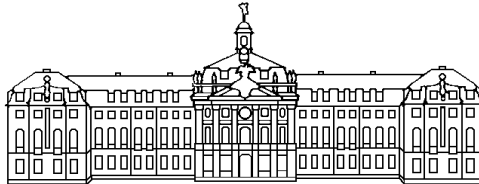


**NINTH ANNUAL WILLEM C. VIS  
INTERNATIONAL COMMERCIAL ARBITRATION MOOT  
VIENNA, 2002**



**UNIVERSITY OF MUENSTER  
GERMANY**

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**MEMORANDUM FOR RESPONDENT**

**IN RESPONSE TO THE MEMORANDUM FOR CLAIMANT,  
THE JOHN MARSHALL LAW SCHOOL, CHICAGO, IL, USA**

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**FUTURA INVESTMENT BANK**

**v.**

**WEST EQUATORIANA BOBBINS S.A.**

**KRISTINA BERGER · HENNING SCHALOSKE · THOMAS SEVENHECK · DARIUS SOGLOWEK**

**AMERICAN ARBITRATION ASSOCIATION**

**MOOT CASE No. 9**

**MEMORANDUM FOR RESPONDENT**

**ON BEHALF OF:**

**WEST EQUATORIANA BOBBINS S.A.**

214 Commercial Avenue

Oceanside

Equatoriana

**RESPONDENT**

**AGAINST:**

**FUTURA INVESTMENT BANK**

395 Industrial Place

Capitol City

Mediterraneo

**CLAIMANT**

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## INDEX OF ABBREVIATIONS

AAA	American Arbitration Association
AAA Int. Arb. Rules	American Arbitration Association International Arbitration Rules
All E.R.	All England Law Reports
Arb. Int'l	Arbitration International
Art.	Article
Arts.	Articles
Bd.	Band (Volume)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGE	Entscheidungen des Schweizerischen Bundesgerichts (Decisions of the Federal Court, Switzerland)
BGH	Bundesgerichtshof (German Federal Supreme Court, Germany)
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen (Decisions of the Federal Supreme Court in Civil Matters, Germany)
CCI	Chambre de Commerce Internationale
<i>c.f.</i>	Confer (compare)
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CISG Online	Case Law on CISG, Database University of Freiburg <a href="http://www.uni-freiburg.de/ipr1/cisg/title.htm">http://www.uni-freiburg.de/ipr1/cisg/title.htm</a>
CLOUT	Case Law on UNCITRAL Texts <a href="http://www.uncitral.org/en-index.htm">http://www.uncitral.org/en-index.htm</a>
Clunet	Journal du droit international
CR	Computer und Recht
Duke J.Comp. & Int'l L.	Duke Journal of Comparative and International Law
EAG	Einheitliches Gesetz über den Abschluss von internationalen Kaufverträgen über bewegliche Sachen (see ULF)
Ed(s).	Editor(s)
e.g.	For Example
EKG	Einheitliches Gesetz über den internationalen Kauf beweglicher Sachen (see ULIS)
<i>et seq.</i>	Et sequenta (following)
F.2d	Federal Reporter, Second Series
Fn.	Footnote
FS	Festschrift
<i>ibid.</i>	Ibidem (in the same place)
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration

i.e.	Id est (that means)
IHR	Internationales Handelsrecht, Zeitschrift für die wirtschaftsrechtliche Praxis
IPRax	Praxis des Internationalen Privat- und Verfahrensrecht
Iran-U.S. C.T.R.	Iran-United States Claims Tribunal Reports
J. Int'l Arb.	Journal of International Arbitration
JZ	Juristenzeitung
Kap.	Kapitel (Chapter)
KTS	Konkurs-, Treuhand- und Schiedsgerichtswesen
LG	Landgericht (Regional Court, Germany)
Lloyd's Rep.	Lloyd's List Law Reports
MDR	Monatsschrift für deutsches Recht
Mealey's Int'l Arb.	Mealey's International Arbitration Report
ML	UNCITRAL Model Law on International Commercial Arbitration
NJW-RR	Neue Juristische Wochenschrift-Rechtsprechungsreport
No.	Number
N.W.2d	North Western Reporter
NY Conv.	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
N.Y.L.J.	New York Law Journal
OGH	Oberster Gerichtshof (Supreme Court of Austria)
OLG	Oberlandesgericht (Regional Court of Appeal, Germany)
p.	Page
Pace Int'l L.Rev.	Pace International Law Review
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Rev. Arb.	Revue de l'arbitrage
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen (Decision of the Supreme Court, Germany, until 1945)
RIW	Recht der internationalen Wirtschaft
Sec. Analytical Comm.	Analytical Commentary on the Draft Convention on Assignment of Receivables in International Trade
Sec. Comm.	Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat
TLDB	Transnational Law Database
Tul.J.Int'l & Comp.L.	Tulane Journal on International and Comparative Law
UCC L.J.	Uniform Commercial Code Law Journal
ULIS	Uniform Law on the International Sale of Goods
ULF	Uniform Law on the Formation of Contracts for the International Sale of Goods
UN	United Nations
UNCITRAL	United Nations Commission On International Trade
UNIDROIT	International Institute for the Unification of Private Law

UNILEX	International Case Law and Bibliography on the UN Convention on Contracts for the International Sale of Goods
U.S.	United States Report
YCA	Yearbook of Commercial Arbitration
ZfRV	Zeitschrift für Rechtsvergleichung



## INTRODUCTION

In response to the Tribunal's Procedural Orders No. 1, dated 6 October 2001, No. 2, dated 5 November 2001, and No. 3, dated 8 November 2001, and the Memorandum for Futura Investment Bank (hereinafter referred to as CLAIMANT), dated 13 December 2001, we respectfully make the following submissions on behalf of our client, West Equatoriana Bobbins S.A. (hereinafter referred to as RESPONDENT):

- The Tribunal does not have jurisdiction to decide this dispute between CLAIMANT and RESPONDENT [**Issue 1**].
- If the Tribunal holds that it has jurisdiction to decide this dispute, RESPONDENT requests the Tribunal to declare that CLAIMANT is not entitled to the fourth installment of \$2,325,000 of the contract price as RESPONDENT was discharged of its obligation to pay by paying to Tailtwist Corp. (hereinafter referred to as TAILTWIST) the same amount on 19 April 2000 [**Issue 2**].
- The waiver of defense clause contained in the contract of sale concluded between TAILTWIST and RESPONDENT on 1 September 1999 does not bar RESPONDENT from asserting the defense of reduction of price with regard to the fifth installment of \$930,000 of the contract price against CLAIMANT [**Issue 3**].
- Moreover, RESPONDENT is not precluded from asserting the defense of reduction of price against CLAIMANT on the grounds that RESPONDENT is already barred from invoking this defense against TAILTWIST [**Issue 4**].
- Finally, CLAIMANT has to bear the costs of arbitration [**Issue 5**].

## ARGUMENT

### **Issue 1: The Tribunal does not have jurisdiction to decide this dispute between CLAIMANT and RESPONDENT**

The Tribunal does not have jurisdiction to decide this dispute. CLAIMANT and RESPONDENT never concluded an arbitration agreement [**A.**]. Furthermore, the arbitration agreement concluded between TAILTWIST and RESPONDENT was not transferred to CLAIMANT with the assignment of TAILTWIST's contractual rights on 29 March 2000 [**B.**].

## **A CLAIMANT and RESPONDENT never concluded an arbitration agreement**

CLAIMANT and RESPONDENT never agreed to submit any dispute to arbitration. The only agreement our client concluded was the agreement to arbitrate with TAILTWIST, which is recorded in the arbitration clause contained in the contract of sale dated 1 September 1999<sup>1</sup>. As arbitration is based on the concept of mutual consent, an arbitration agreement between the parties in dispute is an indispensable prerequisite to commence arbitral proceedings.<sup>2</sup> RESPONDENT and CLAIMANT neither have nor have ever had any business or contractual relationship.<sup>3</sup> Moreover, our client has never contemplated agreeing to arbitrate any dispute, current or in the future, with CLAIMANT.<sup>4</sup> Consequently, CLAIMANT and RESPONDENT have not concluded an arbitration agreement on which these proceedings could be based.

## **B. The arbitration agreement concluded between TAILTWIST and RESPONDENT was not transferred to CLAIMANT with the assignment of TAILTWIST's contractual rights**

Contrary to CLAIMANT's allegations,<sup>5</sup> the arbitration agreement contained in the contract of sale concluded between TAILTWIST and RESPONDENT on 1 September 1999 was not transferred to CLAIMANT with the assignment of TAILTWIST's right to receive payment of the remaining installments of the contract price on 29 March 2000. CLAIMANT cannot argue<sup>6</sup> that such transfer follows from Art. 20 (1) Convention on the Assignment of Receivables in International Trade (hereinafter referred to as Receivables Convention). Art. 20 (1) Receivables Convention does not regulate the transfer of rights in the case of an assignment. The Receivables Convention recognizes that the transfer of rights takes place at the time of conclusion of the contract of assignment.<sup>7</sup> It follows from Art. 20 (1) Receivables Convention that, nevertheless, a modification of the original contract by the assignor and the debtor that has taken place after the transfer of the rights but prior to notification of the debtor of the assignment is effective as against the assignee and that the assignee acquires corresponding rights.<sup>8</sup> Thus, Art. 20 (1) Receivables Convention exclusively refers to the effectiveness of a modification of *rights already transferred* to the assignee. Accordingly, Art. 20 (1) Receivables Convention does not regulate *whether rights are transferred* to the assignee in the first place. Therefore, Art. 20 (1) Receivables Convention does not provide a basis for the transfer of the arbitration agreement incorporated by TAILTWIST and RESPONDENT into the original contract of sale dated

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<sup>1</sup> CLAIMANT's Exhibit No. 1.

<sup>2</sup> Cf. BERGER, *International Economic Arbitration*, p. 118 *et seq.*; FOUCHARD/GAILLARD/GOLDMANN, No. 625 *et seq.*; REDFERN/HUNTER, No. 1-06; RUBINO-SAMMARTANO, p. 195 *et seq.*

<sup>3</sup> Cf. Statement of Defense at 3; Letter from Smart & Smart to the International Center for Dispute Resolution dated 13 June 2001, enclosed in the Problem.

<sup>4</sup> Statement of Defense at 3.

<sup>5</sup> Memorandum for CLAIMANT, Issue 1 II., p. 5 *et seq.*

<sup>6</sup> Memorandum for CLAIMANT, Issue 1 II. A., p. 6 and Conclusion p. 30.

<sup>7</sup> SEC. ANALYTICAL COMM., *Receivables Convention*, Art. 19 (now 17) No. 6.

<sup>8</sup> BAZINAS, 8 *Duke J.Comp. & Int'l L.* 315, at 343; SEC. ANALYTICAL COMM., *Receivables Convention*, Art. 22 (now 20) No. 24; SIGMAN/SMITH, 33 *UCC L.J.* 344, at 351.

1 September 1999 to CLAIMANT with the assignment of the contractual rights on 29 March 2000.

Moreover, a transfer of the arbitration agreement together with the assignment of the contractual rights to receive payment from TAILTWIST to CLAIMANT does not follow from any other legal principle. Firstly, the parties did not agree to transfer the entire contract of sale dated 1 September 1999 including the arbitration clause to CLAIMANT [I.]. Secondly, as a general rule, an arbitration agreement cannot be transferred to an assignee automatically with the assignment of contractual rights [II.]. Alternatively, the automatic transfer of the arbitration clause to CLAIMANT was prevented as TAILTWIST and RESPONDENT concluded their arbitration agreement *intuitu personae* [III.].

#### **I. The parties did not agree to transfer the entire contract of sale including the arbitration clause to CLAIMANT**

RESPONDENT strongly rejects CLAIMANT's submission<sup>9</sup> that the entire contract of sale including the arbitration clause was transferred to CLAIMANT on 29 March 2000. In fact, according to the contract of assignment, CLAIMANT was only assigned TAILTWIST's right to receive the remaining payments of the contract price but was not transferred the entire contract.<sup>10</sup> Moreover, as a general rule of contract law, a transfer of the entire contract requires the consent of all parties involved.<sup>11</sup> In the present case, however, the assignment between TAILTWIST and CLAIMANT was concluded without RESPONDENT's concurrence. Thus, the assignment could not suffice for the transfer of the entire contract. Consequently, CLAIMANT's argument that the arbitration clause concluded between TAILTWIST and RESPONDENT was transferred to CLAIMANT with the entire contract of sale must fail.

#### **II. As a general rule, the arbitration agreement cannot be transferred to an assignee automatically with the assignment of contractual rights**

The arbitration agreement could not be automatically transferred to CLAIMANT with the assignment of the contractual rights. Such automatic transfer of an arbitration agreement is generally precluded. Firstly, the automatic transfer is precluded by the legal nature of the arbitration agreement [1.]. Secondly, the debtor's legitimate rights and interests would be violated if the arbitration agreement traveled automatically with the assigned contractual rights [2.]. Finally, the transfer of the arbitration agreement is precluded by the writing requirement laid down in Art. 7 (2) UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as ML) [3.]

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<sup>9</sup> Memorandum for CLAIMANT, Issue 1 II. A., p. 6.

<sup>10</sup> CLAIMANT's Exhibits No. 2 and 3; Notice of Arbitration at 7.

<sup>11</sup> Cf. BGHZ 96, 27 November 1985, p. 302, at 305 et seq; ICC Award 7331, Clunet 1995, p. 1001, at 1003; FARNSWORTH, § 11.10 p. 742 *et seq.*; GIRSBERGER/HAUSMANINGER, Arb. Int'l 1992, p. 121, at 141, 146; LARENZ, § 35 III, p. 619; PALANDT-HEINRICHS, § 398 No. 38a; SCHOPP, KTS 1979, p. 255, at 257, 259. SCHRICKER, FS Quack, p. 99, at 101; SCHWAB/WALTER, Kap. 7 No. 32; TERRÉ/SIMLER/LEQUETTE, p. 974 No. 1213.

## **1. The legal nature of the arbitration agreement precludes an automatic transfer**

The automatic transfer of the arbitration clause to the assignee of contractual rights is precluded by the legal nature of the arbitration agreement. Firstly, the autonomy of the arbitration agreement prevents the automatic transfer to the assignee [a.]. Secondly, as the arbitration agreement contains rights and duties, it is incapable of traveling automatically with the assigned contractual rights [b.].

### **a. The autonomy of the arbitration agreement prevents the automatic transfer to the assignee**

The arbitration clause contained in the contract of sale concluded between TAILTWIST and RESPONDENT on 1 September 1999 was not automatically transferred to CLAIMANT with the assignment of the contractual rights as the arbitration agreement is fully autonomous from the underlying contract and, thus, incapable of such transfer.

An arbitration agreement cannot be qualified as an accessory and incidental right traveling with the assigned contractual rights.<sup>12</sup> Instead, it leads a distinct legal life of its own.<sup>13</sup> The autonomy of the arbitration agreement from the underlying contract is a generally recognized principle in international arbitration law<sup>14</sup>. It is expressed in a variety of concepts. Firstly, the concept of severability states that the invalidity of either the main contract or the arbitration agreement does not affect the validity of the other.<sup>15</sup> A second concept states that the arbitration agreement survives the termination of the main contract.<sup>16</sup> Thirdly, it is widely agreed that the main contract and the arbitration agreement may be governed by a different law.<sup>17</sup> It follows from these concepts that the arbitration agreement is to be treated as an independent and fully autonomous contract. This is also acknowledged by Art. 16 (1) ML, which is the law of the place of arbitration,<sup>18</sup> and Art. 15 (2) American Arbitration Association International Arbitration Rules (hereinafter referred to as AAA Int. Arb. Rules), the set of arbitration rules chosen by TAILTWIST and RESPONDENT<sup>19</sup>. Treating the arbitration agreement as an autonomous contract on the one hand and treating it as an accessory and incidental right automatically

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<sup>12</sup> Cf. GIRSBERGER/HAUSMANINGER, Arb. Int'l 1992, p. 121, at 131, 137, 139.

<sup>13</sup> Cf. ICC Award No. 109/1980, YCA 1993, p. 92, at 100.

<sup>14</sup> ICC Award No. 109/1980, YCA 1993, p. 92, at 100; AHRENS, p. 16 *et seq.*; BERGER, International Economic Arbitration, p. 119; FOUCHARD/GAILLARD/GOLDMAN, No. 388; GROSS, Arb. Int'l 1995, p. 85; REDFERN/HUNTER, No. 5-30 *et seq.*; RUBINO-SAMMARTANO, p. 140; SCHLOSSER, No. 392; SCHÜTZE/TSCHERNING/WAIS, No. 162.

<sup>15</sup> TLDB PRINCIPLE No. XIV.1; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 12 January 1967, 388 U.S. 395, at 404; BGHZ 53, 27 February 1970, p. 315, at 318 *et seq.*; FOUCHARD/GAILLARD/GOLDMAN, No. 410; GIRSBERGER/HAUSMANINGER, Arb. Int'l 1992, p. 121, at 137; RAESCHKE-KESSLER/BERGER, No. 379 *et seq.*; REDFERN/HUNTER, No. 5-30.

<sup>16</sup> *National R.R. Passenger Corp. v. Boston and Maine Corp.*, 24 June 1988, 850 F.2d 756, at 762; FOUCHARD/GAILLARD/GOLDMAN, No. 410; GIRSBERGER/HAUSMANINGER, Arb. Int'l 1992, p. 121, at 137; REDFERN/HUNTER, No. 3-31.

<sup>17</sup> BERGER, International Economic Arbitration, p. 119 *et seq.*; FOUCHARD/GAILLARD/GOLDMAN, No. 412 *et seq.*; GIRSBERGER/HAUSMANINGER, Arb. Int'l 1992, p. 121, at 137; REDFERN/HUNTER, No. 3-35 *et seq.*

<sup>18</sup> The ML governs these arbitration proceedings pursuant to its Art. 1 (2) as it is the law of Danubia, the place of arbitration. Danubia has adopted the ML, *cf.* Notice of Arbitration at 18.

<sup>19</sup> CLAIMANT's Exhibit No. 1.

traveling to the assignee with the assigned rights on the other hand would result in an inconsistent qualification of the arbitration agreement. To avoid such contradictions, the autonomy of the arbitration agreement must also be recognized in the case of assignment of contractual rights.<sup>20</sup> Therefore, the arbitration clause contained in the contract of sale dated 1 September 1999 cannot be regarded as an accessory and incidental right that traveled automatically with the assigned contractual rights. Thus, the autonomy of the arbitration agreement prevented its automatic transfer to CLAIMANT.

**b. As the arbitration agreement contains rights and duties, it is incapable of traveling automatically with the assigned contractual rights**

Furthermore, the arbitration agreement is incapable of traveling automatically with the assigned contractual rights since it not only contains rights but also imposes duties. An arbitration agreement is a bilateral contract which grants each contracting party the right to arbitrate any dispute subject to the arbitration agreement and also binds both parties to arbitrate with each other instead of instituting ordinary court proceedings. Thus, the arbitration agreement is a combination of rights and duties.<sup>21</sup> Accordingly, the transfer of an arbitration agreement to an assignee must be subject to the rules governing the transfer of entire contracts.<sup>22</sup> As shown above,<sup>23</sup> the transfer of entire contracts involving duties, such as the creditor's duty to arbitrate with the debtor, demands the debtor's express consent. Therefore, without its express consent, RESPONDENT cannot be bound to arbitrate with an assignee of TAILTWIST's contractual rights. Consequently, the arbitration agreement was not automatically transferred to CLAIMANT.

**2. The debtor's legitimate rights and interests would be violated if the arbitration agreement traveled automatically with the assigned contractual rights**

Moreover, contrary to CLAIMANT's contention,<sup>24</sup> the debtor's, i.e. RESPONDENT's, legitimate rights and interests would be violated if the debtor, without its concurrence, was automatically bound to arbitration with the assignee in the case of assignment of contractual rights.<sup>25</sup>

While the original parties who conclude the arbitration agreement are fully aware of who they will have to arbitrate with, the automatic transfer of the arbitration agreement binds the debtor to arbitration with an unknown third party who it has no business or contractual relationship with and who it might never have agreed to arbitrate with in the first place. Thus, the automatic transfer disregards the debtor's party

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<sup>20</sup> Cf. GIRSBERGER/HAUSMANINGER, *Arb. Int'l* 1992, p. 121, at 138 *et seq.*

<sup>21</sup> SCHOPP, *KTS* 1979, p. 255, at 257, 259; SCHRICKER, *FS Quack*, p. 99, at 101, 103.

<sup>22</sup> GIRSBERGER/HAUSMANINGER, *Arb. Int'l* 1992, p. 121, at 141, 146; SCHOPP, *KTS* 1979, p. 255, at 257, 259; SCHRICKER, *FS Quack*, p. 99, at 101; SCHWAB/WALTER, *Kap. 7 No. 32*.

<sup>23</sup> Cf. *Issue 1 B. I.*, p. 3.

<sup>24</sup> Cf. *Memorandum for CLAIMANT*, *Issue 1 II. B.*, p. 7 *et seq.*

<sup>25</sup> Cf. *Shayler v. Woolf*, [1946] *All E.R.* 464, at 468; WEINACHT, 14 *Mealey's Int'l Arb. Rep.* 9/1999, p. 55, at 64 Endnote 18.

autonomy to decide who he concludes an arbitration agreement with and, thereby, violates the consensual nature of arbitration proceedings.<sup>26</sup> Binding the debtor to arbitration with a stranger not of his choosing deprives it of its fundamental right to resort to the state courts.<sup>27</sup> Without its express consent, however, the debtor may not be deprived of its own natural judge.<sup>28</sup>

Furthermore, the assignment of rights subject to an arbitration agreement would endanger the legal as well as the economic position of the debtor if the arbitration agreement was automatically transferred to the assignee. Especially in international arbitration, parties usually agree on a neutral place for the arbitration proceedings.<sup>29</sup> This balanced neutrality is undermined, however, when the assignee turns out to be domiciled in the place of arbitration, or when it is a national of the country whose laws have been chosen by the original parties respectively when it has close ties to a possibly pre-chosen arbitrator.<sup>30</sup> In addition, the assignee might not have sufficient assets to pay the award or merely the costs of arbitration.<sup>31</sup> As a result, the automatic transfer of the arbitration agreement with the ensuing obligation of the debtor to arbitrate with the assignee encompasses serious risks for the debtor's legal and economic position. Therefore, an arbitration agreement may not be transferred automatically but merely when the debtor has expressly consented to arbitrate with the assignee.<sup>32</sup>

Consequently, in the absence of our client's express consent, RESPONDENT may not be bound to arbitrate the present dispute with CLAIMANT.

### **3. The transfer of the arbitration agreement to CLAIMANT is precluded by the writing requirement laid down in Art. 7 (2) ML**

Furthermore, the arbitration agreement concluded between TAILTWIST and RESPONDENT on 1 September 1999 could not be transferred to CLAIMANT with the assignment of TAILTWIST's contractual rights as the writing requirement of Art. 7 (2) ML<sup>33</sup> was not complied with. Art. 7 (2) ML is

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<sup>26</sup> Cf. MUSTILL/BOYD, p. 106, 107 Fn. 8; VEEDER, In: ICCA Congress Series No. 7, p. 268, at 283 *et seq.*; WERNER, J. Int'l Arb. 1991, p. 13, at 16 *et seq.*

<sup>27</sup> Cf. Supreme Court of Switzerland, 9 April 1991, J. Int'l Arb. 1991, p. 18, at 21; GIRSBERGER/HAUSMANINGER, Arb. Int'l 1992, p. 121, at 142; REDFERN/HUNTER, No. 1-06.

<sup>28</sup> Cf. BGE 102 I a, 5 May 1976, p. 574 at 582; BGHZ 68, 5 Mai 1977, p. 356, at 360; *Matter of Presbyterian Hospital of New York City*, 4/13/90 N.Y.L.J. 21; RÜEDE/HADENFELDT, p. 34; WERNER, J. Int'l Arb. 1991, p. 13, at 17.

<sup>29</sup> Cf. BORN, p. 5, 72 *et seq.*; GARNETT/GABRIEL/WAINCYMER/EPSTEIN, p. 14; REDFERN/HUNTER, No. 2-04; RUBINO-SAMMARTANO, p. 565 *et seq.*

<sup>30</sup> GIRSBERGER/HAUSMANINGER, Arb. Int'l 1992, p. 121, at 146.

<sup>31</sup> GIRSBERGER/HAUSMANINGER, Arb. Int'l 1992, p. 121, at 146; WEINACHT, 14 Mealey's Int'l Arb. Rep. 9/1999, p. 55, at 64 Endnote 18.

<sup>32</sup> *Shayler v. Woolf*, [1946] All E.R. 464, at 468; WEINACHT, 14 Mealey's Int'l Arb. Rep. 9/1999, p. 55, at 64 Endnote 18.

<sup>33</sup> The ML governs these arbitration proceedings pursuant to its Art. 1 (2) as it is the law of Danubia, the place of arbitration. Danubia has adopted the ML, *cf.* Notice of Arbitration at 18.

Art. 7 (2) ML has been modeled on Art. II (2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as NY Conv.); *cf.* BROCHES, p. 39 *et seq.*; HOLTZMANN/NEUHAUS, p. 260, 262; GRANZOW, p. 86. By complying with Art. 7 (2) ML, the arbitration agreement also fulfills the prerequisites of Art. II. (2) NY Conv. An award rendered by this Tribunal will thus be recognized and be enforceable in Mediterraneo, where CLAIMANT is located, as well as in Equatoriana, RESPONDENT's place of business, as both countries are party to the NY Conv., *cf.* Notice of Arbitration at 19.

to be applied mandatorily as a uniform substantive rule to ensure legal certainty in international arbitration.<sup>34</sup> The provision intends to provide a record of the agreement and to warn the contracting parties who oust the jurisdiction of the state courts by submitting to arbitration.<sup>35</sup> The written record clearly determines the scope of the arbitration agreement and thus protects the parties from being unwillingly deprived of a judicial forum.<sup>36</sup> Thereby, Art. 7 (2) ML establishes a mandatory protection of the parties involved that may not depend on the circumstances of the individual case.

Art. 7 (2) ML also applies to the transfer of the arbitration agreement in case of the assignment of contractual rights.<sup>37</sup> The text of this provision does not differentiate between the initial conclusion of an arbitration agreement and its subsequent transfer to a third party.<sup>38</sup> Thus, an interpretation that leads to the conclusion that the debtor is bound to arbitrate with an assignee in the absence of a written consent to the transfer of the arbitration agreement by both parties would violate the plain language of Art. 7 (2) ML.<sup>39</sup>

In the present case, the writing requirement of Art. 7 (2) ML has not been complied with. CLAIMANT only consented in writing to the assignment of TAILTWIST's right to receive the remaining payments under the contract of sale. However, neither CLAIMANT nor RESPONDENT consented to the transfer of the arbitration agreement in writing as required by Art. 7 (2) ML. Consequently, the arbitration agreement was not transferred to CLAIMANT.

### **III. Alternatively, the automatic transfer of the arbitration clause to CLAIMANT was prevented as TAILTWIST and RESPONDENT concluded their arbitration agreement *intuitu personae***

Even if an arbitration agreement can be automatically transferred to the assignee of contractual rights, such automatic transfer of the arbitration clause to CLAIMANT was precluded in the present case. TAILTWIST and RESPONDENT concluded their arbitration agreement to apply exclusively to themselves, i.e. *intuitu personae*. It is generally acknowledged that the automatic transfer of an arbitration agreement to the assignee of contractual rights is precluded when the original parties conclude the

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<sup>34</sup> Cf. GIRSBERGER/HAUSMANINGER, Arb. Int'l 1992, p. 121, at 132; HOLTZMANN/NEUHAUS, p. 260; HUBLEIN-STICH, p. 40; KROPHOLLER, p. 9 *et seq.* ZWEIGERT/KÖTZ, p. 24. With regard to Art. II (2) NY Conv. stating that a controversial issue in the text of the NY Conv. shall be solved by ensuring a uniform substantive rule: VAN DEN BERG, NY Conv., p. 175 *et seq.*, 185 *et seq.*

<sup>35</sup> AHRENS, p. 106; VAN DEN BERG, NY Conv., p. 171; BERGER, International Economic Arbitration, p. 135, 136; GIRSBERGER/HAUSMANINGER, Arb. Int'l 1992, p. 121, at 142; GRANZOW, p. 88; HOLTZMANN/NEUHAUS, p. 264; REDFERN/HUNTER, No. 1-06, 3-09 *et seq.*

<sup>36</sup> GIRSBERGER/HAUSMANINGER, Arb. Int'l 1992, p. 121, at 144.

<sup>37</sup> *Zimmer v. Cremascoli*, YCA 1986, p. 518; AHRENS, p. 38; GIRSBERGER/HAUSMANINGER, Arb. Int'l 1992, p. 121, at 142 *et seq.*; SCHLOSSER, No. 362; SCHWAB/WALTER, Kap. 7 No. 32.

<sup>38</sup> GIRSBERGER/HAUSMANINGER, Arb. Int'l 1992, p. 121, at 143 *et seq.*

<sup>39</sup> *Ibid.*

arbitration agreement based upon a confidential or personal relationship or when they specifically tailor it to themselves.<sup>40</sup> Both conditions are met in the present case.

Firstly, TAILTWIST and RESPONDENT concluded their arbitration agreement based upon a personal relationship. RESPONDENT had previously purchased equipment from TAILTWIST on several occasions<sup>41</sup>. As no disputes had arisen from these transactions,<sup>42</sup> RESPONDENT regarded TAILTWIST as a company of integrity and as a trustworthy business partner. Therefore, RESPONDENT agreed on arbitration with TAILTWIST exclusively.<sup>43</sup>

Secondly, TAILTWIST and RESPONDENT specifically tailored the arbitration agreement to themselves. According to its wording, the arbitration agreement between TAILTWIST and RESPONDENT covers “any controversy or claim between *Tailtwist Corp.* and *West Equatoriana Bobbins S.A.* arising out of or relating to this contract”<sup>44</sup>. By including the parties’ names, TAILTWIST and RESPONDENT intentionally deviated from the AAA model clause<sup>45</sup> upon which the present arbitration clause is drafted. While the AAA model clause reads that it applies to “any controversy or claim arising out of this [the underlying] contract”<sup>46</sup> and is, thus, not limited to the original contracting parties, TAILTWIST and RESPONDENT specifically drafted the arbitration agreement to apply exclusively to themselves. This conclusion is emphasized by the fact that TAILTWIST and RESPONDENT had envisaged the scenario of assignment of TAILTWIST’s contractual rights when they concluded the contract of sale on 1 September 1999.<sup>47</sup> If they had intended that the arbitration agreement be applicable also to future disputes with an assignee, TAILTWIST and RESPONDENT would not have inserted their names. Instead, they would have adopted the wording of the AAA model clause without any personal limitations.

CLAIMANT’s assertion<sup>48</sup> that the arbitration clause should be transferred to CLAIMANT regardless of the insertion of TAILTWIST’s and RESPONDENT’s names must fail. In *Colonial Penn Insurance Co.*<sup>49</sup>,

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<sup>40</sup> BGHZ 71, 2 March 1978, p. 162, at 165; *Local No. 6, Bricklayers, Masons and Plasterers Intern. Union of America v. Boyd G. Heminger, Inc.*, 9 August 1973, 483 F.2d 129, at 131; RGZ 56, 8 December 1903, p. 182, at 183; RGZ 146, 27 November 1934, p. 52, at 55; Supreme Court of Sweden, 15 October 1997, *MS Emja Braak Shiffarts KG v. Wärtsilä Diesel Aktiebolag*, Rev. Arb. 1998, p. 431, at 433; Supreme Court of Switzerland, 9 April 1991, J. Int’l Arb. 1991, p. 18, at 20; *A.I. Trade Finance Inc. v. Bulgarian Foreign Trade Bank, Ltd.*, Stockhol Chamber of Commerce (1997), 12 Mealey’s Int’l Arb. Rep. 3/1997, p. 3; ICC Award No. 2626, In: JARVIN/DERAINS, ICC Collection I, p. 316, at 319; cf. *Kintzel v. Wheatland Mut. Ins. Ass’n*, 17 January 1973, 203 N.W. 2d 799; FOUCHARD/GAILLARD/GOLDMAN, No. 716 *et seq.*; MUSTILL/BOYD, p. 106 *et seq.*; RÜEDE/HADENFELDT, p. 70.

<sup>41</sup> Procedural Order No. 2 at 13.

<sup>42</sup> *Ibid.*

<sup>43</sup> Statement of Defense at 3.

<sup>44</sup> CLAIMANT’s Exhibit, No. 1.

<sup>45</sup> Cf. AAA Int. Arb. Rules, Introduction.

<sup>46</sup> *Ibid.*

<sup>47</sup> Statement of Defense at 18.

<sup>48</sup> Memorandum for CLAIMANT, Issue 1 II. B., p. 8.

<sup>49</sup> *Certain Underwriters at Lloyd’s, London And Excess Insurance Company, Ltd., v. Colonial Penn Insurance Company*, 11 June 1997, Westlaw Citation: 1997 UL 3164519.



the case CLAIMANT cites in support of its position, the arbitration agreement referred to disputes between “parties to this agreement”.<sup>50</sup> It did not specify the name of any of these parties. Hence, the wording did not limit the applicability of the arbitration agreement to the *original parties* but allowed for an extension to legal successors of the original contractors. In contrast, the present arbitration clause expressly refers to *Tailtwist Corp.* and *West Equatoriana Bobbins S.A.*, the parties to the original contract.<sup>51</sup> An extension to assignees is thereby precluded.

As a result, CLAIMANT also cannot rely<sup>52</sup> on the argumentation set forth in *A.I. Trade Finance Inc.*<sup>53</sup> and invoke that “in the absence of an agreement to the contrary”<sup>54</sup>, the arbitration agreement between TAILTWIST and RESPONDENT was transferred to CLAIMANT with the assignment of the contractual rights. As shown above, TAILTWIST and RESPONDENT specifically tailored their arbitration agreement to apply exclusively to themselves. Thereby, they agreed that an automatic transfer of the arbitration agreement to the assignee of TAILTWIST’s contractual rights be excluded. Consequently, the arbitration clause concluded between TAILTWIST and RESPONDENT was not automatically transferred to CLAIMANT with the assignment of the right to receive the remaining payments on 29 March 2000.

In the light of the foregoing arguments, CLAIMANT and RESPONDENT neither concluded an arbitration agreement nor was the arbitration agreement concluded between TAILTWIST and RESPONDENT on 1 September 1999 automatically transferred to CLAIMANT. Therefore, the Tribunal does not have jurisdiction to decide the present dispute between CLAIMANT and RESPONDENT.

## **Issue 2: RESPONDENT was discharged from its obligation to pay the fourth installment of the contract price by paying \$2,325,000 to TAILTWIST**

Assuming, but not conceding, that the Tribunal has jurisdiction to decide this dispute between CLAIMANT and RESPONDENT, we request the Tribunal to declare that our client was discharged under Art. 17 (1) Receivables Convention<sup>55</sup> from its obligation to pay the fourth installment of the contract price by paying \$2,325,000 to TAILTWIST on 19 April 2000. Pursuant to Art. 17 (1) Receivables Convention, the debtor is discharged by paying in accordance with the original contract until

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<sup>50</sup> *Ibid.*

<sup>51</sup> CLAIMANT’s Exhibit No. 1.

<sup>52</sup> Memorandum for CLAIMANT, Issue 1 II. B., p. 7.

<sup>53</sup> *A.I. Trade Finance Inc. v. Bulgarian Foreign Trade Bank, Ltd.*, Stockholm Chamber of Commerce (1997), 12 Mealey’s Int’l Arb. Rep. 3/1997, p. 3.

<sup>54</sup> *Ibid.*

<sup>55</sup> The Receivables Convention applies to RESPONDENT pursuant to its Art. 1 (3). This provision reads: “This Convention does not affect the rights and obligations of the debtor unless, at the time of the conclusion of the original contract, [...] the law governing the original contract is the law of a Contracting State.” The original contract concluded between TAILTWIST and RESPONDENT on 1 September 1999 is governed by the CISG, which is in force in Oceania, and, in regard to any questions not governed by it, by the law of Oceania. At the time of the conclusion of that contract, Oceania was a Contracting State to the Receivables Convention.

it receives an effective notification of assignment. In the present case, RESPONDENT did not receive an effective notification of assignment by CLAIMANT before the initiation of payment proceedings [A.]. Even if the Tribunal holds that a notification of assignment was received in time, the notification was rendered formally defective as it contained a defective payment instruction [B.].

**A RESPONDENT was not effectively notified of the assignment prior to payment to TAILTWIST**

RESPONDENT was not effectively notified of the assignment of TAILTWIST's contractual right to receive payments to CLAIMANT before RESPONDENT paid \$2,325,000 to TAILTWIST on 19 April 2000. The document RESPONDENT received on 10 April 2000 from CLAIMANT did not constitute an effective notification of assignment according to Art. 16 (1) Receivables Convention as the notification was written in the German language [I.]. Furthermore, the translated notification of assignment received by RESPONDENT from CLAIMANT on 19 April 2000 arrived too late to prevent payment to TAILTWIST [II.]. Finally, RESPONDENT is not precluded from relying on the delay of the notification of assignment received on 19 April 2000 because it did not contribute to this delay [III.].

**I. RESPONDENT was not effectively notified on 10 April 2000 as the document sent by CLAIMANT was written in the German language**

The document received by RESPONDENT on 10 April 2000<sup>56</sup> does not constitute an effective notification of assignment under Art. 16 (1) Receivables Convention since it was written in the German language. According to Art. 16 (1) Receivables Convention, a notification of assignment must be written in a language that is reasonably expected to inform the debtor about its contents.

Contrary to CLAIMANT's assertion,<sup>57</sup> RESPONDENT could not be reasonably expected to understand the document in German as a notification of assignment. No one at RESPONDENT has command of the German language.<sup>58</sup> Moreover, RESPONDENT was not expected to have knowledge of the German language. German is not commonly spoken in Equatoriana,<sup>59</sup> RESPONDENT's place of business<sup>60</sup>. Furthermore, German is neither the language of the contract of sale<sup>61</sup> between TAILTWIST and RESPONDENT nor was it the language of the contract of assignment<sup>62</sup> between TAILTWIST and CLAIMANT. Indeed, German is a language of minor importance in international relations and business.<sup>63</sup> This is evidenced by the fact that international organizations such as the United

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<sup>56</sup> CLAIMANT's Exhibit No. 2.

<sup>57</sup> Memorandum for CLAIMANT, Issue 2 I. A., p. 9 *et seq.*

<sup>58</sup> Statement of Defense at 7.

<sup>59</sup> *Cf.* Procedural Order No. 2 at 8.

<sup>60</sup> Notice of Arbitration at 2.

<sup>61</sup> CLAIMANT's Exhibit No. 1; Procedural Order No. 2 at 9.

<sup>62</sup> Procedural Order No. 2 at 15.

<sup>63</sup> As opposed to English, *cf.* OLG Hamm, 8 February 1995, IPRax 1996, p. 197, at 198.

Nations<sup>64</sup> or the World Trade Organization<sup>65</sup> do not use German as one of their official languages. Also, the authentic and binding texts of uniform commercial law, such as the CISG, are written in Arabic, Chinese, English, French, Russian and Spanish but not in the German language.<sup>66</sup> Due to this insignificance of German as business language, RESPONDENT was not expected to have sufficient command of German to recognize the document as notification of assignment.

Moreover, CLAIMANT cannot argue that RESPONDENT was reasonably expected to identify the document in German as notification of assignment despite the fact that RESPONDENT neither had nor should have had command of the German language. CLAIMANT's allegation<sup>67</sup> that the document contained English words that reasonably informed RESPONDENT of its content cannot be upheld. In fact, the document did not contain any English words but merely the company names of TAILTWIST, RESPONDENT and CLAIMANT, the date of the contract of sale between TAILTWIST and RESPONDENT, and the numerical figures "\$3,255,000" and "123456".<sup>68</sup> As such, this information does not lead to the conclusion that an assignment has taken place. The remaining text of the document was written in the German language. In its script, German resembles English, RESPONDENT's native language,<sup>69</sup> only with regard to the Latin characters. This similarity, however, cannot suffice to meet the requirement of a language that is reasonably expected to inform the debtor of an assignment. If the identity of the characters was the decisive feature of a language that is reasonably expected to inform the debtor of an assignment under Art. 16 (1) Receivables Convention, RESPONDENT would have been expected to understand a tremendous number of languages of the world<sup>70</sup>. In that case, the purpose of Art. 16 (1) Receivables Convention to protect the debtor against being bound to an assignment of which it cannot be aware<sup>71</sup> would be undermined, and the provision itself would be rendered meaningless.

The same is true for CLAIMANT's allegation<sup>72</sup> that RESPONDENT should have sent the German document to a translation office.<sup>73</sup> If this was to be expected from the recipient of a notification of assignment written in any foreign language, all existing languages would suffice to comply with the reasonable language requirement set forth in Art. 16 (1) Receivables Convention. In addition, such

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<sup>64</sup> Cf. Resolution 2 (I) of the General Assembly dated 1 February 1946 (Chinese, English, French, Russian and Spanish) and Resolution 878 (IX) of the General Assembly dated 4 December 1954 (adding the Arabic language).

<sup>65</sup> Rule 30 of the Rules of Procedure of the Ministerial Conference and Rule 35 of the Rules of Procedure of the General Council state that English, French and Spanish shall be the working languages of the World Trade Organization.

<sup>66</sup> Cf. for the CISG: SCHLECHTRIEM-HERBER, CISG, Art. 7 No. 21: The translation into German may only be used as an aid in the interpretation of the CISG but is not binding.

<sup>67</sup> Memorandum for CLAIMANT, Issue 2 I. A., p. 9 *et seq.*

<sup>68</sup> Cf. CLAIMANT's Exhibit No. 2.

<sup>69</sup> Procedural Order No. 2 at 8.

<sup>70</sup> Cf. FROMKIN/RODMAN, p. 504; METZLER LEXIKON SPRACHE, p. 8395; TRASK, p. 189 *et seq.*; see for a compilation of most languages including scripts: CAMPBELL, Compendium of the World's Languages.

<sup>71</sup> Cf. BAZINAS, 9 Tul.J.Int'l & Comp.L. p. 259, at 266; SEC. ANALYTICAL COMM., Receivables Convention, Art. 17 (now 15) No. 131.

<sup>72</sup> Memorandum for CLAIMANT, Issue 2 I. A., p. 11 Fn. 37.

<sup>73</sup> Cf. OLG Hamm, 8 February 1995, IPRax 1996, p. 197, at 198.

practice would unduly burden the debtor, in this case RESPONDENT, with extra costs. Finally, CLAIMANT cannot argue<sup>74</sup> that RESPONDENT actually recognized the significance of the German document since the secretary who first received the document forwarded it to Mr. Black. The secretary merely identified the company name “Tailtwist” on the notice.<sup>75</sup> Since all correspondence dealing with TAILTWIST was forwarded to Mr. Black, the person in charge of the TAILTWIST contract,<sup>76</sup> the secretary also routinely forwarded the document received on 10 April 2000.<sup>77</sup> In fact, she had no idea what the content of the document was.<sup>78</sup>

Therefore, the document written in the German language did not inform, and was not reasonably expected to inform, RESPONDENT about its contents. Accordingly, it did not constitute an effective notification of assignment under Art. 16 (1) Receivables Convention. Consequently, the receipt of this document does not preclude RESPONDENT from being discharged from its obligation to pay \$2,325,000 by paying this sum to TAILTWIST in accordance with the original contract of sale.

## **II. The translated notification of assignment received by RESPONDENT from CLAIMANT on 19 April 2000 arrived too late to prevent the payment of \$2,325,000 to TAILTWIST**

The translated notification of assignment received by RESPONDENT in the morning of 19 April 2000 was received too late to prevent the payment of \$2,325,000 to TAILTWIST. While this translation complied with the language requirement under Art. 16 (1) Receivables Convention, the translation did not effectively notify RESPONDENT of the assignment *in time* as it was received subsequent to the initiation of the payment process on 18 April 2000 [1.]. CLAIMANT’s contention<sup>79</sup> that Mr. Black was obliged to stop payment by the accounting department must fail [2.].

### **1. The translated notification of assignment was received subsequent to the initiation of the payment process on 18 April 2000**

The translated notification of the assignment of the contractual rights from TAILTWIST to CLAIMANT was received in the morning of 19 April 2000 subsequent to the initiation of payment proceedings the previous day. According to Art. 17 (1) Receivables Convention, the debtor is discharged from its obligation by paying in accordance with the original contract until it has received a notification of the assignment. The term “paying” in the meaning of Art. 17 (1) Receivables Convention must not be understood as to relate to the actual receipt of the payment by the creditor. Art. 17 (1) Receivables

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<sup>74</sup> Memorandum for CLAIMANT, Issue 2 I. A., p. 11.

<sup>75</sup> *Ibid.*

<sup>76</sup> Statement of Defense at 7.

<sup>77</sup> *Ibid.*

<sup>78</sup> Procedural Order No. 2 at 27.

<sup>79</sup> Memorandum for CLAIMANT, Issue 2 I. B., p. 12.

Convention is an expression of the principle of debtor protection<sup>80</sup>, one of the main principles underlying the Receivables Convention<sup>81</sup>. This protection would be undermined if a debtor was precluded from being discharged on the grounds that it was notified of an assignment after it had initiated payment but before the payment was received by the creditor. Therefore, the term “paying” can only be interpreted as to refer to the initiation of the payment process.<sup>82</sup> As Art. 17 (1) Receivables Convention states that the debtor is discharged by paying in accordance with the original contract *until* it has received notification of the assignment, RESPONDENT would only have been precluded from being discharged if it had received notification of the assignment *before* the initiation of payment proceedings.

In the present case, the payment proceedings were initiated when the certification of the installation and commissioning of the machinery was sent to the accounting department by RESPONDENT’s consultant.<sup>83</sup> Pursuant to the contract of sale concluded between TAILTWIST and RESPONDENT, the payment of the pertinent fourth installment of \$2,325,000 became due with the certification of installation and commissioning tests.<sup>84</sup> RESPONDENT’s consultant issued this certification on 18 April 2000.<sup>85</sup> Mr. Black, the person in charge of the TAILTWIST contract,<sup>86</sup> had left instructions with the consultant that the certification be sent directly to the accounting department which would then act upon this certification immediately.<sup>87</sup> As no further authorization of payment was necessary,<sup>88</sup> the dispatch of the certification of the installation and commissioning to the accounting department by the consultant on 18 April 2000 initiated the payment proceedings. Hence, the translated notification of assignment dated 19 April 2000 was received by our client *after* the initiation of payment proceedings. Consequently, RESPONDENT was discharged in accordance with Art. 17 (1) Receivables Convention by making payment of the fourth installment of \$2,325,000 of the contract price to TAILTWIST on 19 April 2000.

## **2. CLAIMANT’s contention that Mr. Black was obliged to stop payment by the accounting department must fail**

CLAIMANT cannot argue<sup>89</sup> that Mr. Black was obliged to stop the payment proceedings by instructing the accounting department to freeze payment of the fourth installment of \$2,325,000 to TAILTWIST. As

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<sup>80</sup> BAZINAS, 9 Tul.J.Int’l & Comp.L. p. 259, at 279; SEC. ANALYTICAL COMM., Receivables Convention, Art. 19 (now 17) No. 5 *et seq.*, Art. 17 (now 15) No. 131.

<sup>81</sup> *Cf.* Preamble of the Receivables Convention and Art. 15 Receivables Convention; BAZINAS, 8 Duke J.Comp. & Int’l L. 315, at 337 *et seq.*; BAZINAS, 9 Tul.J.Int’l & Comp.L. 259, at 266, 277 *et seq.*; SEC. ANALYTICAL COMM., Receivables Convention, Art. 17 (now 15), at 131.

<sup>82</sup> *Cf.* for this interpretation in favor of the debtor: SEC. ANALYTICAL COMM, Receivables Convention, Art. 17 (now 15) No. 131; and e.g. German Law: BGHZ 105, 27 October 1988, p. 358, at 360; MÜNCHKOMM-ROTH, § 407 No. 16; STAUDINGER-BUSCHE, BGB, § 407 No. 30.

<sup>83</sup> *Cf.* CLAIMANT’s Exhibit No. 4; Statement of Defense at 9.

<sup>84</sup> CLAIMANT’s Exhibit No. 1.

<sup>85</sup> *Cf.* Statement of Defense at 9.

<sup>86</sup> Statement of Defense at 7.

<sup>87</sup> Statement of Defense at 9; Procedural Order No. 2 at 31.

<sup>88</sup> Procedural Order No. 2 at 31.

<sup>89</sup> Memorandum for CLAIMANT, Issue 2 I. B., p. 12.

shown above,<sup>90</sup> the payment proceedings were initiated with the dispatch of the certification of installation and commissioning by RESPONDENT's consultant on 18 April 2000, which was before the translated notification of assignment was received the following day. CLAIMANT has not presented any basis for an obligation to stop payment proceedings once they have been initiated. As a matter of fact, neither Art. 17 (1) Receivables Convention nor any other provision of the Convention stipulates that the debtor is obliged to stop ongoing payment proceedings when it receives notification of an assignment. In contrast, such a duty would contradict the Convention's goal of debtor protection<sup>91</sup>. It follows from Art. 15 (1) Receivables Convention that the debtor's legal position is not affected unless the Convention expressly so provides.<sup>92</sup> Thus, an additional duty, that is not explicitly provided for in the Convention, may not be imposed on the debtor. Accordingly, there is no basis for CLAIMANT's contention that Mr. Black should have stopped the payment proceedings.

As the translated notification of assignment had been received by RESPONDENT subsequent to the initiation of the payment process on 18 April 2000, RESPONDENT was discharged from its obligation by making payment of \$2,325,000 to TAILTWIST according to Art. 17 (1) Receivables Convention.

### **III. RESPONDENT is not precluded from relying on the delay of the notification of assignment received on 19 April 2000 because it did not contribute to this delay**

The Tribunal should not conclude that RESPONDENT is nevertheless precluded from being discharged under Art. 17 (1) Receivables Convention by paying \$2,325,000 to TAILTWIST. CLAIMANT cannot argue<sup>93</sup> that RESPONDENT contributed to the late receipt of the translated notification of assignment on 19 April 2000 for the following two reasons. Firstly, RESPONDENT did not have a duty to inquire about the nature of the document written in the German language [1.]. Secondly, even if RESPONDENT was obliged to issue an inquiry, it complied with this duty [2.].

#### **1. RESPONDENT did not have a duty to inquire about the nature of the document written in the German language**

RESPONDENT did not have the duty to inquire about the nature of the document written in the German language. CLAIMANT's assertion<sup>94</sup> that RESPONDENT recognized the legal significance of the German document received on 10 April 2000 is immaterial.

Regardless of whether RESPONDENT recognized or should have recognized that the document was of legal importance, RESPONDENT did not have the duty to inquire about its nature. Such a duty is neither explicitly nor implicitly laid down in the Receivables Convention. The Convention clearly and

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<sup>90</sup> Cf. Issue 2 A. II. 1., p. 12 *et seq.*

<sup>91</sup> Cf. Issue 2 A. II. 1., p. 13 and Fn. 81.

<sup>92</sup> SEC. ANALYTICAL. COMM., Receivables Convention, Art. 17 (now 15), No. 131.

<sup>93</sup> Cf. Memorandum for CLAIMANT, Issue 2 I. A., p. 11 and Fn. 37; Notice of Arbitration at 7.

<sup>94</sup> *Ibid.*

conclusively regulates the issues of the debtor's discharge and of the effectiveness of the notification of assignment. According to Art. 17 (1) Receivables Convention, the debtor is discharged by paying in accordance with the original contract until it has received an effective notification of assignment. Pursuant to Arts. 5 (d) and 16 (1) Receivables Convention, a notification of assignment will only be effective, if it reasonably identifies the assigned receivables and the assignee and is written in a language that is reasonably expected to inform the debtor about its contents.<sup>95</sup> The Receivables Convention does not state any exception to the requirement of the receipt of an effective notification of assignment in order to prevent the discharge of the debtor who pays in accordance with the original contract. It is important to note that while the Convention specifically regulates the issue of the effectiveness of a notification of assignment written in a language that is not reasonably expected to inform the debtor about its contents, it does not require the debtor to inquire about the nature of such a document. Such a duty would contravene the main purpose of Art. 17 Receivables Convention, namely to provide certainty as to the debtor's discharge and to facilitate payment of the debt.<sup>96</sup> Even a debtor who makes payment to the original creditor although it has full knowledge of the assignment is discharged under the Receivables Convention as long as it has not received an effective notification of assignment.<sup>97</sup> In view of that, a debtor who does not know about an assignment at all because it has received a document that it cannot be expected to understand may not, *a fortiori*, be precluded from being discharged from its obligation to pay because it did not inquire about the document's nature. In both cases, certainty as to the discharge of the debtor may not be reduced by subjecting this question to such subjective and unclear circumstances.<sup>98</sup>

Therefore, RESPONDENT was not obliged to inquire about the nature of the document written in the German language received on 10 April 2000. Consequently, RESPONDENT was discharged from its obligation by making payment of \$2,325,000 to TAILTWIST in accordance with the contract of sale dated 1 September 1999 pursuant to Art. 17 (1) Receivables Convention.

## **2. Even if RESPONDENT was obliged to issue an inquiry, it complied with this duty**

Assuming, but not conceding, that RESPONDENT was obliged to inquire about the nature of the document in the German language, RESPONDENT has in fact complied with this duty.

As CLAIMANT concedes,<sup>99</sup> Mr. Black, the person in charge of the TAILTWIST contract at

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<sup>95</sup> Cf. BAZINAS, 9 Tul.J.Int'l & Comp.L. 259, at 279.

<sup>96</sup> Cf. BAZINAS, 8 Duke J.Comp. & Int'l L. 315, at 337; SEC. ANALYTICAL COMM., Receivables Convention, Art. 19 (now 17) No. 5.

<sup>97</sup> BÖHM, p. 81; BAZINAS, 9 Tul.J.Int'l & Comp.L. 259, at 279; SEC. ANALYTICAL COMM., Receivables Convention, Art. 19 (now 17) No. 8.

<sup>98</sup> Cf. BAZINAS, 9 Tul.J.Int'l & Comp.L. 259, at 279; SEC. ANALYTICAL COMM., Receivables Convention, Art. 19 (now 17) No. 8.

<sup>99</sup> Memorandum for CLAIMANT, Issue 2 I. B., p. 11.

RESPONDENT,<sup>100</sup> inquired as to the nature of the communication on 15 April 2000.<sup>101</sup> Contrary to CLAIMANT's contention,<sup>102</sup> RESPONDENT was not obliged to issue an inquiry more quickly. If RESPONDENT was obliged to inquire at all, this duty did not require RESPONDENT to react immediately but only within a reasonable period of time. The standard of reasonableness is a fundamental principle of international contract law.<sup>103</sup> It is inseparably intertwined<sup>104</sup> with the principle of good faith and fair dealing which is applicable to every contract<sup>105</sup>. The principle of reasonableness must also be observed in the interpretation of the Receivables Convention as the interpretation of the Convention is to be based on its international character and the need to promote uniformity in its application and the *observance of good faith* in international trade according to Art. 7 (1) Receivables Convention.

Bearing in mind that CLAIMANT and RESPONDENT have their places of business in different countries<sup>106</sup> and that RESPONDENT must be granted a period of time to contemplate a reaction concerning a communication in a foreign language by an unknown sender, RESPONDENT has complied with this reasonable time requirement. Once the document was received, it was directly forwarded to Mr. Black. Mr. Black returned from his business trip on 13 April 2000. Once he had taken notice of the document, on 15 April 2000, he faxed an inquiry about its nature to CLAIMANT without delay.<sup>107</sup> Therefore, RESPONDENT complied with any duty to inquire about the nature of the German document within a reasonable time. Thereby, RESPONDENT enabled CLAIMANT to send a translated notification of assignment in time to prevent payment. Consequently, RESPONDENT was discharged pursuant to Art. 17 (1) Receivables Convention by making payment of \$2,325,000 to TAILTWIST.

#### **B. Alternatively, the defective payment instruction rendered the notification of assignment formally defective**

Even if the Tribunal does not follow the argumentation set forth above, RESPONDENT was still discharged by paying \$2,325,000 to TAILTWIST on 19 April 2000 as neither of the documents received

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<sup>100</sup> Statement of Defense at 7.

<sup>101</sup> Statement of Defense at 7; Procedural Order No. 2 at 28; RESPONDENT's Exhibit No. 1.

<sup>102</sup> Memorandum for CLAIMANT, Issue 2 I. A., p. 11 Fn. 37.

<sup>103</sup> *cf.* Arts. 8 (2), 39 (1) CISG; THE EUROPEAN PRINCIPLES OF CONTRACT LAW Art. 1:302, In: BERGER, *Creeping Codification*, p. 337, at 339; TLDB PRINCIPLE No. I.2; UNIDROIT PRINCIPLES Arts. 4.1 (2), 4.2 (2); ICC Award No. 2291, *Clunet* 1976, p. 989, at 990; BERGER, *Creeping Codification*, p. 170; BIANCA/BONELL-BONELL, Art. 7 No. 2.3.2.2; FERRARI, *JZ* 1988, p. 9, at 12; FERRARI, 10 *Pace Int'l L.Rev.* 157, at 174; MAGNUS, *LabelsZ* 59, p. 469, at 482; SCHLECHTRIEM, *Internationales UN-Kaufrecht*, No. 48.

<sup>104</sup> *Cf.* BERGER, *Creeping Codification*, p. 165 *et seq.*; JONES, *International Sales Quarterly March* 1995, p. 8; SCHLECHTRIEM, *Internationales UN-Kaufrecht*, No. 48.

<sup>105</sup> *Cf.* TLDB PRINCIPLE No. I.1; UNIDROIT PRINCIPLES Art. 1.7 No. 3; *Beijing Light Automobile Co., Ltd. v. Connell Limited Partnership*, Stockholm Chamber of Commerce Arbitration Award, 5 June 1998, available at: <http://cisgw3.law.pace.edu/cases/980605s5.html>; ICC Award No. 3131, *Rev. Arb.* 1983, p. 525, at 530 *et seq.*; CHENG, p. 106; FOUCHARD/GAILLARD/GOLDMAN, No. 1462; NASSER, p. 141; OSMAN, No. 37 *et seq.*; WITZ/SALGER/LORENZ, Art. 40 No. 8.

<sup>106</sup> While CLAIMANT has its place of business in Mediterraneo, RESPONDENT's place of business is in Equatoriana; *cf.* Notice of Arbitration at 1, 2.

<sup>107</sup> Statement of Defense at 7; Procedural Order No. 2 at 28.



by RESPONDENT on 10 April 2000 and on 19 April 2000 constituted an effective notification of assignment. The payment instruction in each document changed the country of payment from Oceania to Mediterraneo, CLAIMANT's place of business.<sup>108</sup> Thus, the payment instruction was formally defective pursuant to Art. 15 (2) (b) Receivables Convention. As the documents of 10 April 2000 and 19 April 2000 contained both a notification of assignment and a payment instruction, the formal defects in the payment instruction also rendered the notification of assignment formally defective. CLAIMANT cannot argue<sup>109</sup> that the notification of assignment is not affected by the defects in the payment instruction.

Firstly, the Receivables Convention does not draw a clear and definite distinction which would prevent any interdependency in the effectiveness of notification and payment instruction. The Convention merely allows that a notification of assignment and a payment instruction are sent in two separate documents in order to validate practices in which notification is given without any payment instruction.<sup>110</sup> Indeed, Art. 17 (2) Receivables Convention evidences that notification and payment instruction may be interchanged. According to this provision, the debtor is discharged from its obligation to pay by paying as "instructed in the notification of assignment". Thus, the notification of assignment may simultaneously constitute a payment instruction and vice versa.<sup>111</sup> As both can be used interchangeably, the Receivables Convention does not draw a clear and definite distinction between notification of assignment and payment instruction.

Secondly, the question of the interdependency in the effectiveness of a payment instruction and a notification of assignment contained in the same document is not expressly settled in the Receivables Convention. Since the Receivables Convention governs the effectiveness of notification of assignment and payment instruction,<sup>112</sup> this question must be settled in conformity with the general principles on which the Convention is based according to Art. 7 (2) Receivables Convention. As stated above,<sup>113</sup> one of the main principles underlying the Receivables Convention is the principle of debtor protection. In accordance with this principle, any distinction drawn between a notification of assignment and a payment instruction may not be detrimental to the debtor.<sup>114</sup> In case of receipt of a document containing a notification of assignment and a defective payment instruction, a debtor cannot be expected to distinguish ineffective parts of the document from those which might possibly be effective. To ensure an adequate protection of the debtor, this situation of uncertainty for the debtor as to the discharge from its obligation

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<sup>108</sup> CLAIMANT's Exhibit No. 2 and 3; Statement of Defense at 11.

<sup>109</sup> Memorandum for CLAIMANT, Issue 2 II., p. 13.

<sup>110</sup> SEC. ANALYTICAL COMM., Receivables Convention, Art. 15 (now 13) at 124.

<sup>111</sup> SEC. ANALYTICAL COMM., Receivables Convention, Art. 19 (now 17) at 10.

<sup>112</sup> Cf. Arts. 5 (d), 15 (2), 16 Receivables Convention.

<sup>113</sup> Cf. Issue 2 A. II. 1., p. 13 and Fn. 81.

<sup>114</sup> Cf. SEC. ANALYTICAL COMM., Receivables Convention, Art. 17 (now 15), at 131.

to pay must be avoided.<sup>115</sup> Therefore, the entire document must be considered as ineffective if either the notification of assignment or the payment instruction is defective.

In the present case, because the payment instruction changed the country of payment from Oceania to Mediterraneo, it was formally defective under Art. 15 (2) (b) Receivables Convention. Hence, it also rendered the notification of assignment defective as both were contained in the same document. Due to the defectiveness of the entire document, RESPONDENT was not effectively notified of the assignment between TAILTWIST and CLAIMANT before RESPONDENT made payment of the fourth installment of \$2,325,000 to TAILTWIST on 19 April 2000.

In the light of the foregoing arguments, RESPONDENT did not receive an effective notification of assignment before it paid \$2,325,000 to TAILTWIST on 19 April 2000. Therefore, our client was discharged from its obligation to pay in accordance with Art. 17 (1) Receivables Convention.

### **Issue 3: The waiver of defense clause does not bar RESPONDENT from asserting the defense of reduction of price against CLAIMANT**

In its letter dated 10 January 2001, RESPONDENT has effectively declared reduction of price pursuant to Art. 50 CISG<sup>116</sup> with regard to the fifth installment of \$930,000 of the contract price against CLAIMANT.<sup>117</sup> The waiver of defense clause contained in the contract of sale between TAILTWIST and RESPONDENT does not bar RESPONDENT from asserting the defense of reduction of price against CLAIMANT.

CLAIMANT cannot argue<sup>118</sup> that RESPONDENT is not able to prove any deficiency in TAILTWIST's performance of the contract. As the Tribunal has clarified in its Procedural Order No. 2, dated 5 November 2001, for the present stage of these arbitration proceedings, i.e. the oral hearings scheduled for 22-28 March 2002, it is to be assumed that there are deficiencies in TAILTWIST's performance of the contract.<sup>119</sup> RESPONDENT is prepared to present evidence as to the deficiencies once the arbitration reaches the stage of detailed fact-finding.<sup>120</sup>

The waiver of defense clause contained in the contract of sale concluded with TAILTWIST on 1 September 1999 reads that "if Tailtwist should assign the right to the payments due from West

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<sup>115</sup> Cf. SEC. ANALYTICAL COMM., Receivables Convention, Art. 19 (now 17), at 8: Certainty as to the discharge of the debtor may not be reduced by subjecting this question to unclear circumstances.

<sup>116</sup> The CISG governs the contract of sale concluded between TAILTWIST and RESPONDENT on 1 September 1999 pursuant to its Art. 1 (1). The contract for the manufacture and installation of the equipment is a contract of sale of goods within the meaning of Art. 1 (1) CISG. The prerequisites of Arts. 1 (1) (a), 100 (2) CISG are met. The contracting parties have their places of business in different states, TAILTWIST in Oceania and RESPONDENT in Equatoriana. These states were parties to the CISG at the time of formation of the contract.

<sup>117</sup> CLAIMANT's Exhibit No. 5.

<sup>118</sup> Cf. Memorandum for CLAIMANT, Issue 4 II. A., p. 23 *et seq.*

<sup>119</sup> Cf. Procedural Order No. 2, Introduction and at 42.

<sup>120</sup> Cf. Procedural Order No. 2 at 34, 36, 42.

Equatoriana Bobbins, the latter agrees that it will not assert against the assignee any defense it may have against Taitwist arising out of defective performance of this contract, unless Taitwist does not in good faith attempt to remedy the deficiency”<sup>121</sup>. This clause does not bar RESPONDENT from asserting the defense of reduction of price against CLAIMANT as TAILTWIST did not attempt to remedy the deficiencies in the performance of the contract [A.]. Furthermore, contrary to CLAIMANT’s allegations,<sup>122</sup> RESPONDENT is not precluded from invoking this defense as it did not cause TAILTWIST’s failure to attempt a remedy by omitting to give TAILTWIST notice of the deficiencies [B.]. Finally, RESPONDENT was not required to notify CLAIMANT, instead of TAILTWIST, of any deficiency [C.].

**A CLAIMANT may not rely on the waiver of defense clause as TAILTWIST did not attempt to remedy the deficiencies in the performance of the contract**

CLAIMANT cannot rely on the waiver of defense clause as TAILTWIST at no time attempted to remedy the deficiencies as required by this contract clause. Under the waiver of defense clause, RESPONDENT would only have been precluded from invoking the defense of reduction of price against the assignee of TAILTWIST’s contractual rights if TAILTWIST had attempted to remedy the deficiencies in the performance of the equipment.<sup>123</sup> TAILTWIST and RESPONDENT deliberately drafted the exception to the waiver of defense clause to ensure that reclamations by RESPONDENT against defective performance of the contract by TAILTWIST would not become more difficult in case TAILTWIST assigned its contractual rights.<sup>124</sup> RESPONDENT was convinced that an attempt in good faith by TAILTWIST would remedy all likely difficulties.<sup>125</sup> Therefore, the exception to the waiver of defense clause was specifically intended to cover all situations in which TAILTWIST would refuse, would be unwilling or unable to attempt a remedy in good faith. Accordingly, TAILTWIST’s inactivity due to its insolvency falls within the scope of the exception. Consequently, as TAILTWIST did not attempt in good faith to remedy the deficiencies, the preconditions of the waiver of defense clause are not fulfilled. Hence, this clause does not preclude RESPONDENT from asserting the defense of reduction of price against CLAIMANT.

**B. RESPONDENT is not barred from invoking its defense as it did not cause TAILTWIST’s failure to attempt a remedy by omitting to notify TAILTWIST of the deficiencies**

Contrary to CLAIMANT’s allegations,<sup>126</sup> RESPONDENT is not precluded from invoking the defense of reduction of price by the waiver of defense clause as it did not cause TAILTWIST’s failure to attempt a

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<sup>121</sup> CLAIMANT’s Exhibit No. 1.

<sup>122</sup> Memorandum for CLAIMANT, Issue 3 II., p. 19 *et seq.*

<sup>123</sup> *Cf.* Issue 3, p. 18 *et seq.*

<sup>124</sup> Statement of Defense at 18.

<sup>125</sup> *Ibid.*

<sup>126</sup> Memorandum for CLAIMANT, Issue 3 II., p. 19 *et seq.*

remedy. CLAIMANT cannot rely on RESPONDENT's omission of giving TAILTWIST notification of the deficiencies in the performance of the equipment. RESPONDENT was not obliged to notify TAILTWIST of the deficiencies in the performance of the equipment [I.]. Alternatively, CLAIMANT cannot rely on RESPONDENT's omission of giving TAILTWIST notification under the waiver of defense clause as TAILTWIST already knew of the deficiencies in the performance of the equipment [II.].

**I. RESPONDENT was not obliged to notify TAILTWIST of the deficiencies in the performance of the equipment**

RESPONDENT was not obliged to give TAILTWIST notice of the deficiencies in the performance of the equipment. Any such obligation under the waiver of defense clause ceased to exist with the termination of TAILTWIST's business activities on 16 June 2000 [1.]. Before the termination of TAILTWIST's business activities on 16 June 2000, RESPONDENT was not reasonably expected to give TAILTWIST notice of any deficiency [2.].

**1. An obligation to notify TAILTWIST under the waiver of defense clause ceased to exist with the termination of TAILTWIST's business activities on 16 June 2000**

RESPONDENT was freed of its obligation to notify TAILTWIST with the cessation of TAILTWIST's business activities on 16 June 2000. At that time, the purpose of notifying TAILTWIST was frustrated. The waiver of defense clause, contained in the contract of sale dated 1 September 1999, imposes on RESPONDENT the obligation to notify TAILTWIST of any deficiency in its performance in order to enable TAILTWIST to attempt a remedy. Such attempt, however, became impossible after the insolvency court had ordered the cessation of TAILTWIST's business activities on 16 June 2000<sup>127</sup>. Thereafter, liquidation of TAILTWIST commenced and no ordinary business actions, such as after-sales servicing, were carried out<sup>128</sup>. Thus, TAILTWIST was not able to attempt a remedy in accordance with the waiver of defense clause after 16 June 2000. Therefore, RESPONDENT's obligation to notify TAILTWIST of any deficiency only existed until that date.

CLAIMANT cannot assert<sup>129</sup> that RESPONDENT remained obliged to notify TAILTWIST of any deficiency even after 16 June 2000. Its allegation<sup>130</sup> that TAILTWIST's insolvency administrator, if he had received notice of the deficiency, could have hired a third party to provide assistance and training to cure the deficient performance must fail. Firstly, TAILTWIST was the only company capable of providing a remedy for the deficient performance.<sup>131</sup> Secondly, TAILTWIST's insolvency administrator

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<sup>127</sup> Statement of Defense at 19.

<sup>128</sup> Procedural Order No. 2 at 39; Statement of Defense at 19.

<sup>129</sup> Memorandum for CLAIMANT, Issue 4 II. B., p. 27 *et seq.*

<sup>130</sup> *Ibid.*

<sup>131</sup> Procedural Order No. 2 at 41.

could not have hired a third party to cure the deficiencies following the court's order to terminate all business activities on 16 June 2000. Following this decision, the insolvency administrator was legally bound to devote all activities to the liquidation of TAILTWIST. Liquidation, however, does not include further performance of existing contracts, neither by the insolvent itself nor by hired third parties.<sup>132</sup>

Therefore, an attempt by TAILTWIST to remedy its insufficient performance in accordance with the waiver of defense clause became impossible with the cessation of TAILTWIST's business activities on 16 June 2000. From that date on, the purpose of a notification under the waiver of defense clause was frustrated. Consequently, our client was freed of an obligation to notify TAILTWIST under the waiver of defense clause on 16 June 2000.

## **2. RESPONDENT was not expected to notify TAILTWIST of the unsatisfactory performance of the contract before 16 June 2000**

Under the present circumstances, RESPONDENT was not expected to notify TAILTWIST of the unsatisfactory performance before the insolvency court ordered TAILTWIST to terminate all business activities on 16 June 2000<sup>133</sup>. As the contract of sale concluded between TAILTWIST and RESPONDENT on 1 September 1999 does not specify a time period in which notice of a deficiency has to be given,<sup>134</sup> this period must be determined in accordance with the general principle of international contract law requiring a buyer to notify a seller within a reasonable period of time after it discovered or ought to have discovered any defect.<sup>135</sup> Thus, the commencement of the notification period depends on the time when RESPONDENT discovered or ought to have discovered the deficiencies in the performance of the contract.

In the present case, RESPONDENT discovered the unsatisfactory performance at the end of June 2000<sup>136</sup>. Moreover, an earlier discovery of the deficiencies in the performance of the equipment could not be reasonably expected from RESPONDENT. In order to discover that TAILTWIST's performance was unsatisfactory, RESPONDENT had to conduct an examination of the equipment and of the ability of its personnel to operate the machinery. As TAILTWIST had provided training of RESPONDENT's personnel until 10 May 2000, our client was only in the position to properly conduct an examination at the time it was finally operating the equipment on its own.<sup>137</sup> Therefore, the examination period did not

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<sup>132</sup> Cf. DAVIES, p. 835 *et seq.*; FARRAR, p. 712 *et seq.*; HAARMEYER/WUTZKE/FÖRSTER, Kap. 5 No. 60 *et seq.*; PASKAY, p. 264.

<sup>133</sup> Statement of Defense at 19.

<sup>134</sup> CLAIMANT's Exhibit No. 1.

<sup>135</sup> ICC Award No. 5030, Clunet 1993, p. 1004, at 1011; BERGER, *Creeping Codification*, p. 170; FERRARI, 10 *Pace Int'l L. Rev.* 157, at 176; HELLMAN, p. 315; HONNOLD, *Uniform Law*, Art. 7 No. 100; MAGNUS, *RebelsZ* 59, p. 469, at 484; OSMAN, p. 146 *et seq.*; SCHLECHTRIEM-FERRARI, *UN-Kaufrecht*, Art. 7 Rn. 54; see also: TLDB PRINCIPLE No. I.2 and IV.5.8 stating that the standard of reasonableness and the duty to notify are general principles of international trade, and UNIDROIT PRINCIPLES Art. 1.7 No. 2 Illustration 5.

<sup>136</sup> Procedural Order No. 2 at 39.

<sup>137</sup> Cf. OLG Hamm, 8 July 1991, CR 1992, p. 335, at 336; SCHLECHTRIEM-SCHWENZER, *UN-Kaufrecht*, Art. 38 No. 19.

commence before 10 May 2000, the beginning of the three month period of satisfactory performance. In case of a purchase of complex machinery, the buyer must be granted weeks or even months to examine the goods.<sup>138</sup> The contract between TAILTWIST and RESPONDENT dated 1 September 1999 involved the sale of sophisticated and complex machinery RESPONDENT was not familiar with. Thus, the examination period had to be of such length as to enable RESPONDENT to establish whether the insufficient performance was due to defects in the equipment or due to defects in the way it was operated.<sup>139</sup> Hence, RESPONDENT could not be reasonably expected to discover the unsatisfactory performance before the end of June 2000. At that time, however, RESPONDENT was no longer required to notify TAILTWIST due to the cessation of TAILTWIST's business activities on 16 June 2000<sup>140</sup>.

Even if RESPONDENT ought to have discovered the deficiencies in TAILTWIST's performance of the contract earlier, RESPONDENT could not have been expected to notify TAILTWIST before 16 June 2000. It has been shown above that RESPONDENT was required to notify TAILTWIST within a reasonable period of time after RESPONDENT ought to have discovered the deficiencies. In international sales law, this reasonable time period is regarded as one month.<sup>141</sup> Since the examination period commenced on 10 May 2000, an obligation of RESPONDENT to notify TAILTWIST before 16 June 2000 would have required a discovery of the deficiencies within six days, i.e. before 16 May 2000. Bearing in mind the complexity of the task, discovery of the defects could not be expected within such a short space of time. Under no circumstances could RESPONDENT be obliged to give notice before the cessation of TAILTWIST's business activities on 16 June 2000.

Therefore, CLAIMANT cannot contend that RESPONDENT is precluded from relying on the defense of reduction of price against CLAIMANT under the waiver of defense clause on the grounds that RESPONDENT caused TAILTWIST's failure to attempt a remedy by not giving notice of any deficiency.

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<sup>138</sup> Cf. LG Düsseldorf, 23 June 1994, UNILEX-E 1994-16; HEILMANN, p. 296; HERBER/CZERWENKA, Art. 38 No. 7; SCHLECHTRIEM-SCHWENZER, CISG, Art. 38 No. 17.

<sup>139</sup> Cf. BGH, 3 November 1999, NJW-RR 2000, p. 1361; LG Düsseldorf, 23 June 1994, UNILEX-E 1994-16; OLG Köln, 14 July 1986, MDR 1988, p. 322; OGH, 26 August 1999, ZfRV 2000, p. 31; BAASCH ANDERSEN, Review CISG, p. 86; BIANCA/BONELL-SONO, Art. 39 No. 2.5; HEILMANN, p. 292, 295 *et seq.*; MEESKE, p. 81; RUDOLPH, Art. 39 No. 9; SCHLECHTRIEM-SCHWENZER, CISG, Art. 38 No. 17; VOGEL, p. 97 *et seq.*, 115; WITZ/SALGER/LORENZ-SALGER, Art. 39 No. 8.

<sup>140</sup> Cf. Issue 3 B. I. 1., p. 20 *et seq.*

<sup>141</sup> Cf. BGH, 3 November 1999, NJW-RR 2000, p. 1361, at 1362; BGH, 8 March 1995, CISG Online Case No. 144; Cour d'appel Grenoble, 13 September 1995, CLOUT Case No. 202; LG Darmstadt, 29 May 2001, IHR 2001, p. 160, at 161; Obergericht des Kantons Luzern, 8 January 1997, CLOUT Case No. 192; OLG Köln, 21 August 1997, CISG Online Case No. 290; OLG Stuttgart, 21 August 1995, IPRax 1996, p. 139; ICC Award No. 7331, Clunet 1995, p. 1001, at 1004 *et seq.*; ACHILLES, Art. 39 No. 11; BAASCH ANDERSEN, Review CISG, p. 63, at 95 *et seq.*, 146, 155; JANSSEN, p. 164 *et seq.*; SCHLECHTRIEM-SCHWENZER, UN-Kaufrecht, Art. 39 No. 16 *et seq.*; VOGEL, p. 108 *et seq.*; WITZ/WOLTER, RIW 1998, p. 278, at 284.

## II. Alternatively, CLAIMANT cannot rely on RESPONDENT's omission of giving TAILTWIST notice of the deficiencies under the waiver of defense clause

Alternatively, CLAIMANT cannot rely on RESPONDENT's omission of giving TAILTWIST notice under the waiver of defense clause as TAILTWIST already knew of the deficiencies in the performance of the equipment. The duty to notify under the waiver of defense clause serves the purpose of informing TAILTWIST of any deficiency in the performance of the contract. Thereby, it enables TAILTWIST to attempt a remedy as required by this contract clause. However, CLAIMANT cannot rely on RESPONDENT's omission of giving TAILTWIST notice of a deficiency when the purpose of the notification is already fulfilled. It is laid down in Art. 40 CISG that the seller may not rely on the buyer's failure to give notice of a deficiency if the lack of conformity relates to facts the seller had knowledge of or could not have been unaware of. The principle underlying Art. 40 CISG is generally applicable<sup>142</sup> as it is an expression of the general principle of good faith and fair dealing which is applicable to every contract.<sup>143</sup>

In the present case, TAILTWIST had knowledge of the facts leading to the deficiencies in the performance of the equipment. In the contract of sale dated 1 September 1999, TAILTWIST and RESPONDENT agreed that the equipment should perform satisfactorily for three months in order for the fifth installment of \$930,000 of the contract price to become due.<sup>144</sup> To ensure satisfactory performance of the equipment, TAILTWIST promised to provide training of RESPONDENT's personnel by four instructors from 19 April 2000 to 10 May 2000, prior to the commencement of the three month period.<sup>145</sup> Adequate training in the correct operation, adjustment and maintenance of the complex machinery was an indispensable prerequisite for the satisfactory performance of the equipment. However, TAILTWIST deliberately deviated from its contractual obligation by withdrawing two of the four instructors already on 20 April 2000, the second day of the training.<sup>146</sup> TAILTWIST could not have been unaware that reducing the training by 50% would result in insufficiencies in RESPONDENT's ability to operate the machinery and, consequently, in deficiencies in the performance of the equipment.

Furthermore, RESPONDENT, in fact, informed the remaining two instructors that the quality of the

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<sup>142</sup> Cf. *Beijing Light Automobile Co., Ltd. v. Connell Limited Partnership*, Stockholm Chamber of Commerce Arbitration Award, 5 June 1998, available at: <http://cisgw3.law.pace.edu/cases/980605s5.html>; WITZ/SALGER/LORENZ, Art. 40 No. 8.

<sup>143</sup> Cf. TLDB PRINCIPLE No. I.1; UNIDROIT PRINCIPLES Art. 1.7 No. 3; *Beijing Light Automobile Co., Ltd. v. Connell Limited Partnership*, Stockholm Chamber of Commerce Arbitration Award, 5 June 1998, available at: <http://cisgw3.law.pace.edu/cases/980605s5.html>; ICC Award No. 3131, Rev. Arb. 1983, p. 525, at 530 *et seq.*; CHENG, p. 106; FOUCHARD/GAILLARD/GOLDMAN, No. 1462; NASSER, p. 141; OSMAN, No. 37 *et seq.*; WITZ/SALGER/LORENZ, Art. 40 No. 8.

<sup>144</sup> CLAIMANT's Exhibit No. 1.

<sup>145</sup> CLAIMANT's Exhibit No. 1; Procedural Order No. 2 at 35.

<sup>146</sup> Statement of Defense at 14.

training actually given was grossly insufficient.<sup>147</sup> As employees of TAILTWIST,<sup>148</sup> the knowledge of the instructors must be attributed to TAILTWIST as a whole.<sup>149</sup> Accordingly, TAILTWIST knew that the training provided was completely inadequate and, as a result, that RESPONDENT would not be able to operate the machinery.

Hence, TAILTWIST had gained all necessary information to conclude that the equipment would not perform satisfactorily and that it was obliged to undertake an attempt to remedy under the waiver of defense clause. As TAILTWIST was aware of its duty, RESPONDENT was not obliged to inform TAILTWIST of the deficiencies. Therefore, CLAIMANT is precluded from relying on RESPONDENT's failure to notify TAILTWIST in accordance with the waiver of defense clause. Consequently, this clause does not bar RESPONDENT from asserting the defense of reduction of price against CLAIMANT.

### **C. Moreover, RESPONDENT was not required to notify CLAIMANT instead of TAILTWIST**

Moreover, in contrast to CLAIMANT's contention,<sup>150</sup> RESPONDENT was not required to notify CLAIMANT, the assignee of TAILTWIST's contractual rights to receive payment. If RESPONDENT was under the contractual duty to give notice of any deficiency, this duty only required RESPONDENT to notify TAILTWIST, its co-contractor, but not any third party for the following three reasons.

Firstly, TAILTWIST and RESPONDENT drafted the waiver of defense clause specifically to define the contractual rights and duties of the two contracting parties. As this contract clause reads "unless *Tailtwist* does not in good faith attempt to remedy the deficiency"<sup>151</sup>, the waiver of defense clause only applies when TAILTWIST itself has attempted a remedy in good faith. According to its clear and unambiguous wording, any attempt by a third party is not sufficient to bar RESPONDENT from asserting a defense against the assignee of TAILTWIST's contractual rights. Thus, RESPONDENT could only be required to notify TAILTWIST.

Secondly, the assignment of the contractual right to receive payments from TAILTWIST to CLAIMANT did not extend the right to be notified to CLAIMANT. CLAIMANT was neither delegated the duty to attempt a remedy nor authorized to receive notice of a deficiency. Moreover, the assignment of the contractual claims did not create a contractual relationship between CLAIMANT and RESPONDENT<sup>152</sup> on which an extension of RESPONDENT's duty to notify TAILTWIST under the waiver of defense clause to CLAIMANT could possibly be based.

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<sup>147</sup> Procedural Order No. 2 at 39.

<sup>148</sup> Statement of Defense at 14.

<sup>149</sup> Cf. OLG Hamm, 19 December 1983, In: SCHLECHTRIEM/MAGNUS, Rechtsprechung, p. 294, at 298 (on ULIS); ENDERLEIN/MASKOW/STROHBACH, Art. 40 No. 2; HONSELL/MAGNUS, Art. 40 No. 7; MAGNUS, RabelsZ 59, p. 469, at 487 *et seq.*; SCHLECHTRIEM-SCHWENZER, CISG, Art. 40 No. 6; SOERTEL/LÜDERITZ/SCHÜBLER-LANGHEIME, Art. 40 No. 3; STAUDINGER-MAGNUS, CISG, Art. 40 No. 9; VOGEL, p. 159.

<sup>150</sup> Memorandum for CLAIMANT, Issue 3 II., p. 19 *et seq.*

<sup>151</sup> CLAIMANT's Exhibit No. 1.

<sup>152</sup> Cf. BAZINAS, 8 Duke J.Comp. & Int'l L. 315, at 337.



Thirdly and most notably, CLAIMANT's argument is contradicted by the fact that CLAIMANT would not even have been able to remedy any deficiency. From the very outset, no third party could have given RESPONDENT the training or assistance that it could normally have expected to receive from TAILTWIST.<sup>153</sup> As an investment bank, CLAIMANT does not have the resources to provide training in the operation of the machinery nor does it have the resources to fix any defect in the equipment. In addition, RESPONDENT was not even in the position to permit an attempt to remedy by CLAIMANT. Under the contract of sale dated 1 September 1999, the rights in the automation software of the equipment remained the property of TAILTWIST.<sup>154</sup> Also, RESPONDENT had agreed not to reveal to others any information provided by TAILTWIST nor to permit any person not authorized by TAILTWIST to have access to the software or source code.<sup>155</sup> No indication exists that CLAIMANT has been authorized by TAILTWIST or its insolvency administrator to have access to either software or source code. Lacking the necessary expertise and authority, CLAIMANT was in no position to attempt a remedy of the deficiencies in the performance of the contract.

Consequently, RESPONDENT was not obliged to notify CLAIMANT instead of TAILTWIST.

In the light of the foregoing arguments, the waiver of defense clause does not preclude RESPONDENT from asserting the defense of reduction of price against CLAIMANT.

**Issue 4: RESPONDENT is not precluded from asserting the defense of reduction of price against CLAIMANT on the grounds that RESPONDENT is already barred from invoking this defense against TAILTWIST**

Furthermore, CLAIMANT cannot argue<sup>156</sup> that RESPONDENT is precluded from asserting the defense of reduction of price against CLAIMANT because RESPONDENT is already barred from invoking the defense against TAILTWIST. Firstly, contrary to CLAIMANT's allegation,<sup>157</sup> RESPONDENT did not lose its right to rely on the deficiencies in the performance of the equipment according to Art. 39 (2) CISG on the grounds that it did not notify TAILTWIST within the three month period of satisfactory performance between 10 May 2000 and 10 August 2000 [A.]. Secondly, RESPONDENT is not barred from asserting the defense of reduction of price pursuant to Art. 39 (1) CISG for omitting to notify TAILTWIST of the deficiencies [B.]. Moreover, CLAIMANT cannot contend<sup>158</sup> that RESPONDENT is precluded from raising the defense of reduction of price according to Art. 80 CISG [C.].

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<sup>153</sup> Procedural Order No. 2 at 41.

<sup>154</sup> CLAIMANT's Exhibit No. 1.

<sup>155</sup> *Ibid.*

<sup>156</sup> Memorandum for CLAIMANT, Issue 4, p. 20 *et seq.*

<sup>157</sup> Memorandum for CLAIMANT, Issue 4 I., p. 20 *et seq.*

<sup>158</sup> Memorandum for CLAIMANT, Issue 4 II. C., p. 28 *et seq.*

**A. RESPONDENT did not lose its right to rely on the deficiencies according to Art. 39 (2) CISG on the grounds that it did not notify TAILTWIST within the three month period of satisfactory performance**

CLAIMANT cannot assert<sup>159</sup> that RESPONDENT lost its right to rely on the deficiencies in the performance of the equipment according to Art. 39 (2) CISG as RESPONDENT did not notify TAILTWIST within the three month period of satisfactory performance between 10 May 2000 and 10 August 2000. CLAIMANT's interpretation that the three month period of satisfactory performance constitutes a contractual period of guarantee that stipulates the time in which RESPONDENT had to give TAILTWIST notice or, otherwise, lose its remedies for defective performance of the contract cannot be upheld. In fact, TAILTWIST and RESPONDENT merely agreed on the three month period of satisfactory performance as a prerequisite for the maturity of the last installment of the contract price.<sup>160</sup> The contract reads "Total price \$9,300,000, payable as follows: [...]; the balance [i.e. \$930,000] after three months of satisfactory performance".<sup>161</sup> Neither the wording nor the purpose of this clause point to the conclusion that TAILTWIST and RESPONDENT intended this period to define the time in which RESPONDENT had to give notice in order to retain its right to rely on any deficiency in TAILTWIST's performance of the contract.<sup>162</sup> Instead, this clause gives the buyer an additional possibility to secure its rights in case of unsatisfactory performance of the contract but does not constitute a limitation of the buyer's statutory rights. Thus, the contract clause cannot be construed as a contractual period of guarantee. Consequently, RESPONDENT did not lose its right to rely on the deficiencies in the performance of the equipment by omitting to give TAILTWIST notice within the three month period of satisfactory performance from 10 May 2000 to 10 August 2000.

**B. Art. 39 (1) CISG does not bar RESPONDENT from asserting the defense of reduction of price**

Furthermore, RESPONDENT did not lose its right to rely on the deficiencies in the performance of the equipment according to Art. 39 (1) CISG. In the present case, this provision did not require our client to notify TAILTWIST [I.]. Alternatively, CLAIMANT is not entitled to rely on RESPONDENT's omission of giving TAILTWIST notice pursuant to Art. 40 CISG [II.].

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<sup>159</sup> Memorandum for CLAIMANT, Issue 4 I., p. 20.

<sup>160</sup> CLAIMANT's Exhibit No. 1.

<sup>161</sup> *Ibid.*

<sup>162</sup> Cf. for the requirements of an interpretation of a contract clause as contractual period of guarantee: *Beijing Light Automobile Co., Ltd. v. Connell Limited Partnership*, Stockholm Chamber of Commerce Arbitration Award, 5 June 1998, available at: <http://cisgw3.law.pace.edu/cases/980605s5.html>; ACHILLES, Art. 39 No. 16; SCHLECHTRIEM-SCHWENZER, CISG, Art. 39 No. 26; SEC. COMM., CISG, Art. 37 (now 39) No. 7 with examples.

## I. Art. 39 (1) CISG did not require RESPONDENT to notify TAILTWIST

In the present case, Art. 39 (1) CISG did not require RESPONDENT to notify TAILTWIST. CLAIMANT's argument<sup>163</sup> that TAILTWIST's insolvency cannot constitute a reasonable excuse as defined by Art. 44 CISG for RESPONDENT's omission of giving TAILTWIST notice of the deficiencies in the performance of the equipment is immaterial. Even if this assertion was true, RESPONDENT would still be freed of its duty to notify TAILTWIST under Art. 39 (1) CISG. In fact, the buyer's duty to notify under Art. 39 (1) CISG ceases to exist when the purpose of notification is frustrated due to circumstances originating from the seller's sphere of risk.<sup>164</sup> In such cases, it would not only unduly burden the buyer if the seller could nevertheless rely on a lack of notification. Such approach would also violate the general principle of good faith under the CISG prohibiting the misuse of rights.<sup>165</sup> The purpose of the notification under Art. 39 (1) CISG is to enable the seller, i.e. TAILTWIST, to undertake a remedy of the deficiencies in its performance of the contract.<sup>166</sup> As shown above,<sup>167</sup> this purpose was frustrated with the cessation of TAILTWIST's business activities on 16 June 2000. From that date on, TAILTWIST was no longer an operating entity, and, thus, it was unable to remedy the deficiencies.<sup>168</sup> Therefore, RESPONDENT was freed of its duty to give TAILTWIST notice of any deficiency in the performance of the equipment under Art. 39 (1) CISG with the termination of TAILTWIST's business activities on 16 June 2000.

Before 16 June 2000, RESPONDENT was not reasonably expected to notify CLAIMANT of any deficiency.<sup>169</sup> According to an autonomous interpretation of the reasonable time requirement of Art. 39 (1) CISG, RESPONDENT was obliged to notify TAILTWIST one month after RESPONDENT had discovered or ought to have discovered the deficiencies in the performance of the equipment.<sup>170</sup> In accordance with Art. 38 (1) CISG, the examination period began on 10 May 2000, the day the training period ended and the three month period of satisfactory performance commenced.<sup>171</sup> As RESPONDENT did not discover the deficiencies before the end of June, it could not be expected to give notice before it

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<sup>163</sup> Memorandum for CLAIMANT, Issue 4 II. B., p. 25 *et seq.*

<sup>164</sup> JANSSEN, p. 195; STAUDINGER-MAGNUS, CISG, Art. 39 No. 19; VOGEL, p. 155 *et seq.*

<sup>165</sup> Cf. OLG Karlsruhe, 25 July 1986, RIW 1986, p. 818, at 819 (on ULIS); HONNOLD, Uniform Law, Art. 7 No. 99; JANSSEN, p. 195 *et seq.*; MAGNUS, *RabelsZ* 59, p. 469, at 480 *et seq.*; SCHLECHTRIEM-HERBER, CISG, Art. 7 No. 37; STAUDINGER-MAGNUS, CISG, Art. 7 No. 43, Art. 39 No. 19; VOGEL, p. 155 *et seq.*; WEITNAUER, *IPRax* 1987, p. 221.

<sup>166</sup> Cf. BAASCH ANDERSEN, *Review CISG*, p. 63, at 79; BIANCA/BONELL-BONELL, Art. 7 No. 2.3.2.2; HERBER/CZERWENKA, Art. 7 No. 14; MAGNUS, *RabelsZ* 59, p. 469, at 484; NAJORK, p. 96 *et seq.*; SCHLECHTRIEM-SCHWENZER, CISG, Art. 39 No. 6; STAUDINGER-MAGNUS, CISG, Art. 39 No. 21; VOGEL, p. 95 *et seq.*, 155 *et seq.*

<sup>167</sup> Cf. Issue 3 B. I. 1., p. 20 *et seq.*

<sup>168</sup> Statement of Defense at 21; Procedural Order No. 2 at 39.

<sup>169</sup> Cf. Issue 3 B. I. 2., p. 21 *et seq.*

<sup>170</sup> Cf. BGH, 3 November 1999, NJW-RR 2000, p. 1361, at 1362; BGH, 8 March 1995, CISG Online Case No. 144; Cour d'appel Grenoble, 13 September 1995, CLOUT Case No. 202; LG Darmstadt, 29 May 2001, IHR 2001, p. 160, at 161; Obergericht des Kantons Luzern, 8 January 1997, CLOUT Case No. 192; OLG Köln, 21 August 1997, CISG Online Case No. 290; OLG Stuttgart, 21 August 1995, *IPRax* 1996, p. 139; ICC Award No. 7331, *Clunet* 1995, p. 1001, at 1004 *et seq.*; ACHILLES, Art. 39 No. 11; BAASCH ANDERSEN, *Review CISG*, p. 63, at 95 *et seq.*, 146, 155; JANSSEN, p. 164 *et seq.*; SCHLECHTRIEM-SCHWENZER, *UN-Kaufrecht*, Art. 39 No. 16 *et seq.*; VOGEL, p. 108 *et seq.*; WITZ/WOLTER, *RIW* 1998, p. 278, at 284.

<sup>171</sup> Cf. Issue 3 B. I. 2., p. 21 *et seq.*

was freed of this duty on 16 June 2000. Even if RESPONDENT ought to have discovered the deficiencies in the performance of the equipment earlier, RESPONDENT, as shown above<sup>172</sup>, could not have been reasonably expected to give notice to TAILTWIST before the cessation of business activities on 16 June 2000. Consequently, CLAIMANT cannot assert that RESPONDENT lost its right to rely on the deficiencies in the performance of the equipment according to Art. 39 (1) CISG on the grounds that RESPONDENT omitted to notify TAILTWIST of the deficiencies.

## **II. Alternatively, CLAIMANT is not entitled to rely on RESPONDENT's omission of giving TAILTWIST notice pursuant to Art. 40 CISG**

Alternatively, CLAIMANT is not entitled to rely on RESPONDENT's omission of giving TAILTWIST notice of the unsatisfactory performance of the equipment pursuant to Art. 40 CISG. According to this provision, the seller may not rely on the buyer's failure to give notice of a deficiency if the lack of conformity relates to facts the seller had knowledge of or could not have been unaware of and which he did not disclose to the buyer. Art. 40 CISG applies not only to knowledge the seller had before delivery of the goods but also to knowledge the seller obtains subsequent to delivery.<sup>173</sup> In either case, the seller's notification of a deficiency by the buyer is dispensable as the seller has no reasonable basis for requiring the buyer to notify it of these facts.<sup>174</sup> Under the present circumstances, the prerequisites of Art. 40 CISG are fulfilled.

Firstly, TAILTWIST had knowledge of the facts leading to the deficiencies in the performance of the equipment. As shown above,<sup>175</sup> TAILTWIST knew that the training provided was completely inadequate and, as a result, that RESPONDENT would not be able to operate the machinery. Thus, TAILTWIST knew the relevant facts necessary to conclude that satisfactory performance of the equipment could not be achieved.

Secondly, TAILTWIST did not disclose to RESPONDENT its knowledge of the facts relating to the unsatisfactory performance of the equipment. The applicability of Art. 40 CISG is not precluded because RESPONDENT also had knowledge of the facts leading to the deficiencies in the performance of the equipment. In fact, Art. 40 CISG also covers situations in which both the seller and the buyer have knowledge of, or at least cannot be unaware of, the deficiency in the performance of the contract, e.g. the delivery of an obvious *aliud*<sup>176</sup>. In such cases, the seller must still disclose its knowledge if it wants to rely on the buyer's omission of giving notice under Art. 39 (1) CISG. Therefore, RESPONDENT's

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<sup>172</sup> Cf. Issue 3 B. I. 2., p. 22.

<sup>173</sup> Cf. HUTTER, p. 95; KAROLLUS, UN-Kaufrecht, p. 128; KUHLEN, p. 97; SCHLECHTRIEM-SCHWENZER, CISG, Art. 40 No. 8; SOERGEL/LÜDERITZ/SCHÜBLER-LANGEHEINE, Art. 40 No. 2.

<sup>174</sup> *Ibid.*

<sup>175</sup> Cf. Issue 3 B. II., p. 23 *et seq.*

<sup>176</sup> e.g. delivery of a lawn mower instead of clothes, *cf.* for this example STAUDINGER-MAGNUS, CISG, Art. 40 No. 6; see generally ACHILLES, Art. 40 No. 1; HEILMANN, p. 339; PILTZ, § 5 No. 76; SCHLECHTRIEM-SCHWENZER, CISG, Art. 40 No. 5; SOERGEL/LÜDERITZ/SCHÜBLER-LANGEHEINE, Art. 35 No. 5.

knowledge of the facts relating to the unsatisfactory performance of the equipment does not prevent the applicability of Art. 40 CISG.

Since TAILTWIST knew or could not have been unaware that satisfactory performance would not be attained due to the inadequacies in the training and did not disclose its knowledge to RESPONDENT, the prerequisites of Art. 40 CISG are met. Consequently, CLAIMANT cannot rely on RESPONDENT's omission of giving TAILTWIST notice of the deficiencies in the performance of the equipment.

### **C. RESPONDENT is not precluded from raising the defense of reduction of price according to Art. 80 CISG**

Finally, CLAIMANT cannot contend<sup>177</sup> that, pursuant to Art. 80 CISG, RESPONDENT may not rely on TAILTWIST's failure to cure the deficiencies on the grounds that TAILTWIST's failure was caused by RESPONDENT's omission of giving TAILTWIST notice. Art. 80 CISG is not applicable to the buyer's obligation to notify the seller of a deficiency in the latter's performance. The duty to notify the seller of a lack of conformity of the goods is specifically and conclusively regulated in Art. 39 (1) CISG.<sup>178</sup>

When the buyer is freed of its duty to notify under Art. 39 (1) CISG, an application of Art. 80 CISG would undermine the principle that the specialized law prevails over the general laws<sup>179</sup>. In fact, if Art. 80 CISG was applied, Art. 39 (1) CISG with its specific prerequisites and exceptions, e.g. Arts. 40, 44 CISG, would be rendered meaningless. Accordingly, RESPONDENT's duty to notify TAILTWIST of the latter's defective performance is exclusively governed by Art. 39 (1) CISG. Consequently, RESPONDENT is not precluded from raising the defense of reduction of price according to Art. 80 CISG.

In the light of these arguments, RESPONDENT is not precluded from asserting the defense of reduction of price against CLAIMANT on the grounds that RESPONDENT is already barred from invoking the defense against TAILTWIST.

### **Issue 5: CLAIMANT is to pay the costs of arbitration**

The Tribunal should order CLAIMANT to bear the costs of arbitration including costs for legal representation pursuant to Art. 31 AAA Int. Arb. Rules. It is a generally accepted principle that "costs

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<sup>177</sup> Memorandum for CLAIMANT, Issue 4 II. C., p. 28.

<sup>178</sup> Cf. ACHILLES, Art. 39 No. 2 *et seq.*; BIANCA/BONELL, Art. 39 No. 1.1; ENDERLEIN/MASKOW/STROHBACH, Art. 39 No. 1; SCHLECHTRIEM-SCHWENZER, CISG, Art. 39 No. 5; STAUDINGER-MAGNUS, CISG, Art. 39 No. 1.

<sup>179</sup> Cf. for the principle of *lex specialis derogat legi generali*: TLDB PRINCIPLE No. I.10; ICC Award No 5946, YCA 1991, p. 97, at 103; *Amoco Int. Finance Corp. v. Iran*, Iran-US Claims Tribunal, 14 July 1987, 15 Iran-U.S. C.T.R.-189, at 222; BYDLINSKI, p. 465; LARENZ, *Methodenlehre*, p. 268; SCHMALZ, No. 78, 82.

should follow the event”, the “event” being the success of a party’s case.<sup>180</sup> RESPONDENT has laid down that this Tribunal does not have jurisdiction to decide the dispute between CLAIMANT and RESPONDENT. Alternatively, RESPONDENT has laid down that it was discharged regarding the fourth installment of \$2,325,000 of the contract price by making payment to TAILTWIST on 19 April 2000 and that it may assert the defense of reduction of price against CLAIMANT with regard to the fifth installment of \$930,000. Consequently, RESPONDENT requests that the costs of arbitration, including legal costs, be paid by CLAIMANT, the losing party in this arbitration.

## CONCLUSION

In response to the Tribunal’s Procedural Orders No. 1, dated 6 October 2001, No. 2, dated 5 November 2001, and No. 3, dated 8 November 2001, and CLAIMANT’s Memorandum, dated 13 December 2001, we have respectfully made the above submissions on behalf of our client, West Equatoriana Bobbins S.A. For the reasons stated in this Memorandum for Respondent and for additional reasons which will be detailed in the further course of proceedings, we request the Tribunal to declare that:

- it does not have jurisdiction to decide this dispute between CLAIMANT and RESPONDENT,
- alternatively, CLAIMANT is not entitled to the fourth installment of \$2,325,000 as RESPONDENT was discharged from its obligation to pay by paying to TAILTWIST the same amount on 19 April 2000,
- the waiver of defense clause contained in the contract of sale concluded between TAILTWIST and RESPONDENT on 1 September 1999 does not bar RESPONDENT from asserting the defense of reduction of price with regard to the fifth installment of \$930,000 of the contract price against CLAIMANT,
- moreover, RESPONDENT is not precluded from asserting the defense of reduction of price against CLAIMANT on the grounds that RESPONDENT is already barred from invoking this defense against TAILTWIST,
- finally, CLAIMANT has to bear the costs of arbitration.

For West Equatoriana Bobbins S.A.

(signed) \_\_\_\_\_, 8 February 2002

Attorneys

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<sup>180</sup> *Channel Island Ferries Ltd. v. Cenargo Navigation Ltd. (“The Rozel”)*, 7 February 1994, [1994] 2. Lloyd’s Rep., p. 161, at 169; ICC Award No. 6962, YCA 1994, p. 184; VAN DEN BERG, YCA 1987, p. 3, at 27 *et seq.*; FOUCHARD/GAILLARD/GOLDMAN, No. 1255; O’REILLY, p. 29; SMITH, Costs in Arbitration, p. 30 *et seq.*