

NINTH ANNUAL WILLEM C. VIS

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

2001 - 2002

---

# MEMORANDUM

for

West Equatoriana Bobbins S.A.

- RESPONDENT -



Anne Haarmann

Marc-Oliver Heidkamp

Helene Loewié

Sebastian Schödel

Kokularajah Paheenthararajah

Ben Steinbrück

UNIVERSITY OF COLOGNE

FACULTY OF LAW

UNIVERSITY OF COLOGNE  
LAW CENTER FOR EUROPEAN AND INTERNATIONAL COOPERATION  
(R.I.Z.)

TEAM MEMBERS:

ANNE HAARMANN – MARC-OLIVER HEIDKAMP – HELENE LOEWIÉ  
SEBASTIAN SCHÖDEL – KOKULARAJAH PAHEENTHARARAJAH – BEN STEINBRÜCK

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

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

INTERNATIONAL CENTER FOR DISPUTE RESOLUTION  
AMERICAN ARBITRATION ASSOCIATION

CASE NO. MOOT 9

LEGAL POSITION

ON BEHALF OF

WEST EQUATORIANA BOBBINS S.A.

214 COMMERCIAL AVE.

OCEANSIDE

EQUATORIANA

(RESPONDENT)

AGAINST

FUTURA INVESTMENT BANK

395 INDUSTRIAL PLACE

CAPITOL CITY

MEDITERRANEO

(CLAIMANT)

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	III
LIST OF ABBREVIATIONS.....	V
INDEX OF AUTHORITIES.....	VIII
INDEX OF CASES.....	XII
INDEX OF AWARDS.....	XIII
STATEMENT OF FACTS.....	1
APPLICABLE LAW.....	2
INTRODUCTION.....	2
FIRST ISSUE: THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION.....	3
A. THE LIMITED SCOPE OF THE ARBITRATION AGREEMENT BETWEEN RESPONDENT AND TAILTWIST PROHIBITS ANY TRANSFER.....	3
B. THE ARBITRATION AGREEMENT WAS NOT TRANSFERRED TO CLAIMANT.....	5
I. Privity of contract: Generally only signatory parties can invoke an arbitration agreement.....	5
II. There is no general principle of automatic transfer of the arbitration agreement.....	5
1. Various courts and scholars oppose an automatic transfer of the arbitration clause.....	6
2. A rule of automatic transfer would not be in line with basic principles of arbitration.....	6
3. Cases CLAIMANT relies on do not support its position.....	8
SECOND ISSUE: RESPONDENT OBTAINED A VALID DISCHARGE BY PAYING THE FOURTH INSTALLMENT TO TAILTWIST.....	9
A. THE NOTIFICATION IN GERMAN WAS INEFFECTIVE ACCORDING TO ART. 16 (1) RECEIVABLES CONVENTION.....	9
I. The clear language requirement of Article 16 (1) was not fulfilled.....	9
II. RESPONDENT did not identify the writing as a notification of assignment and under Art. 16 (1) could not be expected to.....	10
III. RESPONDENT did not have to obtain a translation.....	11
B. THE NOTIFICATION IN ENGLISH WAS RECEIVED TOO LATE.....	11
I. RESPONDENT was not notified when it initiated the payment process.....	11
II. The late notification was due to CLAIMANT's lack of diligence.....	13

THIRD ISSUE: CLAIMANT DOES NOT HAVE THE RIGHT TO DEMAND PAYMENT OF THE FIFTH INSTALLMENT.....	15
A. NO SUM DUE UNDER THE CONTRACT – NO RIGHT TO CLAIM PAYMENT OF THE 5 <sup>TH</sup> INSTALLMENT	15
B. RESPONDENT WAS ENTITLED TO REDUCE THE PRICE BY 10% IN ACCORDANCE WITH ART. 50 CISG.....	15
C. RESPONDENT DID NOT LOSE ITS RIGHT OF PRICE REDUCTION AS A CONSEQUENCE OF ART. 39 CISG.....	16
I. RESPONDENT is not precluded from exercising the right of price reduction as a consequence of not having notified TAILTWIST of the deficiencies in the performance of the machinery.....	16
1. Art. 39 does not bar RESPONDENT from exercising the remedy of price reduction.....	16
(a) No notice had to be given before the date when the business activities of TAILTWIST were terminated.....	17
(i) Even according to CLAIMANT’s own submissions no notice had to be given before 16 June 2000.....	17
(ii) Meaning of “within a reasonable time” under Article 39 (1) CISG.....	17
(iii) The one-month period started to run at the end of June 2000.....	18
(b) Art. 39 CISG does not bar RESPONDENT from relying on deficiencies in performance of the machinery.....	20
2. RESPONDENT is in any case excused for not giving notice pursuant to Art. 44 CISG.....	21
II. RESPONDENT is not barred from exercising its right of price reduction as a consequence of not having notified TAILTWIST of the deficiencies in the training.....	22
1. No independent notice requirement for the deficiencies in services.....	23
2. RESPONDENT validly notified TAILTWIST of deficiencies in training.....	23
(a) RESPONDENT informed the proper addressee.....	24
(b) Notification fulfils specificity requirement under Art. 39 (1) CISG.....	24
3. No reliance on Art. 39 (1) CISG because TAILTWIST was aware of the facts to which the non-conformity relates according to Art. 40 CISG.....	25
4. RESPONDENT is in any case excused under Art. 44 CISG.....	26
D. THE WAIVER CLAUSE DOES NOT PRECLUDE RESPONDENT FROM EXERCISING ITS RIGHT OF PRICE REDUCTION.....	26
I. Defenses not waived as TAILTWIST did not attempt to remedy the deficiencies.....	27
II. Irrelevant that no notice was given – TAILTWIST would not have remedied the deficiencies anyway.....	27
1. Failure to cure deficiencies in the performance not caused by lack of information.....	28
2. Failure to cure deficiencies in the training not caused by lack of information.....	28
FOURTH ISSUE: COSTS.....	29

## List of Abbreviations

AAA Rules	American Arbitration Association International Arbitration Rules
AC	Appeal Court
AG	Amtsgericht (German District Court)
Art. / Artt.	article / articles
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGE	Bundesgerichtsentscheidungen (Swiss Federal Court Decisions)
BGH	Bundesgerichtshof (German Federal Court of Justice)
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen (Decisions of the German Federal Court of Justice in civil matters)
cf.	<i>confer</i> (compare)
Ch. D.	Chancery Division
Ch. C.	Chambre Civile (Civil chamber)
Cir.	Circuit
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CLOUT	Case Law on UNCITRAL Texts (Internet database), edited by the UNCITRAL Secretariat
Co.	Company
comp.	compare
Corp.	Corporation
DB	Der Betrieb
ed. / Ed.	Edition / Editor
e.g.	<i>exemplum gratia</i> (for example)
et seq.	<i>et sequentes</i> (and following)
fn.	Footnote
F.Supp.	Federal Supplement
ICC	International Chamber of Commerce
idem	same
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
Lloyd's Rep.	Lloyd's Law Report
LG	Landgericht (District Court)
ML / Model Law	UNCITRAL Model Law on International Commercial Arbitration

