Without some knowledge of the insolvency law of Oceania, it was not possible for RESPONDENT to determine the exact meaning of the proceedings TAILTWIST was in. Instead of complying with the notice requirement, however, RESPONDENT preferred to speculate upon the consequences of the insolvency proceedings without making any inquiries as to their significance. One mere phone call would have sufficed to clarify the situation. In the given circumstances, such behavior must be qualified as unprofessional and careless. It does not constitute a reasonable excuse under Art. 44.

¹⁶⁹ According to *Honnold* the "reasonable excuse" for failure to give notice needs to be understood and applied in the light of its legislative history: See Commentary Art. 39 para 261.

¹⁷⁰ *Ibid.*

¹⁷¹ See *Schlechtriem/Huber* Art. 44 para 2. Application of Art. 44 is, however, not dependent on the fact that the buyer comes from a developing country: see *Staudinger/Magnus* Art. 39 para 10; OGH JBL 1999, 318.

¹⁷² See Statement of Defense para 21.

¹⁷³ See *Staudinger/Magnus* Art. 44 para 14; *Witz/Salger* Art.44 para 6; *Schlechtriem/Huber* Art.44 para 6.

¹⁷⁴ See *Mantilla-Serrano*, *International Arbitration and Insolvency Proceedings*, *Arbitration International Volume 11 Number 1* p. 51. For the same result RESPONDENT could have had a look to the UNCTRAL Model Law on Cross Border Insolvency: Art. 2 (a) defines insolvency proceedings as "[...] a collective judicial or administrative proceeding [...] for the purpose of reorganization or liquidation."

FOURTH ISSUE: INTERESTS

CLAIMANT submits that it is to be awarded interest under Art. 78 CISG on the fourth and fifth installment from the time they were due. The fourth installment at an amount of \$2,325,000 became due when RESPONDENT's consultants certified completion of the fourth stage on 18 April 2000. From that time on, interest has to be paid on the fourth installment. The fifth installment at an amount of \$930,000 had to be paid after the end of a three month period of satisfactory performance, which started on 10 May 2000 after the training of RESPONDENT's personnel had been completed.¹⁷⁵ Since the end of this period on 10 August 2000 payment was due. It is irrelevant that RESPONDENT asserts that there has been no period of satisfactory performance, as RESPONDENT is precluded from relying on any deficiencies in the performance of the contract.¹⁷⁶ Therefore interest on the fifth installment has to be paid from 10 August 2000 onwards.

FIFTH ISSUE: COSTS

CLAIMANT requests the Tribunal to order RESPONDENT to bear the costs of arbitration according to Art. 31 of the AAA Rules.

¹⁷⁵ Statement of Defense para 12.

¹⁷⁶ Supra, Third Issue, B (I) (1) and (II) (1).