

**NINTH ANNUAL  
WILLEM C. VIS  
INTERNATIONAL  
COMMERCIAL ARBITRATION MOOT**

Vienna, Austria  
March 22 to 28, 2002

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**THE PROBLEM**

Revised  
October 11, 2001

Organized by:

Institute of International Commercial Law  
Pace University School of Law  
78 North Broadway  
White Plains, NY 10603  
USA

Joseph Langweiler  
Lawyer  
14 Capitol Boulevard  
Capitol City, Mediterraneo

5 June 2001

International Center for Dispute Resolution  
American Arbitration Association  
1633 Broadway  
10<sup>th</sup> Floor  
New York, NY 10019-6708  
USA

Dear Sirs:

I represent Futura Investment Bank, which hereby gives notice that it wishes to commence an arbitration against West Equatoriana Bobbins S.A. under the American Arbitration Association International Arbitration Rules. A copy of this letter with the Notice of Arbitration has been sent to West Equatoriana Bobbins S.A. as called for in Article 2.1 of the Rules.

Futura Investment Bank became the assignee of the right to receive the payments due from West Equatoriana Bobbins S.A. to Taittwist Corp. under a contract dated 1 September 1999. The contract between West Equatoriana Bobbins S.A. and Taittwist Corp. included an arbitration clause providing for arbitration by the American Arbitration Association. Futura Investment Bank claims as assignee of the rights of Taittwist Corp.

I enclose five copies of the Notice of Arbitration with its supporting exhibits. I also enclose US \$8,500 for the Initial Filing Fee as an advance payment on the administrative costs, as provided in the Rules.

Sincerely,

(Signed) \_\_\_\_\_  
Counsel  
Futura Investment Bank

Cc: West Equatoriana Bobbins S.A.

Futura Investment Bank  
Claimant

v.

West Equatoriana Bobbins S.A.  
Respondent

## NOTICE OF ARBITRATION

### I. Parties

1. Futura Investment Bank (hereafter referred to as “INVESTMENT”) is a corporation organized under the laws of Mediterraneo. It has its principal office at 395 Industrial Place, Capitol City, Mediterraneo. The telephone number is 483-5800 and the fax number is 483-5810. INVESTMENT is an investment bank with interests in numerous countries.

2. West Equatoriana Bobbins S.A. (hereafter referred to as “BOBBINS”) is a corporation organized under the laws of Equatoriana. It has its principal office at 214 Commercial Ave., Oceanside, Equatoriana. The telephone number is 555-1212 and the fax number is 555-1214. BOBBINS is a producer of textiles for use in clothing and table linens from natural and synthetic fibers.

### II. Non-Party Entity

3. Tailtwist Corp. (hereafter referred to as “TAILTWIST”) was a corporation organized under the laws of Oceania. It had its principal office at 14 Seaside Boulevard, Sea Port, Oceania. The telephone number was 523-6910 and the fax number was 523-6920. It was a manufacturer of machinery and production processes for the textile trade, some of which were of a type used by BOBBINS. TAILTWIST is currently in insolvency proceedings.

### III. The Facts of the Dispute

#### A. The Contract of Sale

4. On 1 September 1999 BOBBINS and TAILTWIST concluded a contract whereby TAILTWIST agreed to manufacture and install at BOBBINS’ facilities in Equatoriana a manufacturing line for spinning polyester yarn. (Claimant’s Exhibit No. 1) The total price was \$9,300,000. Payment was to be made in five installments: 20% with order; 20% on completion of tests at the TAILTWIST works; 25% on delivery to site; 25% on completion of commissioning on site; the balance of 10% after three months satisfactory performance.

5. The TAILTWIST equipment was delivered and installation by TAILTWIST’s personnel was completed on 18 April 2000. As provided in the contract, TAILTWIST’s personnel

remained on site until 10 May 2000 to train the personnel of BOBBINS in the operation, adjustment and maintenance of the machinery. The three month period at the end of which final payment was due closed on 10 August 2000.

#### B. Payments, Assignment and Non-payment

6. As provided in the contract, BOBBINS paid to TAILTWIST 20% of the contract price (\$1,860,000) on the signing of the contract on 1 September 1999, a further 20% (\$1,860,000) on 6 January 2000 upon completion of tests of the equipment at the TAILTWIST works and 25% of the contract price (\$2,325,000) upon delivery of the equipment to BOBBINS site on 20 February 2000.

7. On 29 March 2000 TAILTWIST assigned to INVESTMENT the right to receive the remaining two payments of 25% of the contract price (\$2,325,000) on completion of commissioning on site and 10% of the contract price (\$930,000) after three months satisfactory performance. Notice of the assignment was sent to BOBBINS on 5 April 2000 (Claimant's Exhibit No. 2) with return receipt requested. Delivery of the notice of assignment was signed for on 10 April 2000. Although the original notice was in German, the fact that it contained the names of Tailtwist Corp. and West Equatoriana Bobbins S.A., the date of the contract between the two, the amount remaining due under the contract, the name of Futura Investment Bank and an account number, all of which were easy to read by an English-speaking person who did not know German, clearly indicated the nature of the document. At the very least, it should have put BOBBINS on notice to inquire further and not to make any payment on the contract without making such an inquiry. A simple telephone call would have sufficed. A translation of the notice into English is contained in Claimant's Exhibit No. 3.

8. Since that time no payment has been made by BOBBINS to INVESTMENT. In the case of the payment due upon commissioning on site, BOBBINS paid it to TAILTWIST on 19 April 2000, i.e., nine days after having received notice of the assignment. BOBBINS has claimed that the notice was defective in form and that it was not received in time to be acted upon prior to payment to TAILTWIST. (Claimant's Exhibit No. 4) These objections are manifestly unfounded.

9. In the case of the payment due after three months satisfactory performance, BOBBINS has refused to pay it at all. It has claimed that the training called for in the contract was not adequate and that the machinery as delivered was not able to operate at the promised capacity. (Claimant's Exhibit No. 4) As a result it has claimed the right to reduce the price of the contract by the unpaid amount of the contract, namely \$930,000. (Claimant's Exhibit No. 5)

10. INVESTMENT is in no position to ascertain whether the complaints that BOBBINS raises in regard to the performance of TAILTWIST are accurate or not. However, INVESTMENT would like to point out that the contract of sale included a clause in which BOBBINS agreed not to assert defenses against any assignee of TAILTWIST should TAILTWIST assign the right to receive the payments. (Claimant's Exhibit No. 1) Although the clause provided that it did not apply to deficient performance under the contract that Tailtwist did not attempt in good faith to remedy, to the best of belief of INVESTMENT, BOBBINS did not give notice to TAILTWIST of either any deficiency in the training it received or in the equipment itself. As a result, Tailtwist could not have attempted to remedy

the deficiencies and BOBBINS has lost the right to assert them as defenses against INVESTMENT.

#### IV. Arbitration Clause

11. The contract between BOBBINS and TAILTWIST provides:

“Any controversy or claim between Tailtwist Corp. and West Equatoriana Bobbins S.A. arising out of or relating to this contract shall be determined by arbitration by the American Arbitration Association by a panel of three arbitrators with the place of arbitration being Vindobona, Danubia and the language of the arbitration English.”

12. When INVESTMENT was assigned the right to payment under the contract between BOBBINS and TAILTWIST, it was necessarily assigned the right to enforce its rights in the same manner as the assignor, TAILTWIST, would have had.

13. According to Article 1(1) of the American Arbitration Association International Rules currently in force, where parties have provided for arbitration by the American Arbitration Association without specifying which rules shall apply and the dispute is international, the arbitration shall take place in accordance with the International Rules. BOBBINS and TAILTWIST, parties to the original arbitration agreement, are from Equatoriana and Oceania respectively while INVESTMENT is from Mediterraneo. Therefore, the dispute is international and the International Rules apply to the arbitration.

14. As provided in the arbitration clause, the arbitration tribunal should consist of three arbitrators and the arbitration should be held in Vindobona, Danubia. The language of the arbitration should be English, that being the language specified in the arbitration agreement.

15. INVESTMENT hereby nominates Dr. XXXX as its arbitrator.

#### V. Applicable Law

16. Equatoriana and Oceania are parties to the United Nations Convention on Contracts for the International Sale of Goods and it, therefore, governs the contract of sale. Furthermore, the contract itself provides that the contract is governed by the Convention and, in regard to any questions not governed by it, by the law of Oceania.