New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
No.	number
NJW	Neue Juristische Wochenschrift
NJW-RR	Neue Juristische Wochenschrift –Rechtsprechungsreport
ÖJZ	Österreichische Juristenzeitung
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (Regional Court of Appeal)
p. / pp.	page / pages
para. / paras.	paragraph / paragraphs
Receivables Convention	Draft Convention on the Assignment of Receivables in International Trade
Reichsgericht	Predecessor of the German Federal Supreme Court
Rev. Arb.	Revue de l'Arbitrage
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen (Decisions of the predecessor of the German Federal Supreme Court in civil matters)
RIW	Recht der internationalen Wirtschaft
SJZ	Schweizerische Juristen- Zeitung
supra	above
SZIER	Schweizerische Zeitschrift für Internationales und Europarecht
UCC	Uniform Commercial Code
ULIS	Uniform Law on the International Sale of Goods
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UN Doc.	UN-Documents
UNILEX	International Case Law & Bibliography on the UN Convention on Contracts for the International Sale of Goods (looseleaf & disk database), edited by Michael Joachim Bonell at the Center for Comparative and Foreign Law Studies, Irvington-on-Hudson, New York.
v.	versus (against)
VersR	Versicherungsrecht
Vol.	Volume
WBl.	Wirtschaftsrechtliche Blätter
WM	Wertpapier-Mitteilungen

YCA

Yearbook Commercial Arbitration

ZIP

Zeitschrift für Wirtschaftsrecht

ZRVgl

Zeitschrift für Rechtsvergleichung (Österreich)

## INDEX OF AUTHORITIES

- ANDERSEN, CAMILLA BAASCH* “Reasonable Time in Article 39 (1)CISG- is Article 39 (1) truly a uniform provision? “  
in: Review of the Convention on Contracts for the International Sale of Goods (CISG)  
1998  
(cited: Andersen)
- BIANCA, CESARE MASSIMO*  
*BONELL, MICHAEL JOACHIM* Commentary on the International Sales Law:  
The Vienna Sales Convention  
Milan, 1987  
(cited: Bianca/Bonell/author)
- CRAIG, W. LAURENCE*  
*PARK, WILLIAM W.*  
*PAULSSON, JAN* International Chamber of Commerce Arbitration  
3<sup>rd</sup> Edition  
New York, 2000  
(cited: Craig/Park/Paulsson)
- FALKNER, CHRISTIAN* “Zum Geltungsbereich der Schiedsvereinbarung einer OHG”  
In: WBI 1989, 173  
(cited: Falkner)
- FERRARI, FRANCO* “The Uncitral Draft Convention on Assignment in Receivables Financing: Applicability, General Provisions and the Conflict of Conventions”  
in: Melbourne Journal of International Law; Volume 1  
Melbourne, 2000  
(cited: Ferrari)
- FOUCHARD, PHILIPPE*  
*GAILLARD, EMMANUEL*  
*GOLDMAN, BERTHOLD* International Commercial Arbitration  
The Hague, Boston, London, 1999  
(cited: Fouchard/Gaillard/Goldman)
- FOUCHARD, PHILIPPE*  
*LEVEL*  
*LOQUIN* “Loquin in L’arbitrage et les tiers”  
in: Revue de L’Arbitrage  
1988  
(cited: Level/Fouchard/Loquin)
- GIRSBERGER, DANIEL*  
*HAUSMANINGER, CHRISTIAN* Assignment of Rights and Agreement to Arbitrate  
in: Arbitration International  
Volume 8 No.2, p.121-165  
(cited: Girsberger/Hausmaninger)

- HERBER, ROLF**  
**CZERWENKA, BEATE**
- Internationales Kaufrecht:  
Kommentar zu dem Übereinkommen der Vereinten  
Nationen vom 11.April 1980 über Verträge über den  
Internationalen Warenkauf  
München, 1991  
(cited: Herber/Czerwenka)
- HONNOLD, JOHN O.**
- Uniform Law for International Sales  
3<sup>rd</sup> Edition  
The Hague, 1999  
(cited: Honnold)
- JANZEN, DIETER**
- Der UNCITRAL-Konventionsentwurf zum Recht der  
internationalen Finanzierungsabtretung:  
Symposium in Hamburg am 18.und 19.September 1998  
in: Rabels Zeitschrift für ausländisches und internationales  
Privatrecht  
Tübingen, 1999; 63:2:368-377  
(cited: Janzen)
- JAUERNIG, OTHMAR**
- Bürgerliches Gesetzbuch  
9<sup>th</sup> Edition  
München, 1999  
(cited: Jauernig)
- KAROLLUS, MARTIN**
- UN- Kaufrecht: Eine systematische Darstellung für  
Studium und Praxis  
1<sup>st</sup> Edition  
Wien, 1991  
(cited: Karollus)
- KÖTZ, HEIN**
- International Encyclopedia of Comparative Law  
Volume VII- Contracts in General  
Chapter 13- Rights of Third Parties  
Dordrecht; Boston; Lancaster, 1992  
(cited: Kötz)
- MAGNUS, ULRICH**
- “Zum räumlich-internationalen Anwendungsbereich des  
UN-Kaufrechts und zur Mängelrüge”  
in: IPRax 1993, 390  
(cited: Magnus)
- MUSTILL, MICHAEL J.**  
**BOYD, STEWART C.**
- The Law and Practice of Commercial Arbitration in  
England  
2<sup>nd</sup> Edition  
London, Edinburgh, 1989  
(cited: Mustill/Boyd,p.)

- PILTZ, BURGHARD*** UN-Kaufrecht  
Gestaltung von Export- und Importverträgen  
3<sup>rd</sup> Edition  
Heidelberg, 2001  
(cited: Piltz, UN-Kaufrecht)
- PILTZ, BURGHARD*** Internationales Kaufrecht: Das UN-Kaufrecht (Wiener  
Übereinkommen von 1980) in praxisorientierter Darstellung  
1<sup>st</sup> Edition  
München, 1993  
(cited: Piltz)
- REDFERN, ALAN*** Law and Practice of International Commercial Arbitration  
***HUNTER, MARTIN*** 3<sup>rd</sup> Edition  
London, 1999  
(cited: Redfern/Hunter)
- RESCH, REINHARD*** “Zur Rüge bei Sachmängeln nach UN-Kaufrecht”  
in: ÖJZ 1992, 470  
(cited: Resch)
- RUSELL ON ARBITRATION*** Rusell on Arbitration  
***(ED. SUTTON, DAVID ST. JOHN*** 21<sup>st</sup> Edition  
***KENDALL, JOHN*** London, 1997  
***GILL, JUDITH)*** (cited: Rusell)
- SCHLECHTRIEM, PETER*** Kommentar zum Einheitlichen UN-Kaufrecht- CISG-  
3<sup>rd</sup> Edition  
München, 2000  
(cited: Schlechtriem/author, german version)
- SCHLECHTRIEM, PETER*** Commentary on the UN Convention on the International  
Sale of Goods (CISG)  
2<sup>nd</sup> Edition (in translation)  
München, 1998  
(cited: Schlechtriem/author)
- SCHLECHTRIEM, PETER*** Internationales UN-Kaufrecht  
Tübingen, 1996  
(cited: Schlechtriem, Internationales UN-Kaufrecht)
- SCHOPP*** “Die Abtretung im Schiedsverfahren”  
in: Konkurs-, Treuhands- und Schiedsgerichtswesen (KTS)  
1979, 255  
(cited: Schopp)

