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

in the matters of:

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

- RESPONDENT-

v.

Futura Investment Bank
395 Industrial Place 214 Commercial Ave.
Capitol City, Mediterraneo

- CLAIMANT-

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CISG	United Nations Convention on Contracts for the International Sale of Goods
NY-Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
Receivables Convention	Draft Convention on the Assignment of Receivables in International Trade
UNC-ML	UNCITRAL Model Law on International Commercial Arbitration

Index of Cases
(sorted by date)

Abbreviation Index

AAA	American Arbitration Association
Add.	Addendum
All ER	All England Reports
ArbInt	Arbitration International
Art./ Artt.	Article / Articles
AZ	Aktenzeichen (case reference)
BB	Der Betriebsberater
BGH	Bundesgerichtshof (German Federal Supreme Court)
cf.	*confer* (compare)
eg	*exempla gratia* (for example)
ICC	International Chamber of Commerce
ICDR	International Center for Dispute Resolution
ie	id est (that means)
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
LG	Landgericht (German Regional Court)
MDR	Monatszeitschrift für Deutsches Recht
NJW	Neue Juristische Wochenschrift
NJW-RR	Neue Juristische Wochenschrift Rechtsprechungs-Report Zivilrecht
No.	number
no.	note
OLG	Oberlandesgericht (German Provincial Court of Appeal)
p. / pp.	page / pages
para.	paragraph
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RIW	Recht der Internationalen Wirtschaft, Außenwirtschaft des Betriebsberaters
SJZ	Schweizerische Juristen-Zeitung
TranspR-IHR	Transportrecht Internationales Handelsrecht
UNCITRAL	United Nations Commission on International Trade Law
v.	versus
Vol.	Volume

Statement of Facts

- On 1 September 1999 West Equatoriana Bobbins S.A. (hereinafter referred to as "RESPONDENT"), a producer of textiles and organized under the laws of Equatoriana, entered into a contract with Tailtwist Corp. (hereinafter referred to as "TAILTWIST"), a manufacturer of machinery and production processes for the textile trade and organized under the laws of Oceania. In the contract TAILTWIST agreed to install a manufacturing line for spinning polyester yarn at RESPONDENT's facilities in Equatoriana and to provide training on site. The total price of $ 9,300,000 was to be paid in five installments. RESPONDENT paid to TAILTWIST the first installment upon conclusion of the contract on 1 September 1999. The second installment was paid on 6 January 2000 and the third installment was paid on 20 February 2000.
- On 29 March 2000 TAILTWIST assigned to Futura Investment Bank (hereinafter referred to as "CLAIMANT"), a corporation with interests in numerous countries and organized under the laws of Mediterraneo, the right to receive the fourth and fifth installment.
- CLAIMANT and RESPONDENT disagree on whether the arbitration clause incorporated in the contract between RESPONDENT and TAILTWIST applies to CLAIMANT.
- A German notification of assignment was delivered to RESPONDENT with return receipt requested for on 10 April 2000. RESPONDENT requested an English translation on 15 April 2000, which was not received in time before payment was made to TAILTWIST in the afternoon of 19 April 2000.
- Insolvency proceedings were opened against TAILTWIST on 20 April 2000, all business activities were terminated on 16 June 2000.
- On 10 January 2001 RESPONDENT claimed a reduction in price of 10% amounting to the fifth installment on the grounds of defective performance. A waiver had been incorporated in the contract between RESPONDENT and TAILTWIST, precluding RESPONDENT from asserting any defenses against a future assignee, if it did not attempt in good faith to remedy the defective performance. CLAIMANT and RESPONDENT disagree on whether this waiver applies.

Introduction

In response to the Memorandum for Claimant, Counsel respectfully submits the following request on behalf of our client West Equatoriana Bobbins S.A. in case Moot No. 9:

§ 1. *This Arbitral Tribunal has no jurisdiction over the present dispute, since the arbitration clause of the original contract did not become binding between CLAIMANT and RESPONDENT with the assignment;*

§ 2. *CLAIMANT is not entitled to payment of the 4th installment amounting to $ 2,325,000, since RESPONDENT was not effectively given notification of the assignment and was therefore discharged of its debt pursuant to Art. 17 (1) Receivables Convention when making payment to TAILTWIST;*

§ 3. *CLAIMANT is not entitled to payment of the 5th installment amounting to $ 930,000; since RESPONDENT is entitled to reduce the price pursuant to Art. 50 CISG;*

§ 4. *CLAIMANT is not entitled to interest on the 4th and 5th installment ;*

§ 5. *CLAIMANT must bear all costs of arbitration and any other legal costs.*

§ 1. This Arbitral Tribunal has no jurisdiction over the present dispute, since the arbitration clause of the original contract did not become binding between CLAIMANT and RESPONDENT with the assignment

Within the scope of this Arbitral Tribunal's *"provisional Competence-Competence"*[1] pursuant to Art. 15 (1) American Arbitration Association International Arbitration Rules[2], this Tribunal should find that it has no jurisdiction over the present dispute.

RESPONDENT and TAILTWIST have effectively concluded an arbitration agreement incorporating the AAA Int.Arb.Rules **[A.]**. The arbitration clause does not apply to the dispute between CLAIMANT and RESPONDENT, since this clause is not extended to CLAIMANT **[B.]**.

A. RESPONDENT and TAILTWIST have effectively concluded an arbitration agreement incorporating the AAA Int.Arb.Rules

RESPONDENT and TAILTWIST concluded an effective contract[3] for work and materials pursuant to Art. 3 (1) CISG[4] on 1 September 1999[5], into which a valid arbitration agreement[6] was incorporated.

In spite of the fact that the original parties agreed on arbitration to be held in Danubia[7], which has adopted the UNCITRAL Model Law on International Commercial Arbitration[8], the parties were not precluded from choosing the AAA Int.Arb.Rules. The UNC-ML is generally binding upon the parties, since its scope of

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[1] Gottwald, p. 66 and p. 67; Berger, p. 6 and p. 29.
[2] In the following referred to as AAA Int.Arb.Rules.
[3] In the following referred to as UNC-ML; Statement of Defense, para. 2.
[4] International practice tends to adopt the law of the contract concerning the arbitration clause (Gottwald, p. 19; Lörcher, BB 1993, p. 4). The CISG is not directly applicable to the determination of jurisdictional issues (Inta S.A. v. MCS Officina Meccanica S.p.A., Argentina, 14 October 1993 Cámara Nacional de Apelaciones en lo Comercial). Nevertheless it is accepted that the CISG not only governs the existence of contracts of sale, but also the formation of incorporated arbitration agreements (Filanto, S.p.A. v. Chilewhich International Corp., U.S. District Court, S.D. New York, 14 April 1992, 789 F. Supp. 1229, 1237; Staudinger-Magnus, Art. 90, no. 11; cf. Artt. 19 (3), 81 (1) CISG: "[…] *settlement of disputes* […]").
[5] CLAIMANT's Exhibit No. 1.
[6] Memorandum for CLAIMANT by Cardozo, I. 2., p. 10.
[7] CLAIMANT's Exhibit No. 1.
[8] Notice of Arbitration, para. 18.

application is fulfilled[9]. Pursuant to Artt. 2 (d), 19 (1) UNC-ML[10], the parties are nevertheless free to agree on the procedure to be followed by the Arbitral Tribunal, as long as it does not contravene the mandatory provisions[11] in the UNC-ML. In order to determine the procedure in the case of controversies, TAILTWIST and RESPONDENT included a standard AAA arbitration clause[12].

In conclusion, RESPONDENT agrees with CLAIMANT that the AAA Int.Arb.Rules are applicable to any controversy or claim between RESPONDENT and TAILTWIST arising out of or relating to the original contract[13].

B. The arbitration clause does not apply to the dispute between CLAIMANT and RESPONDENT, since this clause is not extended to CLAIMANT

Interpretation of the original contract reveals that the arbitration agreement is not extended to CLAIMANT **[I.]**. CLAIMANT cannot rely on the arbitration clause, since a statutory transfer cannot be derived from the Draft Convention on the Assignment of Receivables in International Trade[14] **[II.]**. The arbitration agreement is not binding upon CLAIMANT, since the new parties RESPONDENT and CLAIMANT are required to have formally signed the arbitration agreement **[III.]**.

I. Interpretation of the original contract reveals that the arbitration agreement is not extended to CLAIMANT

It results from the wording of the original contract that RESPONDENT and TAILTWIST did not intend the arbitration agreement to be extended to third parties **[1.]**. The original parties' previous behavior proves that RESPONDENT relied on the fact that any arbitration would remain in the textile trade **[2.]**.

1. It results from the wording of the original contract that RESPONDENT and TAILTWIST did not intend the arbitration agreement to be extended to third parties

It follows from the wording of the original contract that a transfer of the arbitration clause to CLAIMANT or any other third party does not correspond with the intention[15] of the original parties, ie RESPONDENT[16] and TAILTWIST.

According to the wording of the arbitration clause any controversy or claim between TAILTWIST and RESPONDENT shall be determined by arbitration by the AAA[17]. The term "*between*" shows that they did

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[9] All requirements pursuant to Art. 1 (1), (2), (3) (a) UNC-ML are met.
[10] Hußlein-Stich, p. 25.
[11] cf. Hußlein-Stich, p. 107.
[12] RESPONDENT agrees that such arbitration would be conducted under the AAA Int.Arb.Rules (Statement of Defense, para. 2).
[13] The parties to the original arbitration agreement have provided for arbitration the AAA (Statement of Defense, para. 2; Notice of Arbitration, para. 13; CLAIMANT's Exhibit No. 1).
[14] In the following referred to as Receivables Convention.
[15] cf. Statement of Defense, para. 3.
[16] Letter from Smart & Smart dated 13 June 2001: "[…] *I can assure you that my client* [RESPONDENT] *would not enter into an arbitration agreement with it* [CLAIMANT]."; Statement of Defense, para. 3.
[17] CLAIMANT's Exhibit No. 1.

not intend an extension of the arbitration clause to third parties[18]. This indicates that the clause is of a personal character, so that contrary to CLAIMANT's opinion[19], it cannot be subjected to the transfer of an arbitration agreement[20]. The significance of this personal character lies in the fact that it precludes third parties, ie legal successors, from using the arbitration clause[21].

Interpretation of the arbitration clause reveals that the agreement was concluded *"intuitu personae"* (personally)[22], ie the arbitration agreement refers only to the immediate parties to the agreement[23] and therefore makes reference to the original parties' intention. This personal aspect is substantiated by the wording of Art. 1 (1) AAA Int.Arb.Rules[24]. The wording "*any controversy arising out of or relating to this contract*"[25] does not refer to disputes with third parties.

CLAIMANT cannot merely base its argumentation on the arbitration clause[26], but also has to consider the assignment clause. CLAIMANT as the assignee states that it is entitled to arbitrate[27], but interpreting the wording of the assignment clause leads to the opposite result. This assignment exclusively refers to the "right to the payments"[28] and neither makes reference to the assignment of arbitration nor to the procedural assertion of the claim. The arbitration agreement was solely concluded with regard to the assignment of the *payments*[29] and does not refer to a dispute with another party[30].

RESPONDENT agrees with CLAIMANT that the original contract does not contain an explicit *non-assignment* clause, precluding the transfer of the arbitration clause[31]. However, RESPONDENT disagrees that such assignment clause specifically shows that third parties could rely on the arbitration clause[32].

It is evident that RESPONDENT and TAILTWIST did not intend a third party to rely on this clause, since they did not stipulate the transfer of the arbitration clause. Contrary to CLAIMANT's above-mentioned opinion, the assignment clause was specifically negotiated[33] as well as other provisions that have not arisen in this arbitration[34].

TAILTWIST and RESPONDENT have established a close relationship, since the latter party had purchased other equipment from TAILTWIST on several occasions in the past and there had been no

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[18] In addition, an arbitration clause usually is effective with regard to the parties who concluded this clause (cf. Raeschke-Kessler, NJW 1988, p. 3044).
[19] Memorandum for CLAIMANT by Cardozo, I. B., p. 16.
[20] Cottage Club Estates v. Woodside Estates Co. [1927] All E. R. Rep., p. 396; Girsberger/ Hausmaninger, p. 140.
[21] cf. Schricker, FS Quack, p. 106; Glossner, part II no. 49.
[22] Girsberger/ Hausmaninger, p. 126.
[23] Mustill, p. 138.
[24] Art. 1 (1) AAA Int.Arb.Rules: "*Where parties have agreed in writing to arbitrate* […]." Art. 7 (1) UNC-ML is to be considered, having persuasive value. It states: " "*Arbitration Agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them* […]." Therefore, the requirement "between the parties" has to be interpreted *strictly* (cf. Schricker, p. 105 and p. 106).
[25] CLAIMANT's Exhibit No.1.
[26] cf. Memorandum for CLAIMANT by Cardozo, A., pp. 11 ff.
[27] cf. Notice of Arbitration, para. 20.
[28] CLAIMANT's Exhibit No. 1: "*If Tailtwist should assign the right to the payments* […]."
[29] Such assignment does not create a contractual relationship between the assignee and the debtor (Bazinas, Duke Journal of Comparative & International Law, p. 337).
[30] CLAIMANT's Exhibit No. 1: "*Any controversy or claim between Tailtwist Corp. and West Equatoriana Bobbins S.A.* […]."
[31] cf. Memorandum for CLAIMANT by Cardozo, B., p. 15.
[32] cf. Memorandum for CLAIMANT by Cardozo, B., p. 15.
[33] Statement of Defense, para. 18.
[34] Procedural Order No. 2, Clarification No. 11.

disputes arising from those transactions[35]. There has never been any business or contractual relationship *between* RESPONDENT and CLAIMANT[36] on which to build an arbitral agreement. This confidential relationship[37] between RESPONDENT and TAILTWIST must be considered regarding their arbitration agreement[38], so that protection of confidence is necessary[39].

Consequently, the arbitration agreement is inseparable from RESPONDENT and TAILTWIST and therefore the arbitration clause is not extended to CLAIMANT.

2. The original parties' previous behavior proves that RESPONDENT relied on the fact that any arbitration would remain in the textile trade

RESPONDENT agreed to arbitrate with TAILTWIST, since the latter party is engaged in the textile trade and therefore familiar with such matters. RESPONDENT as a producer of textiles[40] and CLAIMANT as a manufacturer of machinery for textile production processes fall within the textile trade[41]. This is proven by the fact that RESPONDENT's arbitrations within the textile trade had usually been handled without the assistance of outside counsel, since they were usually quality disputes[42]. CLAIMANT, however, is an investment bank with interests in numerous countries[43], new to the textile trade, and consequently not engaged and not familiar with it. RESPONDENT cannot rely on the fact that a dispute with CLAIMANT is settled without the assistance of outside counsel, particularly since all arbitrations, in which CLAIMANT had been engaged, had been handled by outside counsel[44]. RESPONDENT cannot assume that CLAIMANT would choose arbitrators within a certain field of business[45], such as the textile trade, as TAILTWIST would have had in case of a dispute[46]. Arbitrators from a different professional background will lack the expertise and therefore may decide the dispute on other grounds. This would disadvantage RESPONDENT[47].

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[35] cf. Procedural Order No. 2, Clarification No. 13.

[36] RESPONDENT had no relations whatsoever with CLAIMANT, with the exception of receipt of a notice of assignment (Letter from Smart & Smart dated 13 June 2001).

[37] Girsberger / Hausmaninger, p. 133.

[38] Mustill, p. 138.

[39] cf. Marchae, The American Review of International Arbitration, p. 137.

[40] Notice of Arbitration, para. 2.

[41] Notice of Arbitration, para. 3.

[42] Procedural Order No. 2, Clarification No. 47.

[43] Notice of Arbitration, para. 1.

[44] Procedural Order No. 2, Clarification No. 47.

[45] Parties who agree upon arbitration usually choose arbitrators they confide in (Gottwald, p. 7; cf. Henn, p. 4; cf. Schwab / Walther, p. 4).

[46] Besides, the fact that RESPONDENT already appointed Attorney XXXX as its arbitrator (Statement of Defense, para. 5) does not constitute a contradiction (Art. 16 (2) UNC-ML:" […] *A party is not precluded from raising plea* [that the arbitral tribunal does not have jurisdiction] *by the fact that he has appointed, or participated in the appointment, of an arbitrator.*"); cf. Hußlein-Stich, p. 89 and p. 90.

[47] The parties want to submit the competence to make a decision regarding the validity of the main contract to the selected arbitrators (Lionnet, p. 68).These arbitrators have the technical and legal expertise to resolve a particular dispute (Berger, p. 7; cf. Schütze, BB 1998, p. 2). An arbitration agreement confers a mandate upon an arbitral tribunal to decide any and all of the disputes that come within the ambit of that agreement (Redfern / Hunter, no. 3-39).

Hence, it does not follow from the interpretation of the original contract that the arbitration clause is extended to CLAIMANT as a third party[48].

II. CLAIMANT cannot rely on the arbitration clause, since a statutory transfer cannot be derived from the Receivables Convention

The Receivables Convention is applicable **[1.]**. By virtue of the general principles of the Receivables Convention, the arbitration clause is not transferred by statute to CLAIMANT **[2.]**.

1. The Receivables Convention is applicable

The question whether the arbitration clause is transferred by statute to the assignee can only be derived from the applicable Receivables Convention. RESPONDENT agrees that the 4th and 5th installment, amounting to $ 3,255,000, were assigned to CLAIMANT on 29 March 2000[49], meeting all formal requirements[50].

According to Artt. 1 (1) (a), 2 (a), 3 Receivables Convention the relationship arising out of the assignment between CLAIMANT and TAILTWIST falls within this Convention's scope of application. It is also applicable to RESPONDENT[51] pursuant to Art. 1 (3) Receivables Convention[52].

Furthermore, the Receivables Convention is the relevant substantive law to be considered by the Tribunal according to Art. 28 (1) AAA Int.Arb.Rules[53].

2. By virtue of the general principles of the Receivables Convention, the arbitration clause is not transferred by statute to CLAIMANT

The Receivables Convention does not explicitly govern the statutory transfer of arbitration clauses, so Art. 7 (2) Receivables Convention calls for the application of general principles **[a.]**. The principle of *"automatic transfer"* as evinced in Art. 10 (1) Receivables Convention does not apply to arbitration agreements **[b.]**. The principle of debtor protection is violated if the principle of *"automatic transfer"* is extended by statute to arbitration clauses, as RESPONDENT relied on the arbitration to remain in the textile trade and is deprived of choosing an international arbitration court **[c.]**.

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[48] This result is substantiated by the fact, that an arbitration contract generally and exclusively binds, like any other contract, its contracting parties (Schlosser, p. 322).

[49] Procedural Order No. 2; CLAIMANT's Exhibit No. 1.

[50] Procedural Order No. 2, Clarification No. 15.

[51] The application of the Receivables Convention to RESPONDENT has to be justified in accordance with Procedural Order No. 2, Clarification No. 5.

[52] Art. 1 (3) Receivables Convention: *"This Convention does not affect the rights and obligations of the debtor unless, at the time of conclusion of the original contract, the debtor is located in a Contracting State or the law governing the original contract is the law of a Contracting State."*.

[53] Art. 28 (1) AAA Int.Arb.Rules: *"The tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate."*.

a. The Receivables Convention does not explicitly govern the statutory transfer of arbitration clauses, so Art. 7 (2) Receivables Convention calls for the application of general principles

The statutory transfer of an arbitration clause is not explicitly governed by the Receivables Convention. Art. 7 (2) Receivables Convention calls for the application of general principles[54]. In its deliberations the Working Group did not explicitly preclude an assignment of an arbitration clause[55]. It follows that this internal gap should be filled interpreting the Receivables Convention autonomously, taking into consideration that the relationship between assignee and debtor falls within the Convention's scope[56].

For these reasons, CLAIMANT is wrong when basing its claim mainly on national jurisdiction[57] rather than the Receivables Convention, since this Convention is the applicable law for international assignments.

b. The principle of *"automatic transfer"* as evinced in Art. 10 (1) Receivables Convention does not apply to arbitration agreements

The statutory transfer of the arbitration clause to CLAIMANT does not fall within the scope of Art. 10 (1) Receivables Convention[58], since it merely regulates the transfer of security rights. This article reflects the generally accepted principle that accessory security rights[59] are transferred automatically with the principle obligation[60].

RESPONDENT disagrees with CLAIMANT's opinion that an independent arbitration clause allows its transfer to third parties[61]. Since the arbitration clause is non-accessory and therefore independent of the claim's existence, CLAIMANT is precluded from using the clause. Its legal nature is determined by Art. 15 (2) AAA Int.Arb.Rules[62], according to which the arbitration clause is to be treated as an agreement independent[63] of the other terms of the contract, even though it was included in the original contract itself[64]. This so-called "doctrine of separability"[65] is widely accepted by various arbitration rules[66], so that the

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[54] Art. 7 Receivables Convention was *"inspired"* by Art. *7 CISG* (Analytical Commentary, A/CN.9/WG.II/WP.105, para. 61; Ferrari, Melbourne Journal of International Law, p. 14). Art. 7 (2) Receivables Convention postulates that such an issue should be settled in conformity with general principles underlying this convention (cf. Bazinas, Duke Journal of Comparative & International Law, pp. 315, 354).

[55] The Working Group did not address various issues in its commentary (Analytical Commentary, A/CN.9/WG.II.105, para. 64).

[56] cf. Art. 20 (1) Receivables Convention.

[57] Memorandum for CLAIMANT by Cardozo, I. A. 1., pp. 12 - 14. For the same reasons, CLAIMANT cannot refer to the UCC (Memorandum for CLAIMANT by Cardozo, III. A. 1., p. 20).

[58] Art. 10 (1) Receivables Convention: *"A personal or property right securing payment of the assigned receivable is transferred to the assignee without a new act of transfer. If such a right, under law governing it, is transferable only with a new act of transfer, the assignor is obliged to transfer such right and any proceeds to the assignee."*.

[59] The meaning of "accessory security rights" covers legal issues such as suretyship, pledge or mortgage (Analytical Commentary, A/CN.9/489, para. 105).

[60] Analytical Commentary A/CN.9/489, para. 105.

[61] Memorandum for CLAIMANT by Cardozo, I. A. 1., p. 12.

[62] Art. 15 (2) AAA Int.Arb.Rules: "[...]*Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract.* [...].". Additionally, Art. 16 (1) UNC-ML substantiates the wording of the AAA Int.Arb.Rules, stating that: "[…] *For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement of the other terms of the contract."* (in the same manner regarding Art. 16 (1) UNC-ML: Ahrendt, p. 87; Jäcker, Handelsverträge, p. 218; Jäcker, Schiedsklauseln, p. 218).

[63] cf. Böckstiegel, Einführung, p. XXIX (p. 29); Schricker, FS Quack, p. 107 and p. 108; Girsberger/Hausmaninger, p. 140; Lionnet, p. 69;
Art. 16 (1) UNCL-ML: "[…] *For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract."*; literally the same meaning: Art. 15 (2) AAA Int.Arb.Rules.

[64] Lionnet, p. 65.

arbitration clause in a contract is considered to be separate from the main contract[67] of which such clause forms part[68]. This independence is further substantiated by the fact that the clause is a procedural[69], not a contractual right.

The principle of automatic transfer merely refers to accessory rights and not to arbitration clauses, since the latter is not closely connected to the claim itself, ie its existence does not depend on the validity of the original contract[70]. Additionally, the wording "*accessory*" refers to the fact that the security right is closely connected to the main receivable, this means that accessory (security) rights become extinct with the main claim's extinction. By contrast, the existence of an arbitration clause as a non-accessory right is generally independent of the claim's continuance[71].

Since the arbitration clause is independent of the main contract and does not constitute an accessory right, it cannot be subjected to the wording of Art. 10 (1) Receivables Convention. Its purpose is to ensure the transfer of certain security rights in favor of the assignee, but not the transfer of rights and duties[72] of the whole contract[73]. Generally, the assignee is bound by an arbitration clause contained in an assigned contract (ie both the main contract and the agreement to arbitrate are assigned)[74].

In the case at issue, only a mere *assignment of claim* (the remaining two payments) has taken place. The assignee of a claim arising out of the contract will only be conferred the benefit of an arbitration clause contained in the original contract[75], if the assignee *and* the debtor agree to such a transfer[76]. As mentioned above, RESPONDENT as the debtor does not consent to the extension of the arbitration clause to CLAIMANT[77].

Consequently, Art. 10 (1) Receivables Convention does not govern the transferability of the arbitration clause to CLAIMANT.

c. The principle of debtor protection is violated if the principle of "automatic transfer" is extended by statute to arbitration clauses, as RESPONDENT relied on the arbitration to remain in the textile trade and is deprived of choosing an international arbitration court

The general principle of debtor protection as evinced in Art. 15 (1) Receivables Convention[78] prohibits the transfer of the arbitration clause from the assignor to the assignee.

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[65] Also known as the "autonomy of the arbitration clause".
[66] Redfern/Hunter, no. 3-31 and no. 5-31; Gottwald-Gottwald, p. 21; Lionnet, p. 69.
[67] cf. Schlosser, p. 392.
[68] Redfern/Hunter, no. 3-31.
[69] The procedural character of the arbitration clause is also based upon the AAA Int.Arb.Rules, which have been developed to resolve procedural impasses (cf. Introduction to the AAA Int.Arb.Rules); cf. Hochbaum, p. 27; Böckstiegel, Einführung, p. XXX (p. 30).
[70] cf. Lionnet, p. 65.
[71] cf. Schlechtriem, Schuldrecht, no. 545.
[72] Girsberger/Hausmaninger, p. 140.
[73] cf. Schwab/Walter, p. 66 and p. 67.
[74] Schricker, FS Quack, p. 107.
[75] Schricker, FS Quack, p. 108.
[76] cf. Schwab/Walter, p. 66 and p. 67.
[77] see supra: § 1 B. I. 1.
[78] Art. 15 (1) Receivables Convention: "*Except as otherwise provided in this Convention, an assignment does not, without the consent of the debtor, affect the rights and obligations of the debtor* […]*.*".

The above-mentioned principle states that an assignment cannot put the debtor in a position which is worse than that in which he would have been if the assignment had not taken place[79], so that the debtor's legal position is not adversely affected[80]. The Receivables Conventions' purpose is to protect the interests of the debtor[81], any doubt as to the debtor's legal position should be resolved *in favor* of the debtor[82].

As mentioned above, RESPONDENT relied on the fact that any arbitration would remain in the textile trade[83]. Therefore, the extension of the arbitration clause to CLAIMANT constitutes a disadvantage for RESPONDENT.

With conclusion of an arbitration agreement both parties waive their right to arbitrate before a national court[84], thus agreeing to lay the dispute within the compulsory jurisdiction of an international arbitration tribunal. Therefore, in case of an extension of the arbitration clause to third parties, the debtor is precluded from freely opting for[85] an international arbitration court and therefore to withdraw from national jurisdiction, ie national protection, thereby causing uncertainties for the debtor. It is not clear whether the debtor would conclude the same arbitration clause with a third party.

RESPONDENT and TAILTWIST have established a close relationship[86]. Arbitration agreements are predominantly concluded with trustworthy parties, since an arbitral agreement is based upon the notion of peaceful dispute resolution[87]. For these reasons, RESPONDENT agreed to arbitrate with TAILTWIST[88] and not with outsiders[89]. Since the conclusion of an arbitration clause constitutes an important decision, each party is to be accorded the possibility to contemplate the consequences of this decision. Therefore, RESPONDENT's autonomy to give up the protection of national courts has to be guaranteed.

Consequently, CLAIMANT cannot enforce its claim by arbitration. Any other legal outcome contravenes the principle of debtor protection and therefore would constitute undue hardship on RESPONDENT.

III. The arbitration agreement is not binding upon CLAIMANT, since the new parties RESPONDENT and CLAIMANT are required to have formally signed the arbitration agreement

RESPONDENT disagrees with CLAIMANT's assertion that the *"in writing"* requirement is not applicable between debtor and assignee[90].

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[79] Ferrari, The Uncitral Draft Convention on Assignment, p. 195; Peltzer, RIW 1997, p. 893; Böhm, p. 37; cf. Schneider/Dreibus, Die Kettenabtretung, p. 535; cf. Buchta, p. 67 and p. 68; Vogt/Kremslehner, ecolex 2000, p. 191.

[80] Trager, New York University Journal of International Law & Politics, p. 627 and p. 635; Analytical Commentary, A/CN.9/489, para. 132; Peltzer, RIW 1997, p. 893; Bazinas, Tulane Journal of International and Comparative Law, p. 278.

[81] Bazinas, Revue de Droit Bancaire et de la bourse, p. 173; cf. Preamble of the Receivables Convention.

[82] Analytical Commentary, A/CN.9/489, para. 131.

[83] see supra: § 1 B. I. 2.

[84] No party can be deprived of its right of a national judge against its will (Geimer, no. 3914). In the case at issue, RESPONDENT and TAILTWIST both gave up their right of a national judge.

[85] In particular, it has to be taken into consideration that arbitral jurisdiction is concluded upon a *voluntary* arbitration agreement by the parties (Schiffer, p. 6).

[86] Procedural Order No. 2, Clarification No. 13:*"Bobbins had purchased other equipment from Tailtwist on several occasions in the past. There had been no disputes arising from those transactions."*.

[87] The parties do not consider themselves as opponents, but rather as parties necessary for a mediation on an amicable basis (cf. Schwytz, p. 4).

[88] CLAIMANT's Exhibit No. 1.

[89] cf. Mustill, p. 138.

[90] Memorandum for CLAIMANT by Cardozo, I. B., p. 16.

CLAIMANT did not fulfill the formal "*in writing*" requirement as set forth in Art. 1 (1) AAA Int.Arb.Rules[91], so that it cannot rely upon the arbitration agreement.

The adherence of the "*in writing*" provision is obligatory[92] and is internationally required for a valid agreement[93]. It facilitates evidences[94] and ensures that each party is aware of the ensuing responsibilities when agreeing to arbitration[95]. A valid agreement to arbitrate excludes the jurisdiction of national courts[96], so that any dispute between the parties must be resolved by a private method of dispute resolution, namely arbitration[97]. In the case at hand, the original contract with the arbitration clause which was concluded between RESPONDENT and TAILTWIST[98], as well as the assignment from TAILTWIST to CLAIMANT[99], were signed by the respective parties. By contrast, the assignment did not include the arbitration agreement[100], so that it is incumbent upon the new parties RESPONDENT and CLAIMANT to sign this agreement.

If an arbitration agreement does not meet all formal requirements, enforcement is not possible[101].

The "*in writing*" requirement does not distinguish between the conclusion of an arbitration clause and the subsequent transfer of the clause to a third party. The arbitration agreement not only contains rights, but also duties and therefore requires the explicit consent of all parties[102]. Orally and implicitly concluded arbitration agreements therefore do not suffice[103]. Consequently, CLAIMANT as the assignee had to consent in writing either way[104].

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[91] Art. 1 (1) AAA Int.Arb.Rules: "*Where parties have agreed in writing to arbitrate* [...]". Art. 7 (2) UNC-ML (Böckstiegel, RIW 1984, p. 672) and Art. II (1) NY-Convention have to be taken into consideration as a persuasive value. In other words, it can be regarded as an internationally uniform rule for the formal validity of the arbitration agreement (van den Berg, p. 387). Art. 7 (2) UNC-ML: "*The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in exchange of statements of claim or defence in which the existence of an agreement is alleged by one party and not denied by another.* [...]".
Art. II (1) NY-Convention: "*Each Contracting State shall recognize an agreement in writing* [...]".; Art. II (2) NY-Convention: "*The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.*".

[92] van den Berg, p. 387; cf. Bernstorff, RIW 1994, p. 544.

[93] Lionnet, p. 66.

[94] Reithmann/Martiny-Hausmann, no. 2341.

[95] van den Berg, p. 171; Girsberger/Hausmaninger, p. 142.

[96] Redfern/Hunter, no. 3-09.

[97] Redfern/Hunter, no. 3-09.

[98] CLAIMANT's Exhibit No. 1.

[99] cf. Procedural Order No. 2, Clarification No. 15.

[100] Procedural Order No. 2, Clarification No. 18.

[101] cf. van den Berg, p. 387.

[102] Girsberger/Hausmaninger, p. 140.

[103] van den Berg, p. 206; cf. Wackenhuth, ZZP 99 (1986), p. 463 and p. 464; Reithmann/Martiny-Hausmann, no. 2341.

[104] In the case at issue, CLAIMANT did not consent in writing since the assignment contract did not contain an arbitration clause (Procedural Order No. 2, Clarification No. 18).

§ 2. CLAIMANT is not entitled to payment of the fourth installment amounting to $ 2,325,000, since RESPONDENT was not effectively notified of the assignment and was therefore discharged of its debt pursuant to Art. 17 (1) Receivables Convention

Pursuant to Art. 17 (1) Receivables Convention[105] RESPONDENT was discharged of its payment obligation by making payment to TAILTWIST in accordance with the original contract, since the notice of assignment received by RESPONDENT on 10 April 2000 was ineffective against RESPONDENT pursuant to Art. 16 (1) Receivables Convention **[A.]**. The English translation received on 19 April 2000 was too late to stop the payment to the old creditor TAILTWIST and consequently did not trigger the legal consequence of Art. 17 (2) Receivables Convention **[B.]**.

A. Pursuant to Art. 17 (1) Receivables Convention RESPONDENT was discharged of its payment obligation by making payment to TAILTWIST in accordance with the original contract, since the notice of assignment received by RESPONDENT on 10 April 2000 was ineffective against RESPONDENT pursuant to Art. 16 (1) Receivables Convention

RESPONDENT was entitled to make payment to its old creditor TAILTWIST, not being notified that a transfer of receivables had taken place and was therefore discharged according to Art. 17 (1) Receivables Convention. The German notification signed for on 10 April 2000 did not meet the requirements of Art. 16 (1) Receivables Convention **[I.]**. RESPONDENT was neither obliged to have the German communication translated nor to inquire of CLAIMANT about its content **[II.]**. If the Tribunal were to find that there was an obligation to make further inquiries about the communication's content, RESPONDENT met this obligation in time **[III.]**.

I. The German notification signed for on 10 April 2000 did not meet the requirements of Art. 16 (1) Receivables Convention

The notification was neither in the language of the original contract, nor in a language that is reasonably expected to inform the debtor of the assignment **[1.]**. The plain data contained in the German communication, ie the names of RESPONDENT, TAILTWIST and CLAIMANT, the sum of $ 3,255,000, the date 1 September 1999 and CLAIMANT's bank account, was not in a language reasonably expected to inform the debtor pursuant to Art. 16 (1) Receivables Convention **[2.]**.