17. Mediterraneo and Oceania are party to the [draft] Convention on the Assignment of Receivables in International Trade. [Note: At the time of writing the Problem UNCITRAL had adopted the draft Convention on the Assignment of Receivables in International Trade and had recommended to the General Assembly that it adopt the draft convention as a convention and open it for signature. The General Assembly is expected to follow the recommendation in December 2001.]

18. Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration.

19. Equatoriana, Oceania, Mediterraneo and Danubia are all party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

### III. Relief Requested

20. INVESTMENT requests the arbitral tribunal:

- To find that it has jurisdiction to consider the claim brought by INVESTMENT against BOBBINS;
- To order BOBBINS to pay the sum of \$3,255,000 to INVESTMENT;
- To order BOBBINS to pay interest on the said sum from the date payment was due until the date of payment;
- To order BOBBINS to pay all costs of the arbitration.

(Signed) XXXX  
Counsel for Futura Investment Bank

5 June 2001  
Date

Claimant's Exhibit No. 1

Contract (Excerpts)

Tailtwist Corp. agrees to sell and West Equatoriana Bobbins S.A. agrees to purchase the following "Spin-a-Whizz" equipment:

Item 1 - One complete six-end manufacturing line for pre-oriented polyester yarn (POY), with High Speed (6,000 rpm) automatic winders, each complete with inverter drive and automatic reel change, all as our standard manufacture, illustrated in the attached diagram. Price \$1,300,000 per single end.

Item 2 - One "Auto-Swop" Doffer, to service the above line, remove filled bobbins and deliver them automatically to a pin-store, provided by you, at the end of the production aisle. Price \$1,420,000.

Item 3 - Training for three weeks on site. Price \$80,000

Total Price \$9,300,000, payable as follows:

20% with order; 20% on completion of tests at our works; 25% on delivery to site; 25% on completion of commissioning on site; the balance after three months satisfactory performance. Each stage to be certified by consultants for West Equatoriana Bobbins S.A.

Delivery, six calendar months from receipt of first payment. Installation and commissioning, two months from delivery.

Included in the price, Tailtwist Corp. will provide all installation work, setting to work and commissioning on site, West Equatoriana Bobbins S.A. to have carried out all building work, including the preparation of floors and the installation of doffer rails to Tailtwist specification. On completion of commissioning tests, Tailtwist personnel will remain on site for three weeks, during which West Equatoriana Bobbins personnel will be trained in the correct operation, adjustment and maintenance of the machinery.

All rights in the automation software to remain the property of Tailtwist. West Equatoriana Bobbins shall not reveal to others any information provided by Tailtwist nor permit any person not authorised by Tailtwist to have access to the software or source code.

If Tailtwist should assign the right to the payments due from West Equatoriana Bobbins, 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.

This contract is subject to the United Nations Convention on Contracts for the International Sale of Goods and, in regard to any questions not governed by it, to the law of Oceania.

Any controversy or claim between Tailtwist Corp. and West Equatoriana Bobbins S.A. arising out of or relating to this contract shall be determined by arbitration by the American Arbitration Association by a panel of three arbitrators with the place of arbitration being Vindobona, Danubia and the language of the arbitration English.

(Signed) \_\_\_\_\_  
Taitwist Corp.

(Signed) \_\_\_\_\_  
West Equatoriana Bobbins S.A.

1 September 1999  
Date

Claimant's Exhibit No. 2

Futura Investment Bank  
395 Industrial Place  
Capitol City, Mediterraneo  
Telephone 483-5800  
Telefax 483-5810

5. April 2000

Bekanntgabe der Zession

Hiermit wird bekanntgegeben, dass das Recht noch verbliebene Zahlungen von West Equatoriana Bobbins S.A. an die Taitwist Corp. in der Höhe von \$ 3.255.000, gemäß dem Vertrag vom 1. September 1999, entgegenzunehmen, an die Futura Investment Bank am 25. März 2000 zediert wurde.

Künftige Zahlungen sind gemäß diesem Vertrag an die Futura Investment Bank, Capitol City, Mediterraneo, Kontonr. 123456, Referenz Taitwist/Bobbins 010999, zu leisten.

(Untergeschrieben) \_\_\_\_\_

Harold Fine  
Vizepräsident

Claimant's Exhibit No. 3

Futura Investment Bank  
395 Industrial Place  
Capitol City, Mediterraneo  
Telephone 483-5800  
Telefax 483-5810

(Translation)

5 April 2000

Notice of Assignment

Notice is hereby given that the right to receive the remaining payments totaling \$3,255,000 due from West Equatoriana Bobbins S.A. to Tailtwist Corp. under a contract dated 1 September 1999 were assigned by Tailtwist Corp. to the Futura Investment Bank on 29 March 2000.

Future payments under this contract should be made to Futura Investment Bank, Capitol City, Mediterraneo, account 123456, reference Tailtwist/Bobbins 010999.

(Signed) \_\_\_\_\_  
Harold Fine  
Vice-President

Claimant's Exhibit No. 4

West Equatoriana Bobbins S.A.  
214 Commercial Ave.  
Oceanside, Equatoriana  
Telephone 555-1212  
Telefax 555-1214

16 May 2001

Mr. Harold Fine  
Vice-President  
Futura Investment Bank  
395 Industrial Place  
Capitol City, Mediterraneo

Dear Mr. Fine:

I wish to make the position of West Equatoriana Bobbins S.A. completely clear. West Equatoriana Bobbins S.A. has no intention of making any further payments in respect of the contract with Tailtwist Corp. dated 1 September 1999. There is no basis for further discussions between our two companies.

The notice of assignment sent by Futura Investment Bank on 5 April 2000 was totally deficient when received on 10 April 2000. It was written in the German language, which no one at West Equatoriana Bobbins S.A. could read. It therefore gave no notice whatsoever. Furthermore, even if it could have been read, it was fatally defective in form, since it called upon West Equatoriana Bobbins S.A. to make the payments to a different country from that to which payments were being made under the contract itself.

Although the English translation finally sent to us by fax on 19 April 2000 eliminated the language problem, it did nothing in regard to the change of country of payment. Moreover, it arrived after the commencement of the payment process within West Equatoriana Bobbins S.A. of the \$2,325,000 due to Tailtwist Corp. Futura Investment Bank simply acted too late in regard to that payment.

As far as the final payment of \$930,000 is concerned, you are aware that the training given our personnel was not that called for by the contract. You are also aware that there have been problems with the machinery delivered to us by Tailtwist that our personnel have not been capable of fixing. You are also aware that we have not been able to call upon Tailtwist for assistance from the time they entered insolvency proceedings on 20 April 2000. As a result, our agreement not to assert defenses in certain circumstances does not apply. You have received a copy of the letter we addressed to the administrator for Tailtwist Corp. on 10 January 2001 in which we declared a reduction of the price by \$930,000.

There is no further sum due from West Equatoriana Bobbins S.A. in respect of its contract with Tailtwist Corp.

If you wish to pursue this matter further, the courts of Equatoriana are open to you.

Sincerely,

Simon Black  
Vice President

Claimant's Exhibit No. 5

West Equatoriana Bobbins S.A.  
214 Commercial Ave.  
Oceanside, Equatoriana  
Telephone 555-1212  
Telefax 555-1214

10 January 2001

Dr. Herbert Strict  
Administrator in Insolvency  
14 White Horse Place  
Sea Port, Oceania

Reference: Contract with Taitwist Corp. dated 1 September 1999

Dear Mr. Strict:

On 18 April 2000, immediately prior to the opening of the insolvency proceedings of Taitwist Corp. on 20 April 2000, our consultant certified that the equipment contracted for in the referenced contract had been installed and that the commissioning tests had been completed by the Taitwist personnel. Consequently, on 19 April 2000 West Equatoriana Bobbins S.A. made the payment of \$2,325,000 as called for in the contract.

Our consultant's certification did not, of course, imply that the equipment was in full working order. That was to be determined by a three month period of satisfactory operation by West Equatoriana Bobbins S.A. Prior to the three-month period and subsequent to the installation and commissioning tests a team of four from Taitwist was to remain on site to train our personnel in the operation, adjustment and maintenance of the equipment. Only two of the team remained on site to conduct the training and they were so distracted by the opening of the insolvency proceedings that their training was grossly insufficient.