- SCHRICKER, GERHARD* “Zur Geltung von Schiedsverträgen bei  
Anspruchsabtretung”  
in: Festschrift für Karlheinz Quack, 1991  
(cited: Schricker)
- SECRETARIAT`S COMMENTARY* Commentary on the Draft Convention  
on Contracts for the International Sale of Goods  
in: Honnold, John O. (Ed.):  
Documentary History of the Uniform Law for  
International Sales  
Deventer, 1989  
(cited: Secretariat`s Commentary)
- SOERGEL, HANS THEODOR* Bürgerliches Gesetzbuch  
Band 3 – Schuldrecht II  
Köln, 1991  
(cited: Soergel/author)
- STAUDINGER, JULIUS VON* Kommentar zum Bürgerlichen Gesetzbuch mit  
Einführungsgesetzen und Nebengesetzen  
Wiener UN-Kaufrecht (CISG)  
13<sup>th</sup> Edition  
Berlin, 1994  
(cited: Staudinger/author)
- TRAGER, MARA* “Towards a predictable law on international receivables  
financing: The Uncitral Convention”  
in: International Law and Politics  
Vol.31, 611  
(cited: Trager)
- WHITE, JAMES J.*  
*SUMMERS, ROBERT S.* Uniform Commercial Code  
5<sup>th</sup> Edition  
St. Paul, Minnesota, 2000  
(cited: White/Summers)
- WITZ, WOLFGANG*  
*SALGER, HANNS-CHRISTIAN*  
*LORENZ, MICHAEL* International Einheitliches Kaufrecht:  
Praktikerkommentar und Vertragsgestaltung  
zum CISG  
Heidelberg, 2000  
(cited: Witz/Salger/Lorenz)

## INDEX OF CASES

### Austria

15.10.1998 OGH, ZfRV 1999, 63  
20.11.1920 OGH; ZBI 1920, 177

### France

29.01.1998 Cour d'appel de Versailles; Unilex D. 1998-4  
13.09.1995 Cour d'appel Grenoble; Unilex E. 1997-2

### Germany

08.12.1903 RG; RGZ 56, 182

03.11.1999 BGH; ZIP 2000, 234; DB 2000, 569  
08.03.1995 BGH; BGHZ 129, 75; Unilex E.1995-9  
02.06.1982 BGH; NJW 1982, 2730  
02.03.1978 BGH; BGHZ 71, 162

11.03.1998 OLG München; SZIER 1999, 199; CLOUT Nr. 232  
21.08.1997 OLG Köln; VersR 1998, 1513; CLOUT Nr. 284  
21.08.1995 OLG Stuttgart; IPRax 1996, 139; Unilex E.1995-21  
25.06.1984 OLG Karlsruhe; RIW 1984, 818  
30.01.1957 OLG Koblenz; BGHZ 23, 198

29.01.1996 AG Augsburg; Unilex E.1996-2.3

### Russia

21.04.1997 Moscow District Court- *IMP Group v. Aeroimp*- YCA 1998, 745

### Switzerland

17.03.1975 Bundesgericht; BGE 101 II, 168  
08.01.1997 Obergericht Luzern; SJZ 1998, 515; Unilex E.1997-2

### United Kingdom

19.04.2000 Queen`s Bench- *Hussman (Europe) Ltd. v. Al Ameen Development & Trade Co. and others*- [2000] 2 Lloyd`s Rep.83  
22.05.1984 Queen`s Bench- *Socony Mobil Oil Co. Inc. And Mobil Oil AG v. The West of England Ship Owners Mutual Insurance Association Ltd. (The Padre Island)*- [1984] 2 Lloyd`s Rep. 408  
03.11.1927 King`s Bench- *Cottage Club v. Woodside Estates Co.*-[1928] 2 KB 463

### USA

- 07.04.1986 Supreme Court- *AT & T Technologies, Inc. v. Communications Workers of America* – 106 S.Ct. 1415
- 02.07.1985 Supreme Court- *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*- 473 U.S.614; 105 S.Ct. 3346
- 12.06.1967 Supreme Court- *Prima Paint Co. v. Flood & Conklin Manufacturing Corp.*- 388 U.S. 395
- 31.10.1947 Supreme Court- *Kaufmann v. William Iselin & Co., Inc.*- 74 N.Y.S.2d 23
- 28.06.1999 Court of Appeals- *Lubritene et al. v. Bel-Ray Company*- YCA 2000, 991; 181 Federal Reporter 3d 435
- 24.08.1995 Court of Appeals- *Thomson-CSF, S.A. v. American Arbitration Ass'n*- 64 F.3d 773
- 28.04.1994 Court of Appeals- *McCarthy v. Azure*- 22 F.3d 351
- 22.02.1989 Court of Appeals- *Labors International Union of North America v. Forster Wheeler Corp.*- 868 F.2d 573
- 14.01.1985 Court of Appeals- *Lachmar v. Trunkline LNG Co.* - 735 Federal Reporter 8
- 02.12.1997 District Court of Minnesota- *Bay Area Factors (a division of Dimmit & Owens Financial Services), Inc., Plaintiff v. Target Stores, Inc.*- 987 F.Supp. 734
- 27.01.1992 District Court Southern New York- *Keystone Shipping Co. v. Texport Oil Company*- 782 F.Supp. 28
- 09.08.1988 District Court Southern New York- *Nicolas A. Califano, M.D. v. Shearson Lehman Bros.*- 690 F.Supp. 789
- 15.12.1986 District Court Southern New York- *Reyes Compania Naviera S.A. v. Manumante S.A.*- 649 F.Supp. 789

## INDEX OF AWARDS

ICC Award No. 109/1980 (1984)

In: YCA 1993, p. 92

ICC Award No. 2626/1977

In: Collection of ICC Arbitral Awards 1974-1985 p. 316

**STATEMENT OF FACTS**

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

## **APPLICABLE LAW**

Since CLAIMANT and RESPONDENT have provided for arbitration under the American Arbitration Association Rules<sup>1</sup>, the arbitral proceedings will be governed by the **UNCITRAL Model Law on International Commercial Arbitration** and the **American Arbitration Association International Arbitration Rules**.<sup>2</sup>

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

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

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

## **INTRODUCTION**

RESPONDENT submits the following legal positions and respectfully requests the tribunal to decide accordingly: The Tribunal has no jurisdiction to hear the claim brought against RESPONDENT [**First Issue**]. CLAIMANT has no right to receive payment of the fourth installment. According to Art. 17 (1) Receivables Convention, RESPONDENT obtained a valid discharge by paying the fourth installment to TAILTWIST, since RESPONDENT was not effectively notified of the assignment prior to this payment [**Second Issue**]. CLAIMANT is not entitled to demand payment of the 5<sup>th</sup> installment as well [**Third Issue**]. Furthermore, RESPONDENT requests the Tribunal to order CLAIMANT to bear the costs of arbitration according to Art. 31 of the AAA Rules [**Fourth Issue**].