1. The notification was neither in the language of the original contract, nor in a language that is reasonably expected to inform the debtor of the assignment

The German notification did not meet the requirements of Art. 16 Receivables Convention. To become effective, the notification has to meet the requirements of Art. 16 (1) Receivables Convention[106] with regard

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[105] Art. 17 (1) Receivables Convention: "*Until the debtor receives notification of the assignment, the debtor is entitled to be discharged by paying in accordance with the original contract.*".

[106] Art. 16 (1) Receivables Convention: "*Notification of the assignment or a payment instruction is effective when received by the debtor if it is in a language that is reasonably expected to inform the debtor about its contents. It is sufficient if notification of the assignment or a payment instruction is in the language of the original contract.*".

to its language[107]. Pursuant to Art. 16 (1) Receivables Convention a notification of assignment is only effective if it is in the language of the contract[108] of which the receivable arose or, if in another language, it can be reasonably expected to inform the debtor of their contents.

The German notification was not in the language of the original contract between RESPONDENT and TAILTWIST[109], which was written in English.

Nor was the German notification in a language that is reasonably expected to inform RESPONDENT of its content. Pursuant to Art. 16 (1) (1) Receivables Convention a notification of assignment must be written in a language that is reasonably expected to inform the debtor, ie in a language which renders it intelligible to the debtor that an assignment has taken place[110]. A notice of assignment has significant consequences for the legal position of the debtor[111], since it triggers a change in the way in which the debtor may discharge its debt[112]. Such consequences may occur only when a notification is in a language that is "reasonably expected to inform the debtor about its contents"[113]. This criterion in Art. 16 (1) Receivables Convention is to be interpreted to the effect that it demands that a reasonable person can easily decode[114] the content of the notice in order to avoid uncertainties. For the purpose of the principle of debtor protection[115], RESPONDENT should have been notified that his creditor has changed and it should not be his responsibility to reveal the notification's content[116]. It follows that the notification sent to RESPONDENT by CLAIMANT should have been in the official language spoken in Equatoriana[117], where RESPONDENT has his place of business[118] or at least in a language predominately used in international trade and commerce, eg English[119]. The notice received by RESPONDENT on 10 April 2000 was in German, which is not considered a language normally used in international trade and commerce, since it is not a universal language[120]. CLAIMANT must have been well aware of the fact that German is not spoken in Equatoriana[121] and that it is not the language used in the contract between RESPONDENT and TAILTWIST[122].

Alternatively, the foreign language in which a notification is written would also be reasonably expected to inform the debtor according to Art. 16 (1) Receivables Convention, if the debtor is capable of drawing a

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[107] CLAIMANT incorrectly quotes Art. 5 (d) Receivables Convention for the determination of the requirements of a notification. Art. 5 (d) Receivables Convention simply constitutes a definition as to the nature of a notification, namely the written form requirement, the amount due and the name of the assignee (Memorandum for CLAIMANT by Cardozo, III., p. 17.).

[108] Art. 5 (a) Receivables Convention: *"Original contract means the contract between the assignor and the debtor from which the assigned receivable arises"*.

[109] CLAIMANT's Exhibit No. 1.

[110] Vogt/Kremslehner, ecolex 2000, p. 191.

[111] Böhm, p. 82.

[112] Analytical Commentary, A/CN.9/WG.II/WP.106, para. 34.

[113] Analytical Commentary, A/CN.9/WG.II/WP.106, para. 34.

[114] Analytical Commentary, A/CN.9/WG.II/WP.106, para. 34.

[115] The principle of debtor protection as evinced in Art. 15 (1) Receivables Convention states that the debtor's legal position cannot be negatively affected by the assignment.

[116] Trager, New York University Journal of International Law & Politics, p. 635; Brink, p. 28.

[117] Procedural Order No. 2, Clarification No. 8.

[118] Notice of Arbitration, para. 2.

[119] English had been more or less the working language (Honnold, Documentary History, p. 272).

[120] Maaß, p. 1; cf. Schlechtriem-Schlechtriem, Art. 24, no. 16.

[121] Procedural Order No. 2, Clarification No. 8.

[122] Procedural Order No. 2, Clarification No. 9.

parallel to similar words of his native language. This applies if the different languages are of the same origin as is the case with Romance languages, such as Spanish, Italian and French. Therefore one could expect a Spanish speaker to be capable of understanding the keyword *"assignment"* expressed in Italian or French, since the spelling of the word for assignment in Spanish ("*cessión*"), Italian ("*cessione*") and French ("*cession*") is almost identical. By comparing the German word *"Zession"* with the English word *"assignment"*, one cannot draw the conclusion that due to the spelling, RESPONDENT should have deduced the nature of the communication[123].

Therefore the German notification signed for on 10 April 2000 was not in a language that is reasonably expected to inform the debtor of the assignment pursuant to Art. 16 (1) Receivables Convention.

2. The plain data contained in the German communication, ie the names of RESPONDENT, TAILTWIST and CLAIMANT, the sum of $ 3,255,000, the date 1 September 1999 and CLAIMANT's bank account, was not in a language reasonably expected to inform the debtor pursuant to Art. 16 (1) Receivables Convention

CLAIMANT could not expect that RESPONDENT, although capable of identifying the sum of $ 2,325,000 and the reference to TAILTWIST, should have drawn the inference that the communication received on 10 April 2000 constitutes a notification of assignment.

CLAIMANT's allegation that Mr. Black knew of the likelihood that the German letter was a notice of the assignment[124] is unfounded, since there is no indication that he had factual knowledge of the nature of the communication. In fact Mr. Black requested a translation, since he was only able to specify the reference to TAILTWIST[125].

CLAIMANT is wrong when stating that the data given in the German notification met the requirement of Art. 16 (1) Receivables Convention[126], since the language by which the data was conveyed could not reasonably be understood by the debtor. RESPONDENT agrees with CLAIMANT that the data given in this notification met the requirements of Art. 5 (d) Receivables Convention[127], but CLAIMANT disregards the fact that it is not exclusively this provision which renders the notification effective[128]. Art. 16 (1) Receivables Convention states that the information required in Art. 5 (d) Receivables Convention has to be expressed in a language that is reasonably expected to inform the debtor, ie in a language that is intelligible to him. The provision of Art. 16 (1) Receivable Convention would be dispensable, if the notification became effective merely by meeting the requirements of Art. 5 (d) Receivables Convention irrespective of the language used. Otherwise a notification written in Chinese characters, but containing the essential data

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123 There would be the opposite result if instead of the word "assignment", the keyword was "bank", which is spelled the same in German and in English. In this case, RESPONDENT could have been expected to understand the meaning.

124 Memorandum for Claimant by Cardozo, III. A. 1., p. 19.

125 Statement of Defense, para. 7.

126 Memorandum for Claimant by Cardozo, III. A. 1., p. 19.

127 Art. 5 (d) Receivables Convnetion:"*Notification of the assignment means a communication in writing that reasonably identifies the assigned receivables and the assignee*".

128 Art. 16 (1) Receivables Convention also adds a requirement to those provided in Art. 5 (d) Receivables Convention for a notification to be effective under the Convention (Analytical Commentary, A/CN.9/489/Add.1, para. 2; Böhm, p. 81).

would have to be considered binding upon RESPONDENT. Therefore RESPONDENT did not have to draw the inference that due to the plain data the communication constitutes a notification of assignment.

In addition to that, the fact that RESPONDENT had assigned receivables in the past and was not unfamiliar with this process[129], does not constitute an exemption from the requirements of a duly notification of assignment. As mentioned above, RESPONDENT did not comprehend the nature of the communication received on 10 April 2000[130]. Therefore any previous experience RESPONDENT had with regard to assignments, would not have made the German notification intelligible.

II. RESPONDENT was neither obliged to have the German communication translated nor to inquire of CLAIMANT about its content

CLAIMANT is wrong when stating that RESPONDENT waited too long before inquiring as to the nature of the German communication on 15 April 2000[131] and was under the obligation to inquire via telephone[132]. RESPONDENT was not obliged to make inquiries concerning the content of the German notification, neither by making a telephone call to CLAIMANT, nor by having the communication translated.

When interpreting Art. 16 (1) Receivables Convention, one comes to the conclusion that the sender bears the risk of intelligibility concerning the content and is obliged to avoid any uncertainty arising out of the notification of assignment. An obligation to inquire can neither be derived from the wording nor from the purpose of the Receivables Convention. Its Art. 16 (1) requires that notification is to be provided for the debtor in a language that is reasonably expected to inform him that an assignment has taken place. An obligation for the debtor to inquire is not intended, since the reasoning of Art. 16 (1) Receivables Convention, to protect the debtor, would otherwise fail. By contrast, if notifications are in a language other than the language of the contract, the recipient does not have to carry the burden of intelligibility[133]. In case of a divergence between the native language of the sender and the language of the original contract, the sender has to make an effort to obtain a translation of the communication[134].

There is no exceptional case which would impose upon the recipient the obligation to have a communication in a foreign language translated. There would be such an exceptional case, if RESPONDENT received a notification written in a universal language in trade and commerce[135]. In this case, RESPONDENT would have been obliged to initiate a translation, since it is taken for granted in international business practice that English is spoken.

Since it is evident that German is not considered a universal language in international trade and commerce[136], RESPONDENT does not have to bear the burden of intelligibility.

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[129] Procedural Order No. 2, Clarifcation No. 14.
[130] Statement of Defense, para. 7; Procedural Order No. 2, Clarification No. 28.
[131] Notice of Arbitration, para. 7.
[132] Notice of Arbitration, para. 7:*"*[…] *it should have put BOBBINS on notice to inquire further* […]. *A simple telephone call would have sufficed."*.
[133] Beckmann, RIW 1981, p. 82 (discussing the general problem of written declaration of intention of in international trade and commerce not in the contract's language).
[134] cf. Beckmann, RIW 1981, p. 82.
[135]: Schlechtriem / Schlechtriem, Commentary, Art. 24, no. 16 (with regard to the CISG).
[136] Maaß, p. 1.

Furthermore, there is no exception arising out of previous business relations between CLAIMANT and RESPONDENT from which one could derive such obligation[137] by virtue of the principle of good faith[138]. The question whether RESPONDENT was under the obligation to inquire by virtue of the principle of good faith must be answered in the negative, since RESPONDENT has never had any business or contractual relationship with CLAIMANT[139]. The assignment itself does not create a contractual relationship between the assignee and the debtor[140]

It is evident that in order to provide excellent customer service, RESPONDENT sent inquiries by its German customers with regard to its products to a local translation service[141]. There is no reason why RESPONDENT should be obliged to have CLAIMANT's communication translated, since RESPONDENT did not know of the German content's importance and did not even recognize the sender. Therefore RESPONDENT was neither obliged to have the German communication translated nor to inquire of CLAIMANT about its content.

III. If the Tribunal were to find that there was an obligation to make further inquiries about the communication's content, RESPONDENT met this obligation in time

RESPONDENT was under no obligation to react immediately upon receipt of the German notification. CLAIMANT is wrong when arguing that Mr. Black had to request the translation at the very latest on 13 April 2000[142].

On 15 April 2000 Mr. Black sent a fax to CLAIMANT inquiring as to the nature of the communication[143]. The reply via fax was not received before the morning of 19 April 2000[144]. Consequently there was an appropriate time span of four days including at least two business days[145]. Within this time, it could have been expected from CLAIMANT to react upon the inquiry thus avoiding all complication concerning the day of payment of the 4th installment[146]. In any case, sending the translation until 18 April 2000 would have sufficed. The question whether the inquiry was sent in time depends on the circumstances. In the case at issue the inquiry would have been sent in time if the translation had reached RESPONDENT's place of business before the payment of the 4th installment became due, ie on 18 April 2000[147].

137: Schlechtriem-Herber, Commentary, Art. 7, no. 15 (with regard to the CISG); Enderlein/Maskow/Strohbach, Art. 8, no. 9.

138 The principle of good faith becomes manifest to most UNCITRAL texts (Analytical Commentary, A/CN.9/489, para. 79). It has its origin in a rule of conduct for the parties when they conclude a contract.

139 Statement of Defense, para. 3:"*RESPONDENT neither has nor has ever had any business or contractual relationship with Futura Investment Bank* […]".

140 Bazinas, Duke Journal of Comparative International Law, p. 337.

141 Procedural Order No. 2, Clarification No. 10.

142 Memorandum for Claimant by Cardozo, III., p. 18.

143 RESPONDENT's Exhibit No. 1.

144 CLAIMANT's Exhibit No. 3; Statement of Defense, para. 7.

145 Monday 17 April 2000 and Tuesday 18 April 2000.

146 Statement of Defense, para. 9:"*early afternoon of 19 April 2000*".

147 As agreed in the original contract between RESPONDENT and TAILTWIST the 4th installment became due on the completion of the installation of the equipment and the commissioning tests. On 18 April 2000 the consultant for RESPONDENT certified that the equipment had been installed and that the commissioning tests had been completed by TAILTWIST's personnel. The certification was sent to the accounting department later that day and consequently the sum of $ 2,325,000 became due.

It can be reasonably assumed that CLAIMANT speaks English, since it is an international investment bank with interests in numerous countries[148], concluding most of its contracts in English, as in the case of the assignment contract with TAILTWIST[149]. Consequently it would not have been necessary for CLAIMANT to delegate the document to an external translation service. It would not have been too onerous for CLAIMANT to translate the document of the German notification of assignment, which did not exceed the length of six lines[150], within the aforementioned period of time. CLAIMANT could have availed itself of the entire time span to initiate further proceedings. Sending the reply via fax[151] and mail[152] would not have shortened the time span to obtain a translation, so that there would have been no necessity to grant CLAIMANT additional time for transmission. Hence, when RESPONDENT inquired for a translation on 15 April 2000, CLAIMANT had sufficient time to send such translation before the date payment was due.

For these reasons, RESPONDENT was discharged of its payment obligation pursuant to Art. 17 (1) Receivables Convention by making payment to TAILTWIST in accordance with the original contract.

B. The English translation received on 19 April 2000 was too late to stop the payment to the old creditor TAILTWIST and consequently did not trigger the legal consequence of Art. 17 (2) Receivables Convention

RESPONDENT is to be granted an appropriate time span for contemplation and reaction after receipt of the English translation **[I.]**. Even if the Tribunal were to find that RESPONDENT was not obliged to avail itself of a quicker means of communication, since CLAIMANT could not expect RESPONDENT to observe a higher level of diligence than CLAIMANT itself adhered to **[II.]**.

I. RESPONDENT is to be granted an appropriate time span for contemplation and reaction after receipt of the English translation

The English translation sent by CLAIMANT on 19 April 2000 was not received in time to stop the payment order to the Accounting Department.

The primary purpose of Art. 16 Receivables Convention is to state the *"receipt rule"* with regard to the time of effectiveness of a notification, that a notification becomes effective when *"received"* by the debtor[153]. According to the receipt rule a written communication becomes effective when it reaches the addressee,

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[148] Notice of Arbitration, para. 1:*"INVESTMENT is an investment bank with interests in numerous countries"*.
[149] Procedural Order No. 2, Clarification No. 15.
[150] CLAIMANT's Exhibit No. 2.
[151] CLAIMANT's Exhibit No. 3.
[152] RESPONDENT's Exhibit No. 3.
[153] When exactly a debtor is deemed to receive a notification is a matter not governed by the Receivables Convention (Analytical Commentary, A/CN.9/489/Add. 1, para. 2). Art. 29 Receivables Convention provides that the relationship between the debtor and the assignee is governed by the law applicable to the original contract. The question of when such notification is received is therefore determined by Art. 24 CISG, laying down rules only for those declarations in Part II of the Convention which must reach the addressee (Schlechtriem, Commentary, Art. 24, para. 2) . A notification of assignment is considered as to be a declaration meeting this requirement.

that is when it is delivered to his place of business or mailing address[154]. In the case at issue a fax would reach the recipient the moment it is received on his receiver[155].

By virtue of the principle of good faith[156] it cannot be expected that RESPONDENT was to immediately act upon receipt of the fax, considering the fact that in larger companies the recipient does not necessarily work in the Accounting Department and that therefore any written communication has to be forwarded to the respective authority. Consequently, it cannot be expected from the debtor to reassure himself before each payment that there was no electronic notification[157] of assignment received in the meantime[158]. In the case at issue RESPONDENT was not informed by CLAIMANT that a fax of this significance has been sent, CLAIMANT should have made a telephone call additionally.

Mr. Black, who had not reckoned with receiving an electronic notification of assignment, followed the usual procedure[159] to initiate further proceedings. He could not be expected to deviate from the usual procedure. The usual procedure was dictating the memorandum containing the instruction to stop payment to his secretary, with several other memoranda at the same time, and initiating that the document would be forwarded upon his signature to the authorized department by the internal messenger service[160]. CLAIMANT as an internationally operating bank had to be aware that during one business day, various business activities have to be dealt with. CLAIMANT was therefore expected to take into account a certain time span for contemplation and reaction.

For these reasons, Mr. Black is to be granted an appropriate time span of a few hours required for contemplation and reaction, which he did not exceed.

II. Even if the Tribunal were to find that RESPONDENT was not obliged to avail itself of a quicker means of communication, since CLAIMANT could not expect RESPONDENT to observe a higher level of diligence than CLAIMANT itself adhered to

Moreover CLAIMANT could not expect RESPONDENT to observe a higher level of diligence than CLAIMANT itself adhered to.

It has to be taken into consideration that CLAIMANT has caused the shortage in time in the first place.

To begin with, by sending a communication in German, CLAIMANT failed to provide RESPONDENT with a notification that met the requirement of Art. 16 (1) Receivables Convention[161]. Secondly, even though RESPONDENT had sent the request for the English translation on 15 April 2000, CLAIMANT

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[154] Herber/Czerwenka, Art. 24, para. 2.

[155] Ebnet, NJW 1992, p. 2990; However, it has to be pointed out that there is a contrary view, more favorable for RESPONDENT, which holds that a communication is received when it actually comes to the recipient's attention (Neumayer, RIW 1994, p. 104).

[156] Art. 7 (1) Receivables Convention, which deals with the interpretation of the law, is inspired by Art. 7 (1) CISG (Analytical Commentary, A/CN.9/489, para. 79); see supra § 2 A., II.; Ferrari, Melbourne Journal of International Law, p. 14.

[157] Sigman/Smith, Uniform Commercial Code Law Journal, p. 348:"*The Convention in Art. 5 (c) Receivables Convention defines "writing" in a manner to include an electronical record.".*

[158] Janzen, RabelsZ Bd. 63 (1999), p. 375.

[159] Procedural Order No. 2, Clarification No. 30.

[160] Procedural Order No. 2, Clarification No. 30.

[161] see supra § 2 A. I. 1.

did not send the reply before 19 April 2000, allowing at least two business days to pass by, although a translation of the essential information would not have been too onerous for CLAIMANT.

CLAIMANT was well aware that the 4th installment had become due the previous day. As agreed in the original contract between RESPONDENT and TAILTWIST, the 4th installment became due upon completion of the installation of the equipment and the commissioning tests[162]. On 18 April 2000 the consultant for RESPONDENT certified that the equipment had been installed and that the commissioning tests had been completed by TAILTWIST's personnel[163]. The certification was sent to the Accounting Department later that day[164] and consequently the sum of $ 2,325,000 became due on 18 April 2000. CLAIMANT could not expect that its notification would take priority over all other business activities of RESPONDENT. So CLAIMANT was obliged to send the English translation prior to 19 April 2000 in order to give RESPONDENT the opportunity to react in an appropriate manner.

Nor can CLAIMANT expect that RESPONDENT would react immediately upon receipt of the English translation. To accuse RESPONDENT of having failed to gain awareness and to directly contact the Accounting Department within a few hours before payment to TAILTWIST was initiated[165], would constitute contradictory conduct and therefore contravene the principle of good faith[166].

In addition to that, CLAIMANT shifted the risk of having to pay twice onto the debtor RESPONDENT, who is precluded from exercising any influence on the assignment itself. This has a negative effect on RESPONDENT's legal position and would therefore contravene the principle of debtor protection[167].

Therefore the English translation received on 19 April 2000 arrived too late to trigger the legal consequence of Art. 17 (2) Receivables Convention. Consequently RESPONDENT was entitled to discharge its obligation by paying to TAILTWIST according to Art. 17 (1) Receivables Convention.

§ 3. CLAIMANT is not entitled to payment of the fifth installment amounting to $ 930,000

With the 5th installment CLAIMANT was assigned by TAILTWIST the right to payment of $ 930,000 **[A.]**. Under Art. 18 (1) Receivables Convention, RESPONDENT can raise the defense of a reduction in price pursuant to Art. 50 CISG against CLAIMANT **[B.]**.

A. With the 5th installment CLAIMANT was assigned by TAILTWIST the right to payment of $930,000

As shown above, the right to payment of the 5th installment was effectively assigned to CLAIMANT under the assignment agreement on 25 March 2000[168].

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[162] CLAIMANT's Exhibit No. 1.
[163] CLAIMANT's Exhibit No. 5; Statement of Defense, para. 9.
[164] Statement of Defense, para. 9.
[165] Statement of Defense, para. 9:"*The accounting department acted upon the certification in the early afternoon of 19 April 2000*".
[166] As shown above, Art. 7 Receivables Convention was "inspired" by Art. 7 CISG (see supra no. 54). It is generally accepted that one can at least infer from the principle of good faith the prohibition of the misuse of rights and the contradictive conduct, venire contra factum proprium (Magnus, RabelsZ 59 (1995), p. 480).
[167] Trager, New York University Journal of International Law & Politics, 1999, p. 635.
[168] see supra § 1 B. II. 1.

B. Under Art. 18 (1) Receivables Convention RESPONDENT can raise the defense of a reduction in price pursuant to Art. 50 CISG against CLAIMANT

RESPONDENT does not contest that the original contract contained an agreement not to assert defenses against CLAIMANT as the assignee. Despite the waiver RESPONDENT can assert its defenses against CLAIMANT **[I.]**. Under Art. 50 CISG[169] RESPONDENT has the right to a reduction in price **[II.]**. RESPONDENT was under no duty to mitigate pursuant to Art. 77 CISG and can therefore claim the full reduction of price amounting to $ 930,000, since Art. 77 CISG does not apply to a claim for reduction of the price for failure by a seller to fulfill its contractual obligations **[III.]**.

I. Despite the waiver RESPONDENT can assert its defenses against CLAIMANT

The waiver's scope of application does not encompass the case of TAILTWIST not being able to remedy a deficiency because of its insolvency **[1.]**. Even if the Tribunal were to find that the waiver's scope of application does encompass the case of TAILTWIST's insolvency, it did not become effective against RESPONDENT as TAILTWIST has failed to attempt to remedy a deficiency in good faith **[2.]**.

1. The waiver's scope of application does not encompass the case of TAILTWIST not being able to remedy a deficiency because of its insolvency

RESPONDENT agrees that the waiver, relating to the assertion of RESPONDENT's defenses against future assignees, has been effectively incorporated by mutual written agreement into the contract between TAILTWIST and RESPONDENT dating from 1 September 1999[170]. Nevertheless, RESPONDENT can assert its defenses against CLAIMANT, since the scope of the waiver clause as agreed upon in the contract by TAILTWIST and RESPONDENT does, contrary to CLAIMANT's opinion[171], not encompass the case of TAILTWIST's insolvency.

Artt. 18 and 19 Receivables Convention allow the parties to agree by mutual written agreement not to raise defenses as against assignees[172], the parties being free to agree upon the scope of such waiver.

The wording of the waiver and its scope of application have to be interpreted narrowly with regard to the wording and the parties' interests. By literal interpretation of the stipulation that TAILTWIST was "*to attempt in good faith to remedy*"[173] it can be deducted that capability of acting is an essential prerequisite to such

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[169] Art. 50 CISG: "*If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.* […].".

[170] cf. CLAIMANT's Exhibit No. 1.

[171] Memorandum for CLAIMANT by Cardozo, III, p. 30:"*However, the error in Respondent's argument is in implying that it was against something that in the end it actually agreed to and contracted for.*".

[172] Analytical Commentary, A/CN.9/489/Add.1, para. 19; Analytical Commentary, A/CN.9/489/Add.1, para. 21.
Art. 18 Receivables Convention sets forth that the debtor generally has against the assignee all the defenses that the debtor could raise against the assignor. Pursuant to Art. 19 Receivables Convention this right may be waived by written mutual agreement between debtor and assignor.

[173] CLAIMANT's Exhibit No. 1:"*If Tailtwist should assign the right to the payments due from Equatoriana Bobbins, the latter agrees that it will not assert against the assignee any defenses it may have against Tailtwist arising out of defective performance of this conctract, unless Tailtwist does not in good faith attempt to remedy the deficiency.*".

attempt. With cessation of the business activities on 16 June 2000 TAILTWIST did no longer possess the capability of acting as a company[174].

When interpreting RESPONDENT's conduct with regard to the conclusion of the contract according to Art. 8 (1) CISG [175], it becomes clear that RESPONDENT did not, contrary to CLAIMANT's argument[176], intend to bear TAILTWIST's risk of insolvency with the waiver, a fact of which TAILTWIST could not have been unaware.

Art. 8 (1) CISG is applicable, as the contract between RESPONDENT and TAILTWIST is governed by the CISG [177].

TAILTWIST could not have been unaware that RESPONDENT had no interest in the waiver, from which it only gained disadvantages[178] and therefore wanted the waiver clause to be applied restrictively.

RESPONDENT did in fact agree to the waiver, nevertheless stating that it would make reclamations against defective performance more difficult[179].When RESPONDENT agreed to the waiver only after intense negotiations[180], it made a concession to TAILTWIST, being well aware that such waiver would only entail disadvantages for RESPONDENT[181].

Therefore, the disadvantages that RESPONDENT was prepared to take with the waiver are to be held at a minimum, so that the terms of the waiver must be interpreted restrictively. The disadvantages contemplated by RESPONDENT are only kept at a minimum when a deficiency is remedied in the ordinary course of events. The insolvency of TAILTWIST does not fall within the ordinary course of events in business relationships. If insolvency were within the ordinary course of events in business relationships, the burden of TAILTWIST's risk of insolvency would be shifted onto RESPONDENT. This cannot have been in its interest and has certainly not been contemplated when agreeing to the waiver.

The speculations in business circles that TAILTWIST might be experiencing financial difficulties[182] are not sufficiently substantiated to be treated as facts that RESPONDENT must have contemplated when negotiating the contract.

2. Even if the Tribunal were to find that the waiver's scope of application does encompass the case of TAILTWIST's insolvency, it did not become effective against RESPONDENT, as TAILTWIST has failed to attempt to remedy a deficiency in good faith

Assuming, but not conceding that the waiver's scope of application does encompass the case that TAILTWIST could not attempt to remedy because of its insolvency, the waiver did nevertheless not

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174 Statement of Defense, para. 19.

175 Art. 8 (1) CISG:" *For the purpose of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was".*

176 Memorandum for CLAIMANT by Cardozo, III, p. 31:"*RESPONDENT knowingly accepted the risk of bankruptcy by seller".*

177 cf. CLAIMANT's Exhibit No. 1.

178 Statement of Defense, para. 18.

179 Statement of Defense, para. 18.

180 Statement of Defense, para. 18.

181 Statement of Defense, para. 18.

182 Procedural Order No. 2, Clarification No. 26.

become effective against RESPONDENT, since there was a deficient performance that TAILTWIST did not attempt to remedy in good faith.

The waiver clause in the original contract put TAILTWIST under the obligation to attempt in good faith to remedy a deficiency[183]. Such waiver would only become effective against RESPONDENT when this condition was met by TAILTWIST.

When remaining inactive despite the fact that RESPONDENT informed TAILTWIST that there was an inadequacy in the training[184], later resulting in the machinery not running at full capacity, TAILTWIST was in bad faith. RESPONDENT and TAILTWIST specifically negotiated the content of the waiver clause[185] in which the term "good faith" was pivotal, since it triggered the loss of RESPONDENT's defenses against TAILTWIST. The original contract was governed by the CISG[186], so that good faith is to be interpreted with reference to the CISG, according to which good faith is essentially to be understood as the duty not to frustrate the contract's objective[187] and not to violate the other party's interests[188]. A contract's objective is in danger of frustration once there is a substantial deviation from the contractual obligations, which is consequently not cured. In the case at issue, the non-reaction to a breach of contract, which was reasonably foreseeable for the party in breach, frustrates the contract's objective[189].

TAILTWIST had knowledge of a deficiency in the training. The three week training period[190] began when installation and commissioning tests were completed on 18 April 2000[191]. Four men of TAILTWIST's personnel, who had provided installation and commissioning, remained on site to train RESPONDENT's staff[192]. Already on the second day of the training two of the trainers were ordered back to return to Oceania, as they had been laid off by their employer TAILTWIST[193]. Contrary to CLAIMANT's assertion[194] there is a breach of contract, since it was contractually agreed that TAILTWIST would send four people. The number of staff TAILTWIST was to provide under the contract was stipulated implicitly. The contract stated that the price for the training amounts to $ 80.000[195]. During prior oral negotiations TAILTWIST declared to send four trainers and valued each employee with $ 20.000[196]. Therefore TAILTWIST wanted to express that the price of $ 80.000 equals four trainers. TAILTWIST knew that two people would not suffice for adequate training. In the light of cost efficiency TAILTWIST would not have provided four trainers if two had sufficed, since manpower is always used to its full capacity. Assuming, but not conceding, that two people would have sufficed, however, due to their dim job prospects,

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183 CLAIMANT's Exhibit No. 1.
184 Procedural Order No. 2, Clarification No. 39.
185 Statement of Defense, para. 18; Procedural Order No. 2, Clarification No. 11.
186 CLAIMANT's Exhibit No. 1.
187 Staudinger-Magnus, Art. 7, no. 47; Schlechtriem-Ferrari, Art. 7, no. 5; Witz/Salger/Lorenz-Witz, Art. 7, no. 15.
188 Staudinger-Magnus, Art. 7, no. 47.
189 ie unimpeded performance of the contractual obligations.
190 CLAIMANT's Exhibit No. 1.
191 Statement of Defense, para. 12.
192 Notice of Arbitration, para. 5.
193 Statement of Defense, para. 14.
194 Memorandum for CLAIMANT by Cardozo, IV. C., p. 35:"[…] *that the contract itself does not specify the number of trainers on the team.*".
195 CLAIMANT's Exhibit No. 1.
196 Procedural Order No. 2, Clarification No. 35.

TAILTWIST's remaining two people were too distressed to provide adequate training[197]. Laying off two trainers had the same effect as if TAILTWIST had provided only two men from the start, since the time of withdrawal was at the very beginning of the training period. In the early state of the tuition, when the trainees had virtually no knowledge about the subject matter, it was vital that there was an appropriately low trainee-trainer ratio to ensure that the trainees acquired a sound knowledge of the basic operation, as well as sufficient skills in adjusting and maintaining the machinery. At this point, TAILTWIST was under a duty to react by remedying, because it had constructive knowledge of the deficiency. TAILTWIST was in bad faith because of its failure to remedy in spite of its knowledge.

It follows that TAILTWIST must have been aware that two people would never suffice, so that the training in the form provided by TAILTWIST constitutes deficient performance. TAILTWIST must have further known that due to such insufficient training RESPONDENT's staff would be prone to cause damage to the complex machinery. As it turned out, they constantly feared causing damage, which prevented it from operating the machinery in such manner as to attain full production capacity[198]. TAILTWIST had a conscious disregard for these facts that met the eye and were of evident relevance to the non-conformity[199]. Consequently TAILTWIST was in bad faith from 20 April 2000, when it withdrew two trainers. They were still in bad faith by the end of June[200] when RESPONDENT came to the conclusion that the deficient performance might be caused by faulty machinery. The prospect that TAILTWIST would remedy was even worse for RESPONDENT by the end of June, when TAILTWIST's business activities had been terminated on 16 June 2000[201]. It follows that TAILTWIST would not have attempted to remedy the deficient machinery either[202], which indicates its bad faith. TAILTWIST's inactivity with regard to the deficient training and deficient machinery[203] frustrated RESPONDENT's expectation of good faith behavior under the clause, since TAILTWIST effectively prevented RESPONDENT from obtaining the full benefit of the purchase agreement worth $ 9,300,000. RESPONDENT was left with brand new machinery but was incapable to operate it to full capacity. TAILTWIST ignored that it was committed to the other party, ie it ignored RESPONDENT's right to be informed of the reasons for the reduction of staff and its consequences. In its deliberate pursuit of self-interest TAILTWIST turned a blind eye to RESPONDENT's interests.

II. Under Art. 50 CISG RESPONDENT has the right to a reduction in price

There is a lack of conformity under Art. 50 CISG, either caused by insufficient training or by faulty machinery **[1.]**. If insufficient training caused the lack of conformity, RESPONDENT complied with the requirements in Artt. 38, 39 CISG **[2.]**. If faulty machinery caused the lack of conformity, RESPONDENT

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197 Statement of Defense, para. 14.
198 Statement of Defense, para. 15.
199 cf. Zeller, Part 1, (ii) (iv) a).
200 Procedural Order No. 2, Clarification No. 39.
201 Statement of Defense, para. 19.
202 Statement of Defense, para. 22:"*It is also obvious that TAILTWIST would not have remedied the defects, or attempted in good faith to do so* […].".
203 Statement of Defense, para. 21:"[…] *RESPONDENT* […] *woud have expected the arrival of Tailtwist personnel who would either have fixed the machinery or have given additional training, or both.*".

did not have to give notice of the lack of conformity to TAILTWIST after the end of June **[3.]**. RESPONDENT has declared reduction pursuant to Art. 50 CISG with its letter to TAILTWIST's insolvency administrator dated 10 January 2001 **[4.]**.

1. There is a lack of conformity under Art. 50 CISG, either caused by insufficient training or by faulty machinery

The lack of conformity is to be found in the fact that the machinery had not been running at full capacity **[a.]**, which can be attributed to two possible causes to be proven when taking evidence at a later stage of the proceedings **[b.]**.

a. The lack of conformity is to be found in the fact that the machinery had not been running at full capacity

TAILTWIST did not deliver goods conforming with the contractual provisions, thus fulfilling the condition of a lack of conformity under Art. 50 CISG [204]. Such non-conformity in performance is further substantiated in Art. 35 (1) CISG [205]. This provision focuses on the contractual provisions and puts the seller under the obligation to deliver goods which are of the quantity, quality and description required by the contract [206]. The level of productivity attained did not meet the level of performance, on which the parties had relied in the contract. After installation and training were completed, the machinery was not able to operate in full working order [207]. When buying machinery it is expected that it will make use of the whole ambit of its possible capacity. Satisfactory performance of the machinery presupposes that TAILTWIST were to install the equipment and train the personnel in such a way that RESPONDENT would be able to operate the equipment at full capacity as expected. But in the case at issue, TAILTWIST failed to deliver equipment that conformed with Art. 35 CISG.

b. The lack of conformity can be attributed to two possible causes to be proven when taking evidence at a later stage of the proceedings

The lack of conformity, ie the fact that RESPONDENT had not been able to run the machinery at full capacity, can be attributed to two possible causes. Such cause is to be found either in inadequate training or in a fault of the machinery itself [208], which is to be established by the taking of evidence at a later stage of the proceedings [209].

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[204] Staudinger-Magnus, Art. 50, no. 8.
[205] Art. 35 (1) CISG: "*The seller must deliver goods which are of the quantity, quality and description required by the contract* […]".
[206] cf. Bianca / Bonell-Bianca, Art. 35, no. 2.1.; Achilles, Art. 35, no. 3.
[207] Statement of Defense, para. 15.
[208] Procedural Order No. 2, Clarification No. 42; CLAIMANT's Exhibit No. 5.
[209] Procedural Order No. 2 Introduction; Procedural Order No. 2, Clarification No. 42.

2. If insufficient training caused the lack of conformity, RESPONDENT complied with the requirements in Artt. 38, 39 CISG

RESPONDENT acted in compliance with Artt. 38, 39 CISG when giving various statements to TAILTWIST's personnel during the training period **[a.]**. Even if the Tribunal were to find that RESPONDENT did not comply with the requirements in Artt. 38, 39 CISG when making statements to TAILTWIST's personnel, the exemption of Art. 40 CISG applies to RESPONDENT **[b.]**.

a. RESPONDENT acted in compliance with Artt. 38, 39 CISG when giving various statements to TAILTWIST's personnel during the training period

The various statements with regard to the insufficient training, as made by RESPONDENT during the training period to TAILTWIST's personnel, constitute a timely notice pursuant to Art. 39 CISG **[aa.]** and were given to the rightful addressee **[bb.]** as well as being sufficiently specified **[cc.]**.

aa. The statements made to TAILTWIST's personnel constitute a timely notice

The various statements made during the training period to the TAILTWIST personnel[210] constitute a timely notice. The notice period of Art. 39 CISG starts with the actual discovery of a deficiency[211]. RESPONDENT had obviously discovered a deficiency in the training as complaints were made on several occasions that the training was insufficient[212], so that notice was given in reaction to such discovery.

bb. TAILTWIST's personnel was the rightful addressee for such notice, since RESPONDENT availed itself of an appropriate means in the sense of Art. 27 CISG

CLAIMANT contests that RESPONDENT has ever given notice to TAILTWIST of the insufficient training[213]. However, it is irrelevant whether TAILTWIST has ever been told by its two trainers about the notice of lack of conformity concerning the training, since the risk of transmission of such notice is to be borne by the recipient pursuant to Art. 27 CISG[214].

Art. 27 CISG applies when communicating a notice of lack of conformity under Art. 39 CISG to the seller[215]. The risk of delay or loss of such communication is to be borne by the seller under Art. 27 CISG, from which follows that he has to choose a means appropriate in the circumstances[216]. When RESPONDENT used TAILTWIST's staff as a messenger[217] to give notice of a lack of conformity, RESPONDENT availed itself of a means appropriate in the circumstances under Art. 27 CISG, since TAILTWIST's staff was the most reliable and reasonable means of communication.

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[210] Procedural Order No. 2, Clarification No. 39.
[211] Staudinger–Magnus, Art. 39, no. 29; Schlechtriem–Schwenzer, Art. 39, no. 19; Soergel/Lüderitz-Schüßler-Langeheine, Art. 39, no. 5.
[212] Procedural Order No. 2, Clarification No. 39.
[213] Notice of Arbitration, para. 10.
[214] cf. Staudinger-Magnus, Art. 39, no. 53; Herber/Czerwenka Art. 39, no. 11; Kuoppala, 4.3.3.3; Andersen, 1.3.2.; Art. 27 CISG:"[…] *if notice*, […] *is given* […] *by means approriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.*".
[215] Soergel/Lüderitz-Schüßler-Langeheine, Art. 39, no. 10; Schlechtriem–Schwenzer, Art. 27, no. 11.
[216] Schlechtriem-Schlechtriem, Art. 27, no. 7.

The appropriateness of the means of communication is to be determined by the circumstances in the individual case[218]. This requirement is met if the sender can reasonably rely on the assumption that his communication will reach the recipient within due time and probability[219]. The notice was conveyed to TAILTWIST in the quickest and safest way possible[220], because TAILTWIST's personnel was not merely concerned with marginal elements[221] for the fulfillment of TAILTWIST's contractual obligations, thus acting within TAILTWIST's sphere[222]. The trainers must have had sound knowledge of the machinery to give instructions. This special qualification distinguishes them from unskilled workers and makes them suitable to convey notice[223] pursuant to Art. 27 CISG.

RESPONDENT had no indications that TAILTWIST's personnel could not be relied on to convey the notice to TAILTWIST. Under the circumstances in the case at issue, it could be reasonably expected that TAILTWIST's personnel would keep contact to TAILTWIST's site in Oceania while staying in Equatoriana, particularly as they had been concerned about whether their employment would be terminated as well[224]. Furthermore, due to TAILTWIST's insolvency, alternative means of communication would not have guaranteed the same degree of certainty[225] of receipt as addressing TAILTWIST's personnel.

Therefore RESPONDENT could reasonably rely on the assumption that the notice would be effectively conveyed to TAILTWIST and thus chose an appropriate means for communication of notice.

cc. The deficiency was sufficiently specified

When RESPONDENT complained to TAILTWIST's personnel on several occasions that the training was inadequate[226], the deficiency in the training was thus sufficiently specified. The requirements for a specification of a lack of conformity should not be exaggerated[227], since they are intended to place the seller in a position whereby he can comprehend the lack of conformity and take the appropriate steps[228]. In the case at issue the complaints made to TAILTWIST's personnel put TAILTWIST in the position to take the appropriate steps, as it must have known that such insufficiency was the result of lacking two trainers.

b. Even if the Tribunal were to find that RESPONDENT did not comply with the requirements in Artt. 38, 39 CISG when making statements to TAILTWIST's personnel, the exemption of Art. 40 CISG applies to RESPONDENT

RESPONDENT was exempt from giving notice of the lack of conformity pursuant to Art. 40 CISG[229],

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[217] cf. Schlechtriem–Schwenzer, Art. 39, no. 14; Herber/Czerwenka, Art. 39, no. 13.
[218] Schlechtriem-Schlechtriem, Art. 27, no. 7.
[219] Staudinger-Magnus, Art. 27, no. 17.; Gerny, p. 200.
[220] cf. BGH, 25.3.1992, VIII ZR 64/91.
[221] Training was explicitly mentioned in the original contract and valued with $ 80.000; cf. CLAIMANT's Exhibit No. 1.
[222] cf. LG Kassel, 15.2.1996, 11 O 4185/95.
[223] cf. OLG Bamberg, 23.2.1979, 2 U 127/77; AG Alsfeld, 12.5.1995, 31 C 534/94.
[224] cf. Statement of Defense, para. 14: *"obviously upset and concerned about their own future"*.
[225] cf. Staudinger-Magnus, Art. 27, no. 17.
[226] Procedural Order No. 2, Clarification No. 39.
[227] Schlechtriem-Schwenzer, Art. 39, no. 6; Staudinger-Magnus, Art. 39, no. 24.
[228] Schlechtriem-Schwenzer, Art. 39, no. 6.
[229] Art 40 CISG:*"The seller is not entitled to rely on the provisions of articles 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."*.

since TAILTWIST could not have been unaware of the fact that the remaining two trainers were not able to provide adequate training and failed to disclose this to RESPONDENT.

Art. 40 CISG does not require deceit on the seller's part, gross negligence is deemed sufficient[230]. As laid out above, TAILTWIST acted grossly negligent when laying off two people despite being contractually bound to provide four trainers[231]. It follows that TAILTWIST could not have been unaware that two trainers would not suffice to fulfill its contractual obligations.

Art. 40 CISG further requires[232] TAILTWIST to disclose explicitly[233] the facts relating to the lack of conformity[234], which TAILTWIST failed to do, since it did not tell RESPONDENT that the withdrawal of the two trainers would entail a lack of conformity[235]. At no time did TAILTWIST mention to RESPONDENT that two people would not suffice to provide adequate training under the contract. So it did not disclose this knowledge to RESPONDENT, which was left to find out for itself about this fact.

Even if TAILTWIST itself did not know that two people were insufficient, the remaining two trainers must have known about the inadequacy in performance and this knowledge will be attributed to TAILTWIST under Art. 40 CISG[236]. Since TAILTWIST has never mentioned that two people would not suffice, it did not disclose this fact relating to the lack of conformity[237] under Art. 40 CISG to RESPONDENT.

3. If faulty machinery caused the lack of conformity, RESPONDENT did not have to give notice of the lack of conformity to TAILTWIST after the end of June

RESPONDENT did not have to adhere to the examination and notice requirements in Artt. 38, 39 CISG, since by the end of June, notice of a lack of conformity could neither have been received nor reacted to by TAILTWIST, so that a notice requirement would contravene good faith **[a.]**. Even if the Tribunal were to find that RESPONDENT had to examine and to give notice pursuant to Artt. 38, 39 CISG before the end of June, RESPONDENT had a reasonable excuse under Art. 44 CISG for its failure to notify **[b.]**.

a. RESPONDENT did not have to adhere to the examination and notice requirements in Artt. 38, 39 CISG, since by the end of June, notice of a lack of conformity could neither have been received nor reacted to by TAILTWIST, so that a notice requirement would contravene good faith

Under Art. 38 (1) CISG[238], RESPONDENT had time for examination at least until the end of June, which was a period as short as practicable in the circumstances, since the machinery was very intricate and of high

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[230] OLG München, 11.3.1998; 7 U 4427/97; Witz, ICC International Court of Arbitration, 2000, p. 16; Heilmann, p. 340; Schlechtriem-Schwenzer, Art. 40, no. 4; The purpose is to ease the burden of proof for the buyer, since gross negligence is easier to establish than positive knowledge.

[231] see supra § 3 B. I. 2.

[232] Linnerz, p. 58.

[233] cf. Hirner, p. 220.

[234] Ziegler, p. 101; Enderlein/Maskow/Strohbach, Art. 40, no. 1.

[235] cf. Witz/Salger/Lorenz-Salger, Art. 40, no. 6.

[236] Schlechtriem-Schwenzer, Art. 40, no. 6; Enderlein/Maskow/Strohbach, Art. 40, no. 2; Honsell-Magnus, Art. 40, no. 7; Herber/Czerwenka, Art. 40, no. 5; Reinhart, Art. 40, no. 2.4.

[237] ie two people cannot provide sufficient training as called for under the contract.

[238] Art. 38 (1) CISG: "*The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.*".

complexity[239]. RESPONDENT did not have to give notice within the notice period, which began upon discovery of the deficiency by the end of June[240]. By then TAILTWIST was no longer an operating concern[241], so that insisting on the notice requirement would contravene the notion of good faith in international trade[242].

When assessing what constitutes *"a period that is as short as is practicable in the circumstances"* pursuant to Art. 38 (1) CISG, it has to be taken into account that this rule is based on the fundamental idea of reasonableness[243], meaning that the buyer must examine the goods as soon as reasonably possible. The length of such period is not a question of law but rather a question of fact[244]. The more complex the goods are, the longer will be the period granted for examination[245]. In the instant case it has to be considered that RESPONDENT had installed a complete six-end manufacturing line, equal to a whole production aisle[246], which took two months to install, from 20 February 2000[247] to 18 April 2000[248]. In addition to that, the machinery was run with customer-tailored software[249], adding further to its complexity. RESPONDENT's personnel had only just acquired the necessary knowledge for operating the equipment by three weeks training, so they had no previous experience how to deal with this particular machinery. This is supported by the fact that RESPONDENT's personnel had severe difficulties in adjusting the machines and fitting the appropriate raw materials[250]. RESPONDENT's personnel was confronted with the mere fact that the equipment was not able to run at full capacity[251]. It did not impose itself upon RESPONDENT's staff where exactly the cause for this deficiency in performance was to be found. They lacked the comprehensive knowledge of TAILTWIST, as the machinery's manufacturer, which was in a much better position to locate and determine possible causes for the unsatisfactory performance. Thorough investigation was therefore needed to rule out the possibility that RESPONDENT's personnel itself was the cause for the deficient performance, because of insufficient training[252].

These facts justify that it took RESPONDENT until the end of June in order to reach a well-founded conclusion with regard to the possible cause for the deficient performance, so that the examination period pursuant to Art. 38 CISG ends by the end of June.

In view of the fact that CLAIMANT concedes that RESPONDENT had a contractual period of three months for examination[253], six weeks for examination are not too generous in the case at issue[254].

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[239] Cour d' Appel d'Aix-en-Provence, 21. 11.1996 (allowing 40 days for examination pursuant to Art. 38 CISG).
[240] Procedural Order No. 2, Clarification No. 39.
[241] Statement of Defense, para. 19.
[242] cf. OLG Karlsruhe, 25.7.1986, 14 U 259 /84.
[243] Bianca/Bonell-Bianca, Art. 38, no. 2.5.
[244] Zeller, Part 1, (ii) (iv) d.; Honsell, SJZ, 1992, p. 353; Escher, RIW, 1999, p. 499; Gerny, p. 185 and p. 193.
[245] Cour d' Appel d'Aix-en-Provence, 21. 11.1996.; Schlechtriem-Schwenzer, Art. 38, no. 17; Gerny, p. 187; Ferrari, International Sale of Goods, p. 189.
[246] CLAIMANT's Exhibit, No. 1.
[247] Notice of Arbitration, para. 6.
[248] Statement of Defense, para. 12.
[249] CLAIMANT's Exhibit No. 1.
[250] Statement of Defense, para. 20.
[251] Statement of Defense, para. 20.
[252] cf. Witz, ICC International Court of Arbitration 2000, p. 18.
[253] Memorandum for CLAIMANT by Cardozo, IV. B., p. 34:"[…] *the three-month performance-monitoring period contractually granted to Bobbins* […]".

RESPONDENT did not have to give notice upon discovery of the deficiency at the end of June when the notice period started pursuant to Art. 39 CISG[255]. Giving notice would have been futile since its purpose, to give the seller the opportunity to secure evidence, could not have been attained anymore. The period for giving notice started by the end of June, when RESPONDENT discovered that there was a deficiency in the machinery, because such notice period starts within the discovery of the deficiency[256].

The purpose of Art. 39 CISG is to put the seller in the position where he can secure evidence in order to ascertain what claims he will have to face later on[257] and how to react[258]. After TAILTWIST was liquidated on 16 June 2000, it was incapable of securing evidence, so that the objective of a notice could not have been met anymore. It follows that CLAIMANT cannot rely on the assertion that RESPONDENT has failed to notify, since such reliance would contravene the notion of good faith as expressed in Art. 7 (1) CISG[259].

b. Even if the Tribunal were to find that RESPONDENT had to examine and to give notice pursuant to Artt. 38, 39 CISG before the end of June, RESPONDENT had a reasonable excuse under Art. 44 CISG for its failure to notify

RESPONDENT was prevented from finding out before the end of June that the fault in the machinery could also have caused the deficient performance, since TAILTWIST failed to remove doubts as to whether deficient training caused the deficient performance. Therefore RESPONDENT has a reasonable excuse for not giving notice under Art. 44 CISG[260].

In order to establish whether there is an excuse under Art. 44 CISG, it is necessary to appraise the circumstances by reference to the notion of fairness[261]. A buyer's conduct, although not in itself correct and in accordance with the rules, is excusable if in the circumstances of the specific case it deserves to be accorded a degree of understanding and leniency[262].

After the training period had ended on 10 May 2000, RESPONDENT was merely confronted with the fact that full production could not be attained[263]. RESPONDENT attributed this to insufficient training on the part of TAILTWIST, since RESPONDENT's staff seemed unable to operate the equipment to full capacity[264] The staff had no experience in handling the machines and therefore had to experiment with adjusting the equipment for different raw materials with constant fear that an incorrect adjustment would

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[254] cf. Cour d' Appel d'Aix-en-Provence, 21. 11.1996.

[255] Art. 39 (1) CISG: "*The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.*".

[256] Bianca/Bonell-Sono, Art. 39, no. 2.5.; Reinhart, Art. 39, no. 3.

[257] Honsell-Magnus, Art. 39, no. 1; Secretariat's Commentary, Art. 39, no. 3; Herber-Czerwenka, Art. 39, no. 2; Staudinger-Magnus Art. 39, no. 3; Bianca/Bonell-Sono, Art. 39, no. 2.3; Magnus, TranspR-IHR, 1999, p. 30; Kritzer, p. 306; Kuoppala, 4.3.1.; Honnold, Uniform Law, para. 255.

[258] Ferrari, Applying the CISG, VII. (for example by examining the goods himself, by repairing the goods or by delivering substitute goods).

[259] cf. OLG Karlsruhe, 25. 7.1986, 14 U 259 /84.

[260] Art. 44 CISG: "[…] *the buyer may reduce the price in accordance with article 50* […] *if he has a reasonable excuse for his failure to give the required notice.*".

[261] Schlechtriem-Huber, Art. 44, no. 5; Andersen, 1.4; Zhang, p. 98.

[262] Schlechtriem-Huber, Art. 44, no. 5; Achilles, Art. 44, no. 3.

[263] Procedural Order No. 2, Clarification No. 39.

[264] Statement of Defense, para. 15 and para. 20.

result in damage to the equipment itself[265]. For these reasons, RESPONDENT has never considered the possibility of a fault in the machinery before the end of June[266].

Assuming that the cause for the deficient performance were to find in a fault of the machinery, TAILTWIST prevented RESPONDENT from timely discovery.

If TAILTWIST had immediately and duly reacted to RESPONDENT's complaints that the training was inadequate by sending staff to RESPONDENT's site to remedy this alleged deficiency and would have found that the training was not the cause for the deficient performance of the equipment. RESPONDENT would then have been easily capable of drawing the conclusion that the only remaining cause for the deficient performance was a fault in the machinery before the end of June.

Not only failed TAILTWIST to provide equipment, which was free from a lack of conformity, it also failed to react duly to RESPONDENT's complaints with regard to the possible cause. In view of the fact that it was TAILTWIST that prevented RESPONDENT from finding the cause for the deficient performance in due time, RESPONDENT has a reasonable excuse for not giving notice under Art. 44 CISG.

4. RESPONDENT has declared reduction pursuant to Art. 50 CISG with its letter to TAILTWIST's insolvency administrator on 10 January 2001

When declaring reduction in price by the last installment in its letter to CLAIMANT on 10 January 2001[267], RESPONDENT has complied with the requirement to declare reduction in Art. 50 CISG[268], such unilateral declaration[269] can take the form of a letter[270].

III. RESPONDENT was under no duty to mitigate pursuant to Art. 77 CISG and can therefore claim the full reduction in price amounting to $ 930,000, since Art. 77 CISG does not apply to a claim for reduction of the price for failure by a seller to fulfill its contractual obligations

CLAIMANT is wrong when arguing that RESPONDENT was under a duty to mitigate the loss and has acted in breach of this duty, so that the amount of the reduction in price is to be reduced by the breaching party[271]. Art. 77 CISG is not applicable to a claim for a reduction in price under Art. 50 CISG[272]. It exclusively applies to claims for damages, but CLAIMANT has not asserted damages in the case at issue. The narrow scope of application of Art. 77 CISG can be supported by its legislative history[273]. Furthermore, failure to notify on time cannot affect the reduction in price pursuant to Art. 50 CISG, since the reduced

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[265] Statement of Defense, para. 20.
[266] cf. Procedural Order No. 2, Clarification No. 39.
[267] CLAIMANT's Exhibit No. 5.
[268] Karollus, p. 158; Staudinger-Magnus, Art. 50, no. 15.
[269] Kritzer, p. 376.
[270] Hirner, p. 294; Staudinger-Magnus, Art. 50, no. 15.
[271] cf. Memorandum for CLAIMANT by Cardozo, E., p. 37: "[…] *Bobbins nonetheless had an affirmative duty to mitigate* […] *under Art. 77 CISG.*".
[272] Audit, no. 174; Secretariat's Commentary, Art. 73, no. 3; Herber/Czerwanka, Art. 77, no. 3; Honsell Art. 77, no. 4; Staudinger-Magnus, Art. 77, no. 7; Bianca/Bonell-Knapp Art. 77, no. 3.2.; Witz/Salger/Lorenz-Witz, Art. 77, no. 3; Soergel/Lüderitz-Dettmaier, Art. 77, no. 12; Rudolph, Art. 77, no. 1, Hirner, p. 225.
[273] When discussing draft Art. 77, the Working Group refused the idea that Art. 77 CISG were to be extended to claims for reduction in price (A/Conf97/C1/L228, Off Rec 133).

price is exclusively calculated by the relationship between the value of the defective goods and the value that the conforming goods would have had at the time of delivery[274].

§ 4. CLAIMANT is not entitled to interest on the 4th and 5th installment

As shown above, RESPONDENT has discharged its obligation of paying the 4th installment pursuant to Art. 17 (1) Receivables Convention when making payment to TAILTWIST[275]. Furthermore, RESPONDENT is entitled to reduce the total price by $ 930,000 pursuant to Art. 50 CISG, so that it does not need to pay interest thereon.

§ 5. CLAIMANT must bear the costs of arbitration

According to Art. 31 Int.Arb.Rules this Tribunal should order CLAIMANT to bear the costs of arbitration as well as any other legal costs.

Request for Relief

In the light of the submissions above, Counsel respectfully requests this Tribunal:

- *to find that this Arbitral Tribunal has no jurisdiction over the present dispute, since the arbitration clause of the original contract did not become binding between CLAIMANT and RESPONDENT with the assignment;*
- *to find that CLAIMANT is not entitled to payment of the 4th installment amounting to $ 2,325,000, since RESPONDENT was not effectively given notification of the assignment and was therefore discharged of its debt pursuant to Art. 17 (1) Receivables Convention when making payment to TAILTWIST;*
- *to find that CLAIMANT is not entitled to payment of the 5th installment amounting to $ 930,000, since RESPONDENT is entitled to reduce the price pursuant to Art. 50 CISG;*
- *to find that CLAIMANT is not entitled to interest on the 4th and 5th installment;*
- *to order CLAIMANT to bear all costs of arbitration and any other legal costs.*

[274] Schlechtriem-Huber, Art. 44, no. 14; Staudinger-Magnus, Art. 44, no. 19.
[275] see supra § 2.

For West Equatoriana Bobbins S.A.

.....	.....
(Mariam Ait-Ahmed)	(Andreas Frahn)
.....	.....
(Mona Kattan)	(Kim Rissel)
.....	.....
(David Stegmaier)	(Ann-Catrin Theisen)

Mainz, 08 February 2002