At no time has West Equatoriana Bobbins S.A. been able to operate the equipment in a fully satisfactory manner. The problems may lie in difficulties with the equipment itself or in the inadequate training given to our personnel. The result is the same in either case.

West Equatoriana Bobbins S.A. has determined that the deficiencies in the performance of the equipment has reduced its value by 10%. Therefore, West Equatoriana Bobbins S.A. hereby declares a reduction in the price of 10%, or \$930,000.

Sincerely,

Simon Black  
Vice President

Cc: Futura Investment Bank

June 5, 2001

VIA FEDERAL EXPRESS

Joseph Langweiler  
Counsel  
Futura Investment Bank  
14 Capitol Boulevard  
Capitol City, Mediterraneo

West Equatoriana Bobbins S.A.  
Legal Department  
214 Commercial Avenue  
Oceanside, Equatoriana

Re: Futura Investment Bank  
and  
West Equatoriana Bobbins, S.A.

Dear Parties:

This will acknowledge receipt by the International Centre for Dispute Resolution on June 5, 2001 from Claimant of a Demand for Arbitration dated June 5, 2001 of a controversy arising out of a contract between the above-captioned parties, containing a clause providing for administration by this Association. We understand that a copy was sent to Respondent. A copy of our International Arbitration Rules is enclosed.

Pursuant to Article 3, within thirty days of the date of this letter, a Respondent shall file a statement of defense in writing with the Claimant and this Association. If Respondent wishes to counterclaim, file three copies of same with the appropriate administrative fee and send a copy directly to Claimant.

Claimant has requested that the hearing be held in Vindobona, Danubia. Please review Article 13 of the Rules regarding the locale of hearings.

We note that the arbitration clause of the contract in this matter provides for that three arbitrators will be appointed to resolve this dispute. We therefore acknowledge receipt of Claimant's nomination of Dr. XXXX as its Arbitrator.

This will also serve to confirm your participation in an Administrative Conference Call on June 15, 2001 at 2:00 p.m. local New York time. The purpose of this call is to address matters that will assist the Association in

administering your case as efficiently and expeditiously as possible. The Association has found that such calls greatly improve the administrative process. Please be prepared to discuss the following items:

Whether mediation or other methods of dispute resolution might be appropriate.

As an option for resolution of this dispute, we propose mediation, as outlined in the enclosed Commercial Mediation Rules. It is our experience that mediation is expeditious, cost saving and highly successful. No additional administrative fee will be required for this process in the event the Parties desire to first attempt to mediate this dispute. Please note that the process is non-binding and the Parties must consent to these procedures.

We note that the arbitration clause of the contract in this matter provides for that three arbitrators will be appointed to resolve this dispute. We therefore acknowledge receipt of Claimant's nomination of Dr. XXXX as its Arbitrator. Please be prepared to further discuss the appointment method and process during the call.

Please provide a brief description of the case, the specification of the claims and the anticipated length of hearing.

Parties are advised to consider the information to be exchanged during the arbitral proceedings. Please note that at this stage all discovery will be voluntary and any difficulties that may arise will be decided by the arbitrators once appointed.

Parties are also encouraged to prepare a stipulation for uncontested facts, which will be reviewed by the arbitrators again, once appointed.

Please limit your discussions to the administrative process. Any discussions regarding issues of arbitrability or the merits of the dispute should be reserved for the arbitrators. Once appointed we will schedule the preliminary hearing where all substantive matters will be brought to the attention of the arbitrator(s). It should be noted that failure to participate in the arbitral proceedings will not prevent the arbitrators from issuing an arbitration award that may be enforced pursuant to the New York Convention.

The call will be initiated by our office on that date. If the Parties are not able to participate on the scheduled date of the call, we kindly request that the parties mutually agree on an alternate date and advise the undersigned so that the call may be scheduled accordingly.

The Association encloses herewith to each Party a form entitled 'Checklist for Conflicts' and requests that each Party fill out the document with the required information and return it to this office by June 14, 2001 be treated as confidential information, and not required to be exchanged by the Parties, unless the Parties agree otherwise. This is only a preliminary

list to identify potential witnesses and for the arbitrator to perform a conflict's check. It will not commit the Parties at this point.

This matter is now being administered by the International Centre for Dispute Resolution of the American Arbitration Association in New York City, and has been assigned to Sara Matathias. Please address all future correspondence to her. In the event I can be of assistance throughout the administration of this matter and to respond to any questions or issues that may arise, regarding the administrative process, please feel free to contact me directly. My contact information is set forth below. Please note that all our case administrators are supervised by multilingual attorneys trained in international arbitration and mediation. We look forward to working with you and to providing you with assistance during your participation in the arbitral process.

Thank you for selecting the American Arbitration Association, a leader in worldwide alternative dispute resolution.

Sincerely,

Eleni Lappa  
ICDR Supervisor  
212-484-3270  
[Lappae@adr.org](mailto:Lappae@adr.org)

Smart & Smart  
Advocates at the Court  
14 Court Street  
Oceanside, Equatoriana

13 June 2001

International Center for Dispute Resolution  
American Arbitration Association  
1633 Broadway  
10<sup>th</sup> Floor  
New York, NY 10019-6708  
USA

Dear Sirs:

We are in receipt of a Notice of Arbitration filed with your Center by Futura Investment Bank against West Equatoriana Bobbins S.A., whom we represent.

It is stated in the Notice of Arbitration that the arbitration clause that is relied upon was in a contract between Tailtwist Corp. and West Equatoriana Bobbins S.A. My client, West Equatoriana Bobbins S.A., has had no relations whatsoever with Futura Investment Bank, with the exception of receipt of a notice of assignment indicating that Futura Investment Bank is the assignee of rights held by Tailtwist Corp. Even though the rights held by Futura Investment Bank are based on an assignment of rights from Tailtwist Corp. arising out of the contract between Tailtwist and my client, it is clear that my client has never entered into any arbitration agreement with the claimant. Furthermore, I can assure you that my client would not enter into an arbitration agreement with it.

If Futura Investment Bank believes that it has a claim against my client, it should bring an action in the proper court, which in this case would seem to be the Commercial Court in Oceanside, Equatoriana.

I ask you, therefore, to inform Futura Investment Bank that its request for arbitration at the American Arbitration Association must be denied without the trouble and expense that would result from constituting an arbitral tribunal.

(Signed) \_\_\_\_\_  
Jonathan Smart

June 13, 2001

Joseph Langweiler  
Counsel  
Futura Investment Bank  
14 Capitol Boulevard  
Capitol City, Mediterraneo

West Equatoriana Bobbins S.A.  
Legal Department  
214 Commercial Avenue  
Oceanside, Equatoriana

Re: Futura Investment Bank  
and  
West Equatoriana Bobbins, S.A.

Dear Parties:

This acknowledges receipt of a letter dated June 13, 2001 from Counsel for West Equatoriana Bobbins. We note that a copy of said letter was not sent to Joseph Langweiler thus we have attached a copy for your reference. The parties are hereby advised to please copy each other on all correspondence.

This will serve to invite Mr. Langweiler's comments regarding this letter by June 18, 2001. If no response is received by said date we will proceed with the next administrative step in this matter. Please note that pursuant to Article 15 of the International Arbitration Rules that govern this matter, pleas as to jurisdiction will be determined by the tribunal, as soon as it constituted.

Sincerely,

Eleni Lappa  
ICDR Supervisor  
212-484-3270  
[Lappae@adr.org](mailto:Lappae@adr.org)

Futura Investment Bank  
Claimant

v.

West Equatoriana Bobbins S.A.  
Respondent

### Statement of Defense

#### I. Parties

1. The information given in the Notice of Arbitration in respect of the name and address of West Equatoriana Bobbins S.A. and Taitwist Corp. are accurate. West Equatoriana Bobbins S.A. has no independent knowledge in respect of Futura Investment Bank.