---

<sup>1</sup> Notice of arbitration, section B IV para. 13; CLAIMANT's Exhibit No. 1.

<sup>2</sup> CLAIMANT's Exhibit No. 1.

<sup>3</sup> Notice of arbitration, B V para. 19.

<sup>4</sup> CLAIMANT's Exhibit No. 1.

## **FIRST ISSUE: THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION**

RESPONDENT respectfully requests the Tribunal to find that it does not have jurisdiction to hear the dispute. CLAIMANT has neither concluded an arbitration agreement with RESPONDENT nor may it invoke the arbitration clause of the original contract between RESPONDENT and TAILTWIST.

The wording of the arbitration clause clearly evidences that RESPONDENT has only agreed to arbitrate disputes with TAILTWIST. Thus, a transfer of the arbitration clause to CLAIMANT is precluded [A]. Irrespective of such an explicit restriction, there is the general principle that only signatory parties may rely on an arbitration agreement. There is no automatic transfer of the arbitration clause to the assignee of contractual rights [B].

### **A. The limited scope of the arbitration agreement between RESPONDENT and TAILTWIST prohibits any transfer**

RESPONDENT and TAILTWIST drafted the arbitration clause in a way that clearly limits its scope of application to disputes between these parties. Contrary to CLAIMANT's submission, the explicit wording of the arbitration clause is of legal significance.

The signatory parties adopted the AAA Rules arbitration clause, but purposefully added their names, stipulating that "any controversy or claim *between TAILTWIST Corp. and West Equatoriana Bobbins S.A.* shall be determined by arbitration".<sup>5</sup>

The standard clause proposed by the AAA Rules, on the other hand, simply reads "any controversy or claim arising out of or relating to this contract shall be determined by arbitration".<sup>6</sup> If the parties had only intended to agree on arbitration without specific regard to the other party, this 'catch-all' clause, as recommended by the AAA, would have been sufficient.

The wording of the arbitration clause, however, is the best indicator of the parties' intent to restrict its scope. This intent is to be honored by the Tribunal<sup>7</sup>, because, "as with any other contract, the parties' intentions control"<sup>8</sup> the scope of the arbitration clause. Thus, an arbitration agreement which was purposefully amended according to the parties' intentions must be read "straightforwardly rather than expansively"<sup>9</sup>.

The circumstances of the case do not allow for another interpretation of the clause. RESPONDENT only agreed to arbitration with TAILTWIST, since both parties had been business partners before. During their long-term business relationship no disputes had ever arisen between them<sup>10</sup>, so that mutual trust had developed when the contract was concluded. This precondition is important, since mutual trust between the

---

<sup>5</sup> CLAIMANT's Exhibit No. 1.

<sup>6</sup> AAA Rules as amended and effective September 1, 2000, Introduction.

<sup>7</sup> *McCarthy v. Azure*, 22 F.3d 351.

<sup>8</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626.

<sup>9</sup> *McCarthy v. Azure*, 22 F.3d 351.

<sup>10</sup> Procedural Order No. 2, para. 13.

parties is essential when establishing an arbitral tribunal and thereby waiving the right to litigate before domestic courts. At the time of the conclusion of the contract, RESPONDENT had good reasons to expect that the business relationship with TAILTWIST would continue in the future. RESPONDENT could rely on the good conduct of TAILTWIST in arbitral proceedings, because TAILTWIST could also be deemed interested in the successful continuation of the business relationship with RESPONDENT.

Therefore, it was acceptable for RESPONDENT to agree on arbitration with TAILTWIST, even though it had little experience with arbitration outside the textile business. The arbitrations RESPONDENT was involved in so far were usually quality disputes and handled without the assistance of outside counsel.<sup>11</sup> Thus, the agreement to arbitrate disputes with a machinery manufacturer like TAILTWIST was exceptional. This exception may not be extended to CLAIMANT as the considerations that have led to its adoption do not apply to CLAIMANT. The latter has never had any contractual relationship with RESPONDENT nor has CLAIMANT, as an investment bank, any special interest in the textile business. RESPONDENT has no past or future relationship with CLAIMANT at all, so that the mutual trust that rendered arbitration with TAILTWIST acceptable is missing in the relationship between RESPONDENT and CLAIMANT.

The intentions of the parties are clearly expressed by the arbitration agreement. CLAIMANT's assertion, however, that "the parties intended to extend the arbitration clause to assignees"<sup>12</sup>, as they negotiated an assignment of the right to payment, lacks any foundation and contradicts the parties' intentions. The signatory parties restricted the standard arbitration clause, just because there was the mere possibility that there might be assignments. RESPONDENT did not only have to fear that one different party might want to rely on the arbitration clause, but also that several arbitration proceedings might be initiated. The risk of multiple parallel arbitrations exists if the arbitration agreement is extended to various assignees of single contractual claims. If TAILTWIST had split its claims into several parts and assigned each of them to different assignees, RESPONDENT would have been confronted with numerous creditors. Every one of them may have enforced its right of payment. If all these assignees invoked the arbitration clause, RESPONDENT would have been obliged to arbitrate the same legal dispute before different tribunals, which would have further raised the costs of dispute settlement. Multiple litigation processes concerning the same issue, on the other hand, may be joined and terminated with only one legally binding decision.

Thus, RESPONDENT had good reasons to exclude future assignees from the arbitration clause. The wording of the arbitration clause is clear, unambiguous and sufficient. What else should the parties have had in mind when limiting the arbitration agreement to *'disputes between TAILTWIST Corp. and West Equatoriana Bobbins S.A.'*?

---

<sup>11</sup> Procedural Order No. 2, para. 47.

<sup>12</sup> CLAIMANT's memorandum, p. 7.

## **B. The arbitration agreement was not transferred to CLAIMANT**

Irrespective of the clear intent of the parties, the alleged automatic transfer of the arbitration agreement did not occur. Contrary to CLAIMANT's submission, the arbitration clause is not assigned together with the contractual right to receive payment.

It is a key principle in international arbitration that the arbitration agreement can only be invoked by the parties that agreed to arbitrate, i.e. RESPONDENT and TAILTWIST [I]. Furthermore, in international arbitration there is no general principle of automatic transfer of the arbitration clause. As RESPONDENT explicitly dissents, any transfer of the arbitration clause is ruled out in the present case [II].