#### II. Arbitration Clause

2. The arbitration clause set forth in paragraph 14 of the Notice of Arbitration reproduces the clause to be found in the contract between Taitwist Corp. and West Equatoriana Bobbins S.A. Therefore, any arbitration based on the clause would be at the American Arbitration Association, would take place in Vindobona, Danubia before a tribunal of three arbitrators and in the English language. Respondent also agrees that any such arbitration would be conducted under the AAA International Arbitration Rules that came into force on September 1, 2000.

3. Respondent denies, however, that Futura Investment Bank can rely upon the clause to commence an arbitration against it. Respondent neither has nor has ever had any business or contractual relationship with Futura Investment Bank and specifically has never contemplated agreeing to arbitrate any dispute, current or in the future, with it. It will be noted that the arbitration clause specifically states that it applies to any dispute between Taitwist Corp. and West Equatoriana Bobbins S.A. Since Taitwist is not a party to the Notice of Arbitration, it is clear that the attempt is to apply the arbitration clause to a dispute that is not contemplated by it.

4. While Respondent has no reason to contest that Futura Investment Bank is the assignee of the right to payment under the contract between Taitwist Corp. and Respondent, the assignment is of the right to payment, not to the dispute settlement mechanism in the contract. If Futura Investment Bank wishes to pursue its claim against Respondent further, the courts of Equatoriana are available to it.

5. Recognizing that the American Arbitration Association has decided that an arbitral tribunal should decide whether Futura Investment Bank can bring an arbitration against Respondent based upon the arbitration clause in the Tailtwist contract, Respondent appoints Attorney XXXX as its arbitrator.

### III. Response on the Merits

#### A. Payment of \$2,325,000

6. Although Respondent is firmly convinced that it is not bound to arbitrate against Futura Investment Bank, an explanation will be given as to why there is no substantive claim against Respondent.

7. As is stated in the Notice of Arbitration, Respondent received the notice of assignment to Futura Investment Bank of the right to payment from Respondent to Tailtwist Corp. under the contract of 1 September 1999 on 10 April 2000. As can be seen from Claimant's Exhibit No. 2, the notice of assignment was in the German language, the language spoken in Mediterraneo but not in Equatoriana. No one who worked for Respondent could read the notice. Nevertheless, since the name of Tailtwist Corp. and the date of the contract were mentioned, the notice was sent to Mr. Simon Black, Vice-President of Respondent and the person responsible for the Tailtwist contract. Mr. Black was on a business trip at the time and did not return to his office until 13 April 2000. Although Mr. Black also could not read the notice, the references to Tailtwist and to the date of the contract led him to send a fax on 15 April 2000 to Futura Investment Bank inquiring as to the nature of the communication. (Respondent's Exhibit No. 1) A reply was received the morning of 19 April 2000 stating that the earlier communication was a notice of assignment of the right to payment under the Tailtwist contract and containing a translation of the notice of assignment into English. (Respondent's Exhibit No. 2. The English translation that was included with the fax is set out as Claimant's Exhibit No. 3, though without indication that it was transmitted to Respondent on 19 April 2000.)

8. It was not clear to Mr. Black what actions should be taken in regard to the purported assignment, especially since the notice had been sent by Futura Investment Bank and not by Tailtwist Corp. Nevertheless, he sent a memorandum to the accounting department not to make any payments to Tailtwist until further notice. (Respondent's Exhibit No. 3) The accounting department received the memorandum late the same afternoon. Mr. Black's intention was to inquire of Tailtwist as to whether there had been such an assignment. The eventual confirmation came in the form of a notice from the insolvency administrator dated 17 October 2000. (Respondent's Exhibit No. 4)

9. The day previous to receipt of the notice of assignment in English, 18 April 2000, the consultant for Respondent certified that the installation and commissioning tests of the Tailtwist equipment had been completed and sent his certification to the accounting department. The accounting department acted upon the certification in the early afternoon of 19 April 2000, prior to receipt of the memorandum from Mr. Black. It sent the requisite payment order to the Equatoriana Commercial Bank directing payment of \$2,325,000 to Tailtwist Corp..

10. The payment made by Respondent on 19 April 2000 entered into the assets of the insolvent. The administrator of the Tailtwist insolvency has approved the sale (assignment)

and there is no reason to doubt that it is fully effective between Tailtwist and Futura Investment Bank. (Respondent's Exhibit No. 5) Futura Investment Bank undoubtedly has a claim to the amount of the payment in the Tailtwist insolvency proceedings.

11. As can be seen, the effective indication that there had been an assignment came subsequent to the payment by Respondent to Tailtwist. Furthermore, we note that the notice of assignment directed us to change the country of payment from Oceania, where Tailtwist and its bank are located, to Mediterraneo, where Futura Investment Bank is located. The notice of assignment was, therefore, formally defective since a change in the country to which the debtor (West Equatoriana Bobbins S.A.) must make payment is not permitted under the Convention on Assignments of Receivables in International Trade. The formal invalidity of the notice of assignment was rectified by Futura Investment Bank only on 5 July 2000. (Respondent's Exhibit No. 5)

#### B. Payment due after three months satisfactory performance

12. According to the contract with Tailtwist two periods began upon the certification of successful installation and commissioning tests on 18 April 2000. The first was a period of three weeks during which the Tailtwist personnel would remain to train the Respondent's personnel in the correct operation, adjustment and maintenance of the machinery and a further three month period of satisfactory performance of the Tailtwist equipment, at the end of which Respondent was required to pay the final balance of \$930,000 of the contract price.

13. The sale (assignment) by Tailtwist to Futura Investment Bank of its right to payment from Respondent was apparently a final effort to save Tailtwist from insolvency. The effort failed and insolvency proceedings were opened in Oceania on 20 April 2000.

14. The commencement of insolvency proceedings had an immediate effect on the implementation of Tailtwist's remaining obligations under the contract. A team of four persons had been expected to carry out the training of Respondent's personnel. However, on the opening of the insolvency proceedings on 20 April 2000 two of them were ordered to return immediately to Oceania. On their return they were notified that their employment was terminated effective immediately. The two remaining Tailtwist employees would have had a difficult time at best to conduct the training that was called for under the contract for which four persons had been anticipated. Under the circumstances, they were obviously upset and concerned about their own future. As a result, they were not able to give even the amount and quality of training that they otherwise might have given. In total, the training given by Tailtwist's personnel under the contract was totally unsatisfactory.

15. The result for Respondent has been that the Tailtwist equipment has not performed satisfactorily. Full production has not been attained. Respondent's personnel have had to experiment with adjusting the equipment for different raw materials, with constant fear that an incorrect adjustment would result in damage to the product and perhaps to the equipment itself.

16. Since there has been no period of three months satisfactory performance, Respondent's consultant has given no such certification and Respondent has not paid the final balance of \$930,000. Finally, in order to bring a close to the open aspects of the Tailtwist contract, on 10 January 2001 Respondent declared a reduction of the price of \$930,000 in accordance with article 50 of the United Nations Convention on Contracts for the International Sale of Goods.

(Claimant's Exhibit No. 5) Consequently, there is no balance due on the contract and no sum due to be paid to Futura Investment Bank. That West Equatoriana Bobbins S.A. considered the matter to be closed and not subject to further discussion was communicated to Futura Investment Bank on 16 May 2001. (Claimant's Exhibit No. 4)

### C. Agreement not to Assert Defenses; Notice of defective goods

17. In the Notice of Arbitration Futura Investment Bank refers to the clause in the contract by which Respondent agreed not to assert against an assignee of Taittwist's right to receive payments from Respondent "any defense it may have against Taittwist arising out of defective performance of this contract, unless Taittwist does not in good faith attempt to remedy the deficiency."

18. During the negotiation of the contract Taittwist insisted upon a clause of this nature. It anticipated that it might wish to assign the right to receive the payment from Respondent and it would receive better terms from the assignee if such a clause were present. Respondent did not wish to have such a clause in the contract, since it would make reclamations against defective performance more difficult. Finally, it was agreed that there would be a clause, but that deficiencies Taittwist did not in good faith attempt to remedy would be excluded from its operation. If there would be a deficiency in Taittwist's performance of the contract, Taittwist would be bound to attempt in good faith to remedy the deficiency (which at the time of negotiating the contract Respondent was convinced would remedy all likely difficulties) or Respondent would be able to assert the deficiency as a defense against the assignee.

19. The opening of the Taittwist insolvency proceedings on 20 April 2000 upset all of the calculations. As already mentioned, the first consequence was that two of the four men expected to remain at Respondent's place of business for training Respondent's personnel were immediately called back and their employment was terminated on their arrival in Oceania. On 13 June 2000 the insolvency administrator recommended to the court in Oceania that all further business activities of Taittwist be terminated immediately and that the company be liquidated. The recommendation was accepted by the court on 16 June 2000. From then on the only activities carried on in respect of Taittwist were in connection with the liquidation.

20. The contract provided that at the end of a three month period of satisfactory performance the final 10% of the purchase price (\$930,000) was to be paid. The anticipated period of three months ended on 10 August 2000, but the machinery had not worked in a satisfactory way. Full production has not been attained. As noted above, Respondent's personnel have had to experiment with adjusting the equipment for different raw materials, with constant fear that an incorrect adjustment would result in damage to the product and perhaps to the equipment 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 Taittwist. In either case, the result has been the same.

21. The obvious response would normally have been that Respondent would have notified Taittwist of the problems and would have expected the arrival of Taittwist personnel who would either have fixed the machinery or have given additional training, or both. However, with the insolvency of Taittwist and the complete cessation of all its operations except those devoted to liquidating the company, there was no one to whom to send any such notice.

22. In respect of the agreement not to assert defences, it is obvious that Taitwist did not attempt in good faith to remedy the deficiencies in its performance. It is also obvious that Taitwist would not have remedied the defects, or attempted in good faith to do so, even if Respondent had sent a notice to the insolvency administrator, who was the only available addressee to whom such a notice could theoretically have been sent. Consequently, Respondent is not precluded from asserting its defenses against Taitwist's assignee, Futura Investment Bank, either as a result of the clause or as a result of not having given notice of the deficient performance of the equipment.

#### IV. Request of the Tribunal

23. The Respondent requests the arbitral tribunal:

- To declare that it does not have jurisdiction to hear the claim brought against the Respondent for lack of an arbitration agreement;
- To award Respondent all costs of the arbitration.

24. If the arbitral tribunal should find that it has jurisdiction to hear the claim, the Respondent requests the arbitral tribunal to declare

- that the notice of assignment sent by Futura Investment Bank was ineffective against Respondent since it was in the German language;
- that the notice of assignment sent by Futura Investment Bank was ineffective against Respondent because it changed the country to which payment should be made;
- that the notice of assignment was not binding on Respondent until it was confirmed by the assignor;
- that the English language translation of the notice of assignment sent by Futura Investment Bank on 19 April 2000 arrived too late to stop the payment of \$2,325,000 due on the completion of the installation of the equipment and the commissioning tests;
- that the agreement not to assert defenses against an assignee of Taitwist Corp. does not preclude Respondent from asserting the defective performance of the contract since Taitwist Corp. did not in good faith attempt to remedy the deficiencies;
- that there was no effective person to whom Respondent could have sent a notice of defective performance once all of Taitwist's business activities were terminated by the court in Oceania handling its insolvency proceedings.

Respondent further requests the arbitral tribunal to award Respondent all costs of the arbitration.

(Signed) \_\_\_\_\_  
Counsel for West Equatoriana Bobbins S.A.

14 June 2001

Respondent's Exhibit No. 1

West Equatoriana Bobbins S.A.  
214 Commercial Ave.  
Oceanside, Equatoriana  
Telephone 555-1212  
Telefax 555-1214

15 April 2000

Harold Fine  
Vice-President  
Futura Investment Bank  
395 Industrial Place  
Capitol City, Mediterraneo

Dear Mr. Fine:

We are in receipt of a communication from you dated 5 April 2000 that we do not understand. Since it contains the name of Taitwist Corp. and the date 1 September 1999, which is the date of a contract between Taitwist and ourselves, we inquire as to the nature of your communication to us.

I must ask you to reply in the English language, since that is the only language that I and my colleagues are able to read.

In anticipation of your reply, I remain

Sincerely yours,

Simon Black  
Vice President

FAX

Respondent's Exhibit No. 2

Futura Investment Bank  
395 Industrial Place  
Capitol City, Mediterraneo  
Telephone 483-5800  
Telefax 483-5810

19 April 2000

Mr. Simon Black  
Vice President  
West Equatoriana Bobbins S.A.  
214 Commercial Ave.  
Oceanside, Equatoriana

Dear Mr. Black:

The correspondence from us dated 5 April 2000 was a notice of assignment. Tailtwist Corp. has assigned to us the right to receive the payments due to it under your contract with Tailtwist dated 1 September 1999.

I apologize for the fact that the notice of assignment sent to you was in German. A translation into English is attached.

Please be sure that all future payments in regard to your contract with Tailtwist are made to our account.

Sincerely,

Harold Fine  
Vice-President

Encl.: Notice of Assignment (English) [Note: the enclosed translation of the notice of assignment is set forth as Claimant's Exhibit No. 3.]

Fax and Mail

Respondent's Exhibit No. 3

West Equatoriana Bobbins S.A.  
214 Commercial Ave.  
Oceanside, Equatoriana

To: Accounting Department  
From: Simon Black  
Date: 19 April 2000  
Re: Tailtwist contract

I have just received a notice that Tailtwist assigned to Futura Investment Bank the right to receive the payments from us due on the Tailtwist contract. One of them will soon be due. Please be sure not to make any payment to Tailtwist until I receive confirmation from Tailtwist that they have indeed made the assignment.

Respondent's Exhibit No. 4

Dr. Herbert Strict  
Administrator in Insolvency  
14 White Horse Place  
Sea Port, Oceania

MATTER OF THE INSOLVENCY OF TAILTWIST CORP.

On 29 March 2000 Tailtwist Corp. assigned to the Futura Investment Bank, 395 Industrial Place, Capitol City, Mediterraneo, the right to receive the remaining payments due from West Equatoriana Bobbins S.A. under a contract dated 1 September 1999. The amount of the payments assigned was \$3,255,000. Futura Investment Bank paid to Tailtwist the sum of \$3,150,000 in exchange for the assignment.

Transfers of property made by an insolvent within 90 days of the opening of the insolvency proceedings may be set aside by the Insolvency Administrator under certain circumstances. The assignment referred to above was made within 90 days of the opening of the insolvency proceedings.

I find that the transfer did not contravene the policies set forth in the Insolvency Law of Oceania. Therefore, the assignment is confirmed.

Signed \_\_\_\_\_

17 October 2000

Date

Respondent's Exhibit No. 5

Futura Investment Bank  
395 Industrial Place  
Capitol City, Mediterraneo  
Telephone 483-5800  
Telefax 483-5810

5 July 2000

Mr. Simon Black  
Vice President  
West Equatoriana Bobbins S.A.  
214 Commercial Ave.  
Oceanside, Equatoriana

Dear Mr. Black:

I refer to the notice of assignment dated 5 April 2000 in which Futura Investment Bank notified you that your payment obligations under the contract with Tailtwist Corp. had been assigned to the Bank.

In the notice of assignment you were instructed to make payment to Futura Investment Bank, Capitol City, Mediterraneo, account 123456, reference Tailtwist/Bobbins 010999.

You are hereby instructed to make future payments to Oceania Commercial Bank, Port City, Oceania, account of Futura Investment Bank, account number 345678, reference Tailtwist/Bobbins 010999.

(Signed)

\_\_\_\_\_  
Harold Fine  
Vice-President

June 14, 2001

Joseph Langweiler  
Counsel  
Futura Investment Bank  
14 Capitol Boulevard  
Capitol City, Mediterraneo

West Equatoriana Bobbins S.A.  
Legal Department  
214 Commercial Avenue  
Oceanside, Equatoriana

Re: Futura Investment Bank  
and  
West Equatoriana Bobbins, S.A.

Dear Counsel:

This will acknowledge receipt on June 14, 2001 from Respondent of a Statement of Defense to the Demand for Arbitration which was initiated by Claimant on 5 June, 2001. We understand that a copy was sent to the Claimant.

We further note that Respondent has appointed Attorney XXXX as its arbitrator.

The Parties are kindly reminded of our administrative conference call set for tomorrow, June 15, 2001, at 2:00 p.m. local New York time.

Sincerely,

Eleni Lappa  
ICDR Supervisor  
212-484-3270  
[Lappae@adr.org](mailto:Lappae@adr.org)

June 15, 2001

Joseph Langweiler  
Counsel  
Futura Investment Bank  
14 Capitol Boulevard  
Capitol City, Mediterraneo

West Equatoriana Bobbins S.A.  
Legal Department  
214 Commercial Avenue  
Oceanside, Equatoriana

Re: Futura Investment Bank  
and  
West Equatoriana Bobbins, S.A.

Dear Counsel:

This will serve to confirm that an administrative conference call took place on June 15, 2001, wherein the following matters were discussed. Participating on the call were Joseph Langweiler representing the Claimant and YYYYYY representing the Respondent.

Although mediation was discussed, the parties felt that mediation was not an option at this time.

**Number of Arbitrators:**

The parties agree that the arbitration will be heard by a tripartite panel.

**Method of Appointment:**

Your arbitration agreement provides for party-appointed arbitrators. The parties have each appointed their respective arbitrators and we will be confirming said appointments and assisting in the appointment of the third Arbitrator shortly.

**Locale:**

Your arbitration agreement provides for the arbitration to be held in Vindobona, Danubia

Thank you for your participation in today's conference call.

Sincerely,

Eleni Lappa  
ICDR Supervisor  
212-484-3270  
[Lappae@adr.org](mailto:Lappae@adr.org)

October 6, 2001

Joseph Langweiler  
Counsel  
Futura Investment Bank  
14 Capitol Boulevard  
Capitol City, Mediterraneo

West Equatoriana Bobbins S.A.  
Legal Department  
214 Commercial Avenue  
Oceanside, Equatoriana

Re: Futura Investment Bank  
and  
West Equatoriana Bobbins, S.A.

Dear Counsel:

This acknowledges receipt of Procedural Order No. 1 issued by the Arbitrator. A copy of said Order is attached herewith for your review and compliance.

Sincerely,

Eleni Lappa  
ICDR Supervisor  
212-484-3270  
[Lappae@adr.org](mailto:Lappae@adr.org)

Futura Investment Bank  
Claimant

v.

West Equatoriana Bobbins S.A.  
Respondent

**PROCEDURAL ORDER NO. 1**

1. The Arbitral Tribunal, composed of Mr. \_\_\_\_\_, Dr. \_\_\_\_\_, and myself as chairman, has authorized me in conformity with AAA International Arbitration Rules, Article 26.2, to make procedural rulings alone.

2. On 30 September 2001 I met with \_\_\_\_\_, counsel for the Claimant, Futura Investment Bank, and \_\_\_\_\_, counsel for the Respondent, West Equatoriana Bobbins S.A. We discussed the procedures that should be followed in the arbitration. Counsel agreed that the Tribunal might be able to decide the arbitration on legal issues alone, without the need for an extensive procedure to determine facts beyond those already set forth in the Notice of Arbitration and the Statement of Defense. The factual issues that may need to be developed at this first stage of the arbitration will be determined in accordance with the procedures found in the Rules of the Ninth Annual Willem C. Vis International Commercial Arbitration Moot. In accordance with those Rules questions may be submitted to Professor Eric Bergsten, preferably by e-mail at [eric.bergsten@chello.at](mailto:eric.bergsten@chello.at), by Friday, 26 October 2001. The answers will be distributed to all parties by 5 November 2001.

3. West Equatoriana Bobbins S.A. has contested the jurisdiction of the arbitral tribunal to consider this dispute on the grounds that there is no arbitral agreement between it and Futura Investment Bank. Futura Investment Bank in reply argues that as the assignee of Tailtwist Corp., it can rely on the arbitration clause in the contract between Tailtwist and West Equatoriana Bobbins S.A.

4. West Equatoriana Bobbins S.A. has also contested on the merits the claims put forward by Futura Investment Bank. In respect of the sum of \$2,325,000 due from West Equatoriana Bobbins S.A. on the completion of the commissioning tests, it claims that the notice of assignment dated 5 April 2000 from Futura Investment Bank, was

- defective in form when received in that it was in the German language, which no one at West Equatoriana Bobbins S.A. could read;
- defective in form, whether in German or in the English translation later received, in that it called for payment to be made in Mediterraneo rather than in Oceania as in the contract with Tailtwist;
- did not bind West Equatoriana Bobbins S.A. until confirmation of the assignment was received from Tailtwist Corp., the assignor; and
- received too late in the readable English translation to affect the payment to Tailtwist already in process.

Futura Investment Bank counters with the argument that even if the German text was not fully readable to the personnel of West Equatoriana Bobbins S.A., there were sufficient indications in it as to its nature to give notice that payment should not be made to Tailtwist Corp. until further inquiry was made.

5. In respect of the sum of \$930,000 due upon the completion of three months satisfactory operation of the equipment, West Equatoriana Bobbins S.A. claims that the machinery did not perform satisfactorily and that it was justified in reducing the price by the outstanding sum due, namely \$930,000. In response to the argument raised by Futura Investment Bank that it had signed an agreement not to assert against an assignee of Tailtwist Corp. defenses arising out of the deficient performance of the contract, West Equatoriana Bobbins S.A. states that the agreement did not apply to deficient performance that Tailtwist Corp. did not in good faith attempt to remedy. It goes on to say that, because of the insolvency of Tailtwist Corp., there was no attempt to remedy the deficient performance. Futura Investment Bank in reply has stated that West Equatoriana Bobbins S.A. did not give Tailtwist Corp. notice of the deficient performance. Not only did that preclude Tailtwist Corp. from attempting to remedy the deficient performance, but by itself would have been grounds for precluding West Equatoriana Bobbins S.A. from asserting the deficient performance against Tailtwist Corp. itself. West Equatoriana Bobbins S.A. replies that Tailtwist Corp. was in insolvency proceedings at the time notice would have been given and all functions had ceased, except those associated with liquidating the company. It states that there was no one to whom an effective notice could have been given.

6. It would be normal practice for the Arbitral Tribunal to receive arguments first as to its jurisdiction before it received arguments on the substance of the dispute. However, in the interests of efficient administration of the arbitration, the parties are requested to submit their arguments as to all the issues at the same time. A memorandum for claimant in regard to these issues is to be submitted by e-mail to Professor Eric Bergsten by 13 December 2001. At least five hard copies must be received in Vienna by 18 December 2001. A further twenty copies are due in Vienna by 10 January 2002. Counsel are reminded that they may need to send the hard copies before 13 December in order for them to arrive by 18 December. Counsel are also reminded that failures of the delivery service, whether the post or a courier service, are at their risk.

7. A memorandum for respondent is to be submitted by e-mail to Professor Eric Bergsten by 8 February 2002. At least five hard copies must be received in Vienna by 13 February 2002 with an additional twenty copies due by 19 February 2002.

8. Oral arguments will be held during the period 22 to 28 March 2002. There will be an unofficial welcoming party organized by the Moot Alumni Association on Thursday evening, 21 March 2002.

(Signed)

6 October 2001

Futura Investment Bank  
Claimant

v.

West Equatoriana Bobbins S.A.  
Respondent

### **PROCEDURAL ORDER NO. 2**

Following the procedure agreed upon by the parties and set forth in Procedural Order No. 1, the parties have submitted a number of requests for clarifications. The responses to those requests are set forth below.

On 2 November 2001 there was a further conference telephone call between the President of the Tribunal and counsel for the parties. During that telephone call it was clarified that there were a certain number of factual questions that might require the taking of evidence at hearings to be held at some time after the hearings in March 2002 [i.e., after the Moot is over.] In particular, if the Tribunal were to decide that West Equatoriana Bobbins S.A. was not precluded from reducing the price by reason of either the clause in the contract in which it agreed not to assert certain defenses against a future assignee of the right to receive payment or the fact that it had not given notice of the deficiencies in performance of the equipment, there might still be a need to determine whether there was in fact such a deficiency in performance and whether the amount of reduction in the price was appropriate. Similarly, if the Tribunal were to find that West Equatoriana Bobbins S.A. was obligated to pay to Futura Investment Bank either or both of the two payments claimed, the amount of interest would need to be determined at a time after the hearings in March 2002. It was, therefore, agreed that for the purposes of preparing the memoranda to be submitted in accordance with the schedule set forth in Procedural Order No. 1 and the oral hearings 22 to 28 March 2002, no issues as to the monetary amount owed by one party to the other should be discussed. Furthermore, all facts alleged in either the Notice of Arbitration or the Statement of Defense, as well as all facts clarified in the present Procedural Order, would be accepted as being correct. That would not prevent either party from contesting any of those facts at later evidentiary hearings after the hearings in March 2002.

### **Applicable Law**

#### **1. Was the Draft Convention on the Assignment of Receivables in International Trade in force at the time of the contract between Tailtwist and Bobbins and at the time of the conclusion of the contract of assignment between Tailtwist and Futura?**

Yes. Even though at the time of distribution of the Problem the text is in fact a Draft Convention, for the purposes of the Moot the Convention is in force, and was in force for Mediterraneo and Oceania, but not for Equatoriana, at all relevant times. The existence of the Convention was well known in Oceania and Mediterraneo in the professional circles dealing

with trade financing. This included the financial officers of Tailtwist and the relevant personnel in Futura. There is no knowledge whether there is interest in the Convention in Equatoriana.

The Convention may be referred to as the “Receivables Convention”.

**2. Have Equatoriana and Oceania incorporated into their domestic law the United Nations Convention on Contracts for the International Sale of Goods and have Oceania and Mediterraneo incorporated into their domestic law the Draft Convention on the Assignment of Receivables in International Trade ? Have they made any reservations or declarations to the conventions to which they are party?**

The conventions have been incorporated into domestic law by the constitutional procedures of the three countries.

No reservations or declarations have been made by any of the three States to any of the Conventions relevant to this arbitration to which they are party.

**3. Were Equatoriana, Oceania or Mediterraneo parties to the UNIDROIT Convention on International Factoring at any of the relevant times?**

No, none of the three States is party to that Convention.

**4. Are there any trade usages in the sense of article 11 of the Draft Convention on Assignments of Receivables in International Trade that would affect the relations between Tailtwist and Futura?**

No.

**5. Is there anything in the law of Oceania that would preclude the application of the Draft Convention on Assignments of Receivables in International Trade to Bobbins?**

There is nothing in the law of Oceania that is contrary to the provisions of the Draft Convention. Application of the Draft Convention to Bobbins would, of course, have to be justified.

**6. Are Equatoriana, Oceania and Mediterraneo common law or civil law countries?**

Equatoriana and Oceania are common law countries while Mediterraneo is a civil law country.

**7. Have any of the three countries adopted the UNCITRAL Model Law on Cross-Border Insolvencies?**

Sadly, no.

**Contract, contract terms and prior business relations**

**8. What language is spoken in Equatoriana, Oceania and Mediterraneo?**

English is spoken in Equatoriana and Oceania while German is spoken in Mediterraneo.

**9. In what language was the contract between Tailtwist and Bobbins?**

English.

**10. Had Bobbins had previous dealings with parties who communicated in German?**

Basically no, though it had received inquiries in German in regard to its products on several occasions. On those occasions it had sent the letters to a local translation service to have them translated into English. All follow-up correspondence had been in English.

**11. Who drafted the contract?**

The contract was negotiated, but the negotiations commenced on the basis of the Tailtwist standard contract form. As was noted in the Statement of Defense para. 18, the clause relating to the agreement not to assert defenses was specifically negotiated. There were other provisions that have not arisen in this arbitration that were also specifically negotiated.

**12. Did the contract specify the country to which payments to Tailtwist were to be made?**

The contract specified that payments were to be made to Tailtwist's bank account in Oceania.

**13. Had Bobbins had any prior dealings with Tailtwist?**

Bobbins had purchased other equipment from Tailtwist on several occasions in the past. There had been no disputes arising from those transactions.

**14. Has Bobbins ever had the situation before where its creditor assigned the right to receive payments from Bobbins?**

In some countries assignment of trade credit is a common form of business financing. That is the situation in Equatoriana. Therefore, it had happened on many occasions that creditors of Bobbins had assigned to someone else the right to receive payment from Bobbins. Moreover, Bobbins had also on occasion financed its current operations by assigning its receivables to a financing company.

## **Assignment**

**15. Was the assignment from Tailtwist to Futura oral or written and in what language was the contract concluded?**

It was written in English. It met all formal requirements for being a valid and effective assignment.

**16. Was it a factoring contract?**

No.

**17. Did the contract give Futura a right of recourse against Taitwist if Bobbins did not make the two anticipated payments to Futura?**

Yes, Futura has a right of recourse under the contract of assignment.

**18. Did the assignment contract contain an arbitration clause?**

No.

**19. Did the assignment contract provide which of the two parties would notify Bobbins of the assignment?**

It provided that Futura would notify Bobbins.

**20. At the time of the assignment did Futura know of the terms of the contract between Taitwist and Bobbins?**

Yes. Futura would not have paid \$3,150,000 (see Respondent's Exhibit No. 4) if it had not known in detail for what it was paying.

## **Insolvency**

**21. When did Bobbins learn of the opening of the Taitwist insolvency proceedings?**

Bobbins learned of the opening of the insolvency proceedings on 23 April 2000. It knew of the decision of the administrator to request the court to terminate all of Taitwist business operations and the decision of the court to accede to the request on the day on which they were made.

**22. Is there anything in the insolvency law of Oceania that would affect the rights of Bobbins or Futura in regard to the assignment of the right of payment from Taitwist to Futura?**

There is nothing other than that which is set forth in the decision of Dr. Herbert Strict, Administrator in Insolvency, Respondent's Exhibit No. 4. Under the insolvency law and procedure in Oceania, the decision of Dr. Strict was a final decision on all matters to which it pertained.

**23. In what manner, if any, did the opening of insolvency proceedings in Oceania affect Taitwist's contractual rights and obligations towards Bobbins?**

Under the insolvency law of Oceania the contract remains in force unless and until the court decides otherwise. If Bobbins has an affirmative claim against Taitwist, it would have to be asserted in the insolvency proceedings. Taitwist would have claims against Bobbins only to the extent that it had fulfilled its contractual obligations. Under the insolvency law of Oceania a reduction of the price for failure by a seller to fulfill its obligations is not considered to be an affirmative claim on the part of the buyer.

**24. Did the payment of the \$2,325,000 by Bobbins to Taitwist on 19 April 2000 become part of the assets of Taitwist in the insolvency proceedings?**

Yes, the funds became part of the assets of Taitwist in the insolvency proceedings. If anyone other than Taitwist had a right to those funds, he/it would have to file a claim in the insolvency proceedings as a general creditor and would share with all other general creditors of Taitwist on a pro rata basis. A claimant to those funds would have no priority in the insolvency proceedings in regard to them. It is anticipated that general creditors in the Taitwist insolvency will receive approximately 20 percent of their claims.

**25. When did Bobbins write Taitwist's administrator in insolvency to request confirmation of the assignment?**

It never did. Since it had already paid Taitwist the \$2,325,000, it had no intention of paying Futura as well, even if there was an effective assignment. Similarly, since it had no intention of paying the final amount of \$930,000, it had no interest in whether there had been an assignment.

**26. Was Bobbins aware at any time prior to the opening of the Taitwist insolvency proceedings on 20 April 2000 that Taitwist was in financial difficulties?**

There had been some speculation in business circles that Taitwist might be having financial difficulties, but the opening of insolvency proceedings was a surprise to Bobbins.

## **Payment procedures**

**27. Was there anyone besides Mr. Black to whom the notice of assignment in German might have been sent?**

The secretary who opened the envelope containing the notice of assignment had no idea what it was. She could tell that it involved the contract with Taitwist, since the name of the company was on the notice. All correspondence dealing with the Taitwist contract was sent to Mr. Black. No one had been delegated to deal with the contract while he was on the business trip.

**28. When did Mr. Black read the notice?**

He did not actually read the notice, since he could not read German. However, he looked at it on Saturday, 15 April 2000, the day he sent the inquiry by fax to Futura.

**29. When Taitwist received the payment initiated by Bobbins on 19 April 2000, was there any instruction from Futura to hold the payment for Futura's benefit?**

No, it had been expected that notice would be given to Bobbins of the assignment and that Bobbins would pay directly to Futura.

**30. By what procedure did Mr. Black send his memorandum to the Accounting Department, Respondent's Exhibit No. 3.**

Mr. Black followed the usual procedure. After he dictated the memorandum, which was one of several he dictated at the same time, it was typed by his secretary and presented to him for signature. After he signed it, the memorandum was placed in the out-going mailbox for the internal messenger service. The memorandum was delivered to the Accounting Department by the internal messenger service. It took about two and a half hours from the time the memorandum was signed to the time it was received in the Accounting Department.

**31. Was it necessary for Mr. Black to sign or in any other way authorize the payment to Taitwist?**

No. Before he left on his business trip he had discussed with the consultant the progress being made in the installation and commissioning of the Taitwist equipment. Since there was the possibility that it would be completed while he was still traveling, he had left instructions that the certification would go directly from the consultant to the accounting department and that payment should then be made.

**32. Would it have been possible for Bobbins to stop the payment after the accounting department received the memorandum from Mr. Black that payment should not be made to Taitwist until further information in regard to the assignment was received?**

The instruction to Equatoriana Commercial Bank to make the payment was transmitted to it by Internet. Since the payment order sent by Bobbins was in the format prescribed by the Bank, the account of Bobbins was debited and the payment order was sent by the Bank to Taitwist's bank in Oceania within an hour of receipt. That was prior to the time that Mr. Black's memorandum was received by the accounting department.

**33. Would it have been prejudicial to Bobbins to make payment to a bank in Mediterraneo rather than to a bank in Oceania? Would the transfer have cost more?**

No, there would have been no difference as far as Bobbins was concerned.

**Quality of the Goods and Nature of the Training**

**34. Were there specifications of performance set out in the contract?**

Yes, there were detailed specifications in the annexes to the contract as to the performance of the Taitwist "Spin-a-Whizz" equipment as well as the "Auto-Swop" Doffer. Bobbins will be prepared to present evidence as to the deficiencies in performance of the equipment, if the arbitration reaches a stage of detailed fact-finding. Such detailed presentation of evidence would take place, if at all, only after the oral hearings scheduled for March 22-28, 2002 [i.e., only after the Moot is completed].

**35. Did Taitwist agree that they would provide four of their personnel for the training?**

In oral discussions prior to the conclusion of the contract Taitwist had said that the training would be conducted by four of their personnel. It was also stated that the cost would be \$20,000 per person for the three week period. The contract did not specifically state how many persons would conduct the training.

**36. Were there any specifications as to what would be covered by the training or the level of competence Bobbins' personnel would achieve in regard to operation, adjustment and maintenance of the Tailtwist equipment?**

No. The assertion by Bobbins in paragraph 14 of the Statement of Defense that the training given was totally unsatisfactory would be supported in any later evidentiary hearing by evidence from its personnel as to the training they had been given as to how to operate, adjust and maintain the equipment and why that training was insufficient.

**37. Did the two men that remained to give the training know that the other two men had been laid off?**

Yes.

**38. Did the contract contain any provisions as to the obligations of a party if a problem of performance arose?**

There were no special provisions other than what is to be found in the United Nations Convention on Contracts for the International Sale of Goods.

**39. Did Bobbins at any time inform an employee of Tailtwist or the insolvency administrator about the problems in operating the equipment or the insufficiency of the training?**

Various statements were made to the two men from Tailtwist who gave the training that the training being given was not sufficient. No other complaints were made. As for the performance of the equipment, the deficiencies in performance became evident only after the end of the training period. Although full production was never achieved, it was not before the end of June that Bobbins reached the conclusion that they would not be able to make whatever adjustments might be necessary to achieve the desired level of production. By that time Tailtwist was no longer an operating concern, including that there was no after-sales servicing available. No communications in regard to the operation of the machinery were made to Tailtwist following the end of the training period on 10 May 2000.

**40. Is there any reason why Bobbins couldn't have notified Tailtwist or the administrator of the defective performance prior to the letter dated 10 January 2001 (Claimant's Exhibit No. 5)?**

Although Bobbins did not see the utility of giving notice for the reasons given above, there was no reason why Bobbins could not have notified the administrator of the defective performance

**41. Could Bobbins have obtained the training from any third party or have sought assistance with the machinery from any third party?**

The machinery and software were proprietary to Tailtwist. It is unlikely that any third party could have given Bobbins the training or assistance that it could normally have expected to receive from Tailtwist.

**42. In the light of paragraph 10 of the Notice of Arbitration, has Futura conceded that the training given by Tailtwist was inadequate?**

At this point in the arbitration Futura has neither admitted nor denied that the training given was inadequate, or that there were any deficiencies in the machinery. That is not an issue, of course, if Futura's argument in regard to the lack of notice is upheld by the Arbitral Tribunal. Therefore, at the stage of the arbitration that is the subject matter of the Moot it can be assumed that there are deficiencies in the performance of the Tailtwist equipment. It may still incumbent upon Bobbins to prove those deficiencies in later stages of the arbitration that may take place after the completion of the Moot.

**43. Did Bobbins approach any former Tailtwist personnel to give further training after Tailtwist ceased business operations on 16 June 2000?**

No, it did not.

**44. Was the building and preparation work performed by Bobbins according to the specifications provided by Tailtwist?**

Apparently so, since at no time did the personnel of Tailtwist suggest that there were any problems with it.

## **Other Matters**

**45. How did Bobbins arrive at the figure of a 10 percent reduction in the price?**

The contract provided that 10 percent, or \$930,000 was to be paid at the end of three months satisfactory performance. Bobbins claims there was not satisfactory performance and, therefore, the \$930,000 is not due to be paid. It calculated that it would have paid approximately \$8,300,000 to \$8,400,000 for machinery that would have performed as the Tailtwist machinery was performing.

**46. Was it common for Bobbins to enter into contracts for \$9,000,000?**

Such contracts were not unknown to Bobbins, but they were not common.

**47. Were Bobbins or Futura experienced in arbitration law and practice?**

Arbitration is common within the textile trade in which Bobbins is engaged. Bobbins had less experience with arbitration outside the trade, though it had happened. Futura had engaged in several arbitrations in the past. Bobbins arbitrations within the textile trade had usually been handled without the assistance of outside counsel, since they were usually quality disputes. All of the disputes outside the textile trade and all arbitrations in which Futura had been engaged had been handled by outside counsel.

(Signed) \_\_\_\_\_  
President of the Tribunal

November 5, 2001

Futura Investment Bank  
Claimant

v.

West Equatoriana Bobbins S.A.  
Respondent

PROCEDURAL ORDER NO. 3

It has been suggested that it is not completely clear what issues will be considered in the memoranda to be submitted by Claimant and Respondent and to be argued in the hearings scheduled for 22-28 March 2002 and what issues should not be considered at this time. It is understood that, at a later time, the Tribunal may consider the issues not considered at the present time, if the occasion calls for it [but not in the Moot].

The memoranda and hearings should consider the following issues:

- Whether the Tribunal has jurisdiction to hear the merits of the claim brought by Futura Investment Bank on the basis of the arbitration clause in the sales contract between Tailtwist Corp. and West Equatoriana Bobbins S.A.;
- Whether the notice of assignment, either the German text received on 10 April 2000 or the English text received on 19 April 2000, was effective to obligate West Equatoriana Bobbins S.A. to pay the \$2,325,000 to Futura Investment Bank rather than to Tailtwist Corp.;
- Whether the “waiver of defense” clause in the sales contract precludes West Equatoriana Bobbins S.A. from asserting against Futura Investment Bank the alleged deficiencies in the training and in the performance of the equipment;
- Whether the failure to give notice of the alleged deficiencies precludes West Equatoriana Bobbins S.A. from asserting the alleged deficiencies in the training and in the performance of the equipment.

Any matters relevant to these issues may be brought to the attention of the Tribunal in the current memoranda and the hearings in March 2002.

The memoranda and hearing should not consider the following issues:

- Whether the alleged deficiencies in training and performance of the equipment in fact justified a reduction in the price and, consequently, whether the amount of reduction was appropriate;
- The rate of interest that West Equatoriana Bobbins S.A. should pay to Futura Investment Bank if it has to pay Futura any amount of the purchase price assigned;
- Any calculation or apportionment of the costs of the arbitration.

(Signed)  
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President of the Tribunal

8 November 2001