### **I. Privity of contract: Generally only signatory parties can invoke an arbitration agreement**

CLAIMANT is not entitled to compel RESPONDENT to arbitrate their dispute, since the arbitration agreement as the "foundation stone of modern international commercial arbitration"<sup>13</sup> is missing. Arbitration is a "matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit"<sup>14</sup>. It is the arbitration agreement "which gives rise to the consensual and predominantly bilateral nature of the arbitration to the exclusion of third parties"<sup>15</sup>. According to this principle of 'privity of contract', only those parties that have consented to settle disputes between them by arbitration may rely on this agreement.<sup>16</sup> It has already been evidenced that RESPONDENT has only agreed to submit to arbitration possible disputes with TAILTWIST. CLAIMANT is not a signatory party, nor can it rely on the recognized exceptions, in which courts apply arbitration clauses to non-signatories. These exceptions are incorporation by reference to another contract's arbitration clause, implication from party's conduct, agency, piercing the corporate veil and estoppel.<sup>17</sup> The assignment of contractual claims, however, is not recognized as such an exception.

### **II. There is no general principle of automatic transfer of the arbitration agreement**

CLAIMANT's submission that the automatic transfer of the arbitration clause is a generally recognized principle of arbitration is misguided. There is no such uniform substantive rule in international commercial arbitration concerning this issue.<sup>18</sup> Various courts and scholars have denied that the arbitration clause is

---

<sup>13</sup> *Redfern/Hunter*, p. 4; *Fouchard/Gaillard/Goldman*, p. 31, para. 46: arbitration agreement is the "fundamental constituent" .

<sup>14</sup> *Labors International Union of North America v. Foster Wheeler Corp.*, 868 F.2d 573, 576; *Reyes Compania Naviera S.A. v. Manumante S.A.*, 649 F.Supp. 789, 791; *Nicholas A. Califano, M.D. v. Shearson Lehman Bros.*, 690 F.Supp. 1354, 1355.

<sup>15</sup> *Russel*, p. 5, para. 1-003.

<sup>16</sup> *Fouchard/Gaillard/Goldman*, p. 280.

<sup>17</sup> Cf. *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773; *Chemrite, Lubritene et al. v. Bel-Ray Company*, YCA 2000, p. 991, 1000; *Keystone Shipping Co. v. Texport Oil Company*, 782 F.Supp. 28, 30.

<sup>18</sup> All decisions refer to national law: the Arbitral Tribunal, for example, that rendered the award mentioned by CLAIMANT applied German law: ICC Award no. 2626, in: Collection of ICC Arbitral Awards 1974-1985, p. 316.

automatically assigned together with contractual claims [1]. Furthermore, a number of cases cited in support of the alleged rule do not advocate an automatic transfer [2].

### **1. Various courts and scholars oppose an automatic transfer of the arbitration clause**

CLAIMANT tries to verify its assertion of a general rule of automatic transfer by an in-depth analysis of German and French case law. Legal scholars from Germany and France, however, reject the idea of an automatic assignment of the arbitration agreement.<sup>19</sup> Moreover, the focus on civil law countries is a biased interpretation of international case law. A closer look to common law authorities reveals that courts have denied an automatic transfer of the arbitration clause by the mere assignment of contractual rights.<sup>20</sup> The English Court of Appeals plainly stated that “the arbitration clause is a personal covenant, and cannot be transferred”<sup>21</sup>. The court expressly held that the arbitration clause is not affected by an assignment of rights, but remains “in full force and effect as between the original parties”<sup>22</sup>. In *Hussman v. Al Ameen* the same court recently required the express or implied consent of the debtor of the assigned claim to the transfer of the arbitration agreement.<sup>23</sup>

Russian decisions opposed an automatic transfer of the arbitration clause as well.<sup>24</sup> An ICC Arbitral Tribunal in 1984 held that an arbitration agreement “cannot at all be the subject of cession”.<sup>25</sup> The *Moscow District Court* accordingly demanded that the assignee conclude a new arbitration agreement.<sup>26</sup> Therefore, CLAIMANT’s assertion that automatic transfer of the arbitration agreement is a general principle in arbitration is not supported by international case law, which is apparently divided on this issue.

### **2. A rule of automatic transfer would not be in line with basic principles of arbitration**

The denial of the automatic transfer of the arbitration agreement is consistent with basic principles of arbitration law. In international arbitration it is undisputed that the arbitration agreement is a contract of its own which is legally autonomous from the main contract. This view is based on the doctrine of severability, which provides for the strict separation of the arbitration agreement from the contract which contains the commercial obligations of the parties. CLAIMANT’s submission that the doctrine of severability does not apply<sup>27</sup> therefore disregards the doctrine’s fundamental character. The doctrine of severability always applies in international arbitration, as it is one of the cornerstones of arbitration. The legal autonomy of the

---

<sup>19</sup> *Level/Fouchard/Loquin*, p. 460, 469 f, 472; *Schricker*, pp. 103-105; *Schopp*, p. 259.

<sup>20</sup> USA: *Kaufmann v. William Iselin & Co., Inc.*, 74 N.Y.S.2d 23; *Lachmar v. Trunkline LNG Co.*, 753 Fed. Rep. 2<sup>nd</sup> 8, 10; Great Britain: *Hussman v. Al Ameen*, Q.B. (Com.Ct.), Lloyd’s Law Rep. 2000, 83; *Cottage Club estate v. Woodside Estates Co.*, [1928] 2 KB 463.

<sup>21</sup> *Cottage Club Estates v. Woodside Estates Co.*, [1928] 2 KB 463, 466.

<sup>22</sup> *ibid.*

<sup>23</sup> *Hussman v. Al Ameen*, Q.B. (Com.Ct.), Lloyd’s Rep. 2000, pp. 83, 88.

<sup>24</sup> *Sojuznefteexport v. Joc Oil Ltd*, YCA 1993, p. 92; *IMP Group v. Aeroimp*, Moscow District Court, YCA 1998, p. 745.

<sup>25</sup> *Sojuznefteexport v. Joc Oil Ltd*, YCA 1993, pp. 92, 100.

<sup>26</sup> *IMP Group v. Aeroimp*, Moscow District Court, YCA 1998, pp. 745, 748.

arbitration is widely accepted in both theory<sup>28</sup> and case law<sup>29</sup> and is confirmed by the Model Law in Art. 16 (1) as well as by most modern arbitration laws<sup>30</sup>.

That the doctrine applies is evidenced in particular by Russian decisions. These decisions as well as the legal scholars mentioned above have specifically taken recourse to the autonomy of the arbitration clause in order to deny its transfer to the assignee. The arbitration clause is referred to as “an autonomous procedural contract”<sup>31</sup> as well as a “procedural agreement independent from other terms of the contract”<sup>32</sup>. French legal scholars also criticize the use of the automatic assignment rule by French Courts by referring explicitly to its autonomy<sup>33</sup>, stating that the arbitration clause does not necessarily follow the contractual law, as it is separated from the contract.<sup>34</sup> Especially the reference to the procedural nature of the arbitration agreement evidences that the arbitration agreement may not be affected by changes concerning the main contract, which is governed by material-contractual law. Consequently, the *Moscow District Court* required, due to the autonomous character of the arbitration clause, the “conclusion of a new arbitration agreement”.<sup>35</sup> RESPONDENT, however, never concluded any arbitration agreement with CLAIMANT.

Additionally, denying an automatic transfer also appears to be reasonable with regard to its contractual character. Being an entire contract the arbitration agreement does not only confer the right to settle disputes by arbitration but also imposes the duty to arbitrate on the parties, e.g. to accept the tribunal’s jurisdiction and participate in the proceedings. The “duty to arbitrate” is clearly recognized by the United States Courts, including the Supreme Court.<sup>36</sup> In the determination of the question which parties may refer to an arbitration agreement the contractual nature of the arbitration agreement cannot be disregarded. Critics of an automatic transfer therefore argue that the arbitration agreement can only be transferred to a third party if all parties involved consent.<sup>37</sup> In the present case, RESPONDENT never consented to such a transfer.

The authorities CLAIMANT relies on in order to support its position do not recognize that arbitration is also a duty. Especially the German Supreme Court ignores that the arbitration agreement is a contract of

<sup>27</sup> CLAIMANT’s Memorandum, p. 6.

<sup>28</sup> *Redfern/Hunter*, 3-31, p. 154.

<sup>29</sup> For example by the United States Supreme Court in: *Prima Paint Co. v. Flood & Conklin Manufacturing Corp.*, 388 U.S. 395, 402.

<sup>30</sup> For example: Swiss PIL Act, 1987, Art. 178 (3); LCIA Arbitration Rules, Art. 23.1.

<sup>31</sup> *Sojuznefteexport v. Joc Oil Ltd*, YCA 1993, pp. 92, 100.

<sup>32</sup> *IMP Group v. Aeroimp*, Moscow District Court, YCA 1998, pp. 745, 748.

<sup>33</sup> *Level/ Fouchard/ Loquin*, p. 429, at pp. 460, 469 f, 472.

<sup>34</sup> *Fouchard*, *ibid*, at p. 470.

<sup>35</sup> *IMP Group v. Aeroimp*, Moscow District Court, YCA 1998, 745, 748; similarly: *Sojuznefteexport v. Joc Oil Ltd*, YCA 1993, pp. 92, 100.

<sup>36</sup> *AT & T Technologies, Inc. v. Communications Workers of America et al.*, 475 U.S., pp. 643, 649, 106 S.Ct., 1415 at 1419; see also: *Lachmar v. Trunkline LNG Company*, 753 Fed. Rep. 2<sup>nd</sup> Series, pp. 8, 10; *Laborers Intern. Union v. Foster Wheeler Corp.*, 868 F.2d 573, 576.

<sup>37</sup> Cf. *Schricker*, pp. 103-105; *Schopp*, p. 259.

its own which contains not only rights but also duties. The Court refers to the “basic idea contained in § 401 BGB” to advocate the automatic transfer. Since according to § 401 BGB, only accessory rights are assigned together with contractual claims, the Federal Supreme Court simply treats the arbitration agreement as an accessory right.<sup>38</sup> In other decisions, however, the Court expressly refrained from an analogy to § 401 BGB for the only reason that the agreement to be transferred was an entire contract containing duties.<sup>39</sup>

Furthermore, considering the arbitration agreement as a personal right which adheres to the signatory parties<sup>40</sup> also forbids regarding the arbitration clause as an accessory right. The unassignability of personal rights is firmly established in most legal systems.<sup>41</sup> Moreover, it is convincing to acknowledge the personal character of the arbitration clause. Since a party to an arbitration contract has given up one of its most important rights – the right to go to its own court of law – the right to arbitrate is exclusively attached to the person who made this decision. Thus, it cannot be separated from this party, unless this party consents and thereby concludes a new arbitration agreement with the third party.

### **3. Cases CLAIMANT relies on do not support its position**

Moreover, CLAIMANT bases the alleged automatic transfer rule on cases which do not support its motion. The only British case CLAIMANT relies on does not approve an automatic transfer of the arbitration agreement. The similarities to the case at hand are only superficial. In *The Padre Island*<sup>42</sup>, a third party replaced one of the signatory parties by taking over all its rights and duties. In that case, all parties involved expressly consented to the transfer. Hence, the arbitration contract, being a part of these rights and duties, was passed along with the main contract and was therefore available to the assignee. As shown above, RESPONDENT has neither expressly nor impliedly consented to any transfer of the arbitration agreement to CLAIMANT.

Furthermore, the decision of the German Reichsgericht<sup>43</sup> referred to by CLAIMANT as the German standard decision on this issue, does not advocate the automatic transfer of the arbitration clause either. The decision is misinterpreted. It did not apply an analogy to § 401 BGB, but referred solely to the will of the parties.<sup>44</sup> This decision emphasizes that the intent of the parties is to be honored.

---

<sup>38</sup> BGHZ 71, pp. 162, 164 et seq.; *Jauernig*, § 401, paras. 1 et seq.

<sup>39</sup> The Supreme Court rejected an automatic transfer in cases of security transaction: e.g. cautionary land charge (BGH NJW 1974, p. 101) or ownership by way of chattel mortgage (BGH NJW-RR 1986, p. 1128).

<sup>40</sup> *Cottage Club Estates v. Woodside Estates Co.*, [1928] 2 KB 463, 466; OGH ZBI 1920, p. 177.

<sup>41</sup> USA: Restatement of contracts 2d § 317 (2) (a); Germany: § 399 BGB; Swiss: Art. 164 Civil Code; Italy: Art. 1260 para. 1; French and English law lack explicit provisions but also follow the same basic idea; cf. *Kötz*, pp. 52, 62.

<sup>42</sup> *Socony Mobil Oil Co., Inc., Mobil Oil Co., Ltd. and Mobil Oil AG v. West of English Ship Owners Mutual Insurance Association (Lodon) Ltd., The Padre Island* [1984], 2 Lloyd’s Rep 408.

<sup>43</sup> Predecessor of the German Federal Supreme Court, RGZ 56, p. 182.

<sup>44</sup> RGZ 56, pp. 182, 183.

Therefore, the parties' intent has to be ascertained in every single case in order to determine whether the arbitration clause can be transferred to an assignee. As shown above, it is the clear intent of RESPONDENT and TAILTWIST that the arbitration agreement shall not be transferred at all. Consequently, for lack of a valid arbitration agreement, CLAIMANT is not entitled to initiate arbitration proceedings against RESPONDENT.

## **SECOND ISSUE: RESPONDENT OBTAINED A VALID DISCHARGE BY PAYING THE FOURTH INSTALLMENT TO TAILTWIST**

CLAIMANT has no right to receive payment of the fourth installment. According to Art. 17 (1) Receivables Convention, RESPONDENT obtained a valid discharge by paying the fourth installment to TAILTWIST. RESPONDENT was not effectively notified of the assignment prior to this payment.

The notification in German did not fulfill the prerequisite for being an effective notice of assignment. [A]. In addition, the translation in the English language was received too late to cause any changes to RESPONDENT's legal obligations [B].

### **A. The notification in German was ineffective according to Art. 16 (1) Receivables Convention**

Contrary to CLAIMANT's submission, the notification written in German was not effective pursuant to Art. 16 (1) Receivables Convention. It did not fulfill the clear language requirement of Art. 16 (1), since a notification in German could not reasonably be expected to inform RESPONDENT of its content [I]. RESPONDENT did not identify the writing as a notification of assignment and under Art. 16 (1) could not be expected to [II]. Furthermore, RESPONDENT did not have to obtain a translation of the notification on its own [III].

#### **I. The clear language requirement of Article 16 (1) was not fulfilled**

The first notice in German, sent by CLAIMANT on 5 April 2000, did not effectively notify RESPONDENT about the assignment. Article 16 (1) requires that the notification be written "in a language that is reasonably expected to inform the debtor about its contents". However, Mr. Black, Vice-President of RESPONDENT, could not read the notice, since he could not read German.<sup>45</sup> He identified its sender in order to inquire as to the nature of the communication.<sup>46</sup> No one at RESPONDENT's office speaks German.<sup>47</sup> RESPONDENT could not comprehend the essential information given in the notice, as clearly evidenced by the fact that it asked CLAIMANT for a translation. Not only did Mr. Black not understand the notification but a reasonable business person in his position could not be expected to understand the content of the notification either, since German is not a language that can be reasonably expected to inform English speaking persons about an assignment. Art. 16 (1) sets a clear standard. Its

---

<sup>45</sup> Procedural Order No. 2, para. 28.

<sup>46</sup> Statement of Defense, para. 7.

<sup>47</sup> *ibid.*

requirements are only met by a language the debtor is familiar with. The primary purpose is to ensure that the debtor is not adversely affected by a notification which it is not able to understand.<sup>48</sup> Since the notification entails severe consequences, the debtor must not be left in any doubt about the meaning of the writing. The notice must be such as to leave no need for interpretation. Anything else contravenes the Convention's main goals – the pursuit of legal certainty and debtor protection.<sup>49</sup> The reference to 'reasonableness' serves as a general criterion for the evaluation of the parties' behavior.<sup>50</sup> The German language is certainly not the *lingua franca* in international business. Thus, CLAIMANT could not reasonably expect RESPONDENT to understand German. It was up to CLAIMANT to make use of the "safe harbor rule" contained in Art. 16 (1), second sentence, in order to obtain legal certainty. CLAIMANT could have prevented any disputes about the "reasonableness" of the use of the German language by writing the notice in English which is the language of the original contract.

## **II. RESPONDENT did not identify the writing as a notification of assignment and under Art. 16 (1) could not be expected to**

CLAIMANT furthermore alleges that RESPONDENT could have identified single elements relating to assignments within the document, e.g. names and amounts due according to a contract, and that it hence could have understood the content of the writing.<sup>51</sup> This assertion contravenes the clear standard imposed by Art. 16 (1). RESPONDENT is not required to put together the pieces of information given in a foreign language like a puzzle and to speculate about the content of the writing.

Mentioning these elements only fulfils the form requirements for a notification of assignment as stipulated by Art. 5 (d) Receivables Convention. This, however, is not sufficient to effectively notify the debtor about the assignment. The prerequisites of an effective notification are exclusively governed by Art. 16 (1), which explicitly supersedes the form requirements of Art. 5 (d).<sup>52</sup>

Apart from being misguided on the legal requirements of Art. 16 (1), CLAIMANT's assertion also lacks factual basis. It was impossible for RESPONDENT to conclude from single words and numbers anything about the nature of the writing.

To the contrary, the content of the notice was further obscured by an invalid payment instruction. The payment instruction which was sent with the German writing demanded payment to a bank account in the

---

<sup>48</sup> Cf. U.N.-Document A/CN.9/489, Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade, para. 6.

<sup>49</sup> Preamble of the Receivables Convention.

<sup>50</sup> View shared regarding of the interpretation of the term "reasonable" in the CISG by Bonell, in *Bianca/Bonell*, Art 7, 2.3.2.2., p. 81. This argumentation also applies to the Receivables Convention as both conventions have been drafted by UNCITRAL and contain the same rules of interpretation in Art 7. Cf. *Janzen*, p. 370. A uniform interpretation is necessary to meet the recent unification efforts in International Law. Cf. *Ferrari*, p. 2.

<sup>51</sup> CLAIMANT's Memorandum, p. 12.

<sup>52</sup> U.N.-Document A/CN.9/489/Add.1, Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade, Addendum, para. 2.

state of Mediterraneo.<sup>53</sup> Thereby the state in which payment was to be made was changed. This contravenes Art. 15 (2) (b) Receivables Convention which forbids changes to the state in which payment is to be made as specified in the original contract.<sup>54</sup> Referring to a bank account in Mediterraneo does therefore not indicate an assignment at all, but rather adds to the confusion. The invalidity of the payment instruction was not rectified by CLAIMANT until 5 July 2000. The notice in German was therefore not only written in an incomprehensible language, but was also formally defective.

### **III. RESPONDENT did not have to obtain a translation**

CLAIMANT's allegation that the occasional use of a translation service implies that "German was a language expected to inform RESPONDENT"<sup>55</sup> is misguided. CLAIMANT tries to construe Art. 16 (1) to the effect that RESPONDENT is required to make extraordinary efforts to understand the content of the writing. These assertions contradict the clear wording of Art. 16 (1), which does not require the debtor to obtain a translation. Art. 16 (1) does not impose any legal obligations on the addressee. In requiring that the language must be reasonably expected to inform the debtor, Art. 16 (1) places the risk of choosing the appropriate language with the sender of the notice. The mere possibility of obtaining a translation does not mean that the addressee can be expected to understand a document's content. CLAIMANT's submission is a misinterpretation of the correlation between cause and effect. The only reason why RESPONDENT needs translations is its inability to understand documents written in German.<sup>56</sup> According to CLAIMANT's interpretation, every language would be reasonably expected to inform RESPONDENT as long as a translation is available. This would render the language requirement of Art. 16 (1) meaningless.

### **B. The notification in English was received too late**

Receipt of the notification in English did not prevent RESPONDENT from being discharged by payment of the fourth installment to TAILTWIST. The document did not trigger the effects of Art. 17 (2) Receivables Convention, as it was received too late by RESPONDENT. At the time RESPONDENT ordered payment to TAILTWIST, it was not effectively notified of the assignment [I]. The late notification was caused by CLAIMANT's lack of diligence in its conduct of business [II].

### **I. RESPONDENT was not notified when it initiated the payment process**

RESPONDENT was not effectively notified at the time it initiated payment of the fourth installment to TAILTWIST. Contrary to CLAIMANT's assertion, neither the mere delivery of the notification to RESPONDENT's place of business nor the knowledge of Mr. Black can be regarded as receipt of

---

<sup>53</sup> CLAIMANT's Exhibit No. 2.

<sup>54</sup> U.N.-Document A/CN.9/489/Add.1, Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade, Addendum, para. 10.

<sup>55</sup> CLAIMANT's memorandum, p. 11-12.

<sup>56</sup> Procedural Order No. 2, para. 10.

notification in the sense of Art. 17 (2) Receivables Convention.<sup>57</sup> With reference to Art. 24 CISG CLAIMANT contends that “as long as the notification is received prior to payment, even a few minutes before”, the debtor can only be discharged by paying to the assignee.<sup>58</sup> Questions relating to assignments, however, are not dealt with by the CISG but by the Receivables Convention.<sup>59</sup> Art. 17 (2) Receivables Convention must not be interpreted by reference to provisions of the CISG but with regard to Art. 7 (1) Receivables Convention. Art. 7 (1) mandates that the principles set forth in the preamble of the Receivables Convention shall govern the interpretation of the Receivables Convention. Among those, the principle of debtor protection is of utmost importance.<sup>60</sup> It stipulates that assignments should not negatively affect the position of the debtor.<sup>61</sup>

CLAIMANT’s point of view, however, would lead to the unbearable consequence that a debtor would be without protection at the time of payment: A debtor making payment could never be certain that it was paying to the right creditor as there is always the risk of a notice of assignment, which has not yet come to its attention and to which it has not had any chance to react. CLAIMANT’s interpretation is not in line with the general principle of debtor protection. The question which party has to shoulder the burden of payment to the ‘wrong’ creditor obtains paramount importance in cases like the present one, where the assignor is insolvent and the debtor has almost no possibility to recover the first payment. The question of being discharged must not depend on random chance.

Applying a strict receipt rule might be the appropriate way to deal with questions concerning the formation of a contract under the CISG. Under the Receivables Convention, a different approach is necessary. Article 17 (2) primarily intends to enable the debtor to adapt the payment process to the changed legal situation. Thus, the debtor must have the possibility to gain actual knowledge of the assignment and the time to react appropriately.

In the case at hand, however, the accounting department which was in charge of the payment had no knowledge of the assignment when it initiated the payment process. Although Mr. Black reacted immediately, the memorandum was not received by the accounting department prior to the payment.<sup>62</sup>

---

<sup>57</sup> Art. 17 (2) Receivables Convention: “*After the debtor receives notification of the assignment, subject to paragraphs 3 to 8 of this article, the debtor is discharged only by paying the assignee or, if otherwise instructed in the notification of the assignment or subsequently by the assignee in a writing received by the debtor, in accordance with such payment instruction*”.

<sup>58</sup> CLAIMANT’s Memorandum, p. 16.

<sup>59</sup> *Caemmerer/Schlechtriem/Herber*, Art. 4, para. 23.

<sup>60</sup> U.N.-Document A/CN.9/489, Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade, para. 131.

<sup>61</sup> U.N.-Document A/CN.9/489, Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade, para. 131: The Secretariat of UNCITRAL emphasizes in the Analytical Commentary, whose significance is equal to an official commentary, that “any doubt as to whether an assignment changes the debtor’s legal position should be resolved in favour of the debtor”; *Trager*, p. 635.

<sup>62</sup> Procedural Order No. 2, para. 32.

In order to attain effective debtor protection as required by the Receivables Convention, a company has to be granted the time to communicate crucial information to the person or department in charge. CLAIMANT's submission that RESPONDENT was in any case notified prior to the payment as Mr. Black 'read' the notification before payment was ordered by the accounting department<sup>63</sup> does not recognize that the knowledge of an entire company is to be judged differently from that of a single person. No reasonable business person would expect that information given to one part is available to the entire company at once. Within a company time for communication is required. A company can only be regarded as being notified after a certain period of time which is necessary for the information to reach its destination within the company body, i.e. the department in charge of executing the task in question. Imputing knowledge to the entire company in cases where only one single person has gained this knowledge would not sufficiently protect the debtor, i.e. the company. Payment to the assignor made in good faith by the accounting department would not discharge the debtor for the only reason that another part of the company, be it the vice-president, has read a notification of assignment only a short time before. To avoid this risk, the person who is in charge of receiving the notice would be obliged to take care of every single payment himself. This is unacceptable, as the delegation of powers is vital for the proper functioning of every average-sized company. In light of the fundamental principle of debtor protection, Art. 17 (2) must be interpreted with regard to the complexities of modern business.

## **II. The late notification was due to CLAIMANT's lack of diligence**

In the case at stake, problems only arose because CLAIMANT itself lacked diligence in notifying RESPONDENT in time. RESPONDENT on the other hand organized the communication procedure within the company in a reasonable way.

It needs to be kept in mind that three weeks passed after the claims had been assigned to CLAIMANT until the essential information was revealed to RESPONDENT by the notification written in English. First, CLAIMANT wasted two weeks by sending RESPONDENT a notification in a language that it could not reasonably be expected to understand. Second, it took CLAIMANT five days to provide an English translation of this notification. It should have been possible for an investment bank, like CLAIMANT, to obtain such a translation into English on short notice. English, in contrast to the German language, is indeed the lingua franca of international business. Assignments are CLAIMANT's field of business and it deals with notifications on a daily basis. Thus a professional conduct, i.e. an appropriate notification at an early stage, could be expected. It is completely unreasonable to impose even more rigid requirements as to a diligent reaction on RESPONDENT, who is active in the textile trade.

The need for a quick notification should have been obvious to CLAIMANT. The terms of the contract between RESPONDENT and TAILTWIST, which were known to CLAIMANT in detail<sup>64</sup>, provided for a

---

<sup>63</sup> CLAIMANT's memorandum, p. 16.

<sup>64</sup> Second Procedural Order, para. 20.

precise time schedule concerning the payment dates of the assigned installments.<sup>65</sup> Moreover, as CLAIMANT “would not have paid \$3,150,000 if it had not known in detail for what it was paying”<sup>66</sup>, CLAIMANT can be presumed to have been aware of the fact that the equipment had been delivered to RESPONDENT’s site on 20 February 2000. Given this information, CLAIMANT should have easily been able to calculate the date on which the fourth installment was to become due at the latest, i.e. 20 April 2000.<sup>67</sup> Even without this information, it was apparent that the need for a quick notification of RESPONDENT increased with every day that passed. If RESPONDENT had been notified a single day earlier, no problems would have occurred. CLAIMANT, however, who is responsible for a delay of an effective notification of three weeks, asserts that the termination of the payment process by RESPONDENT within only two and a half hours lacked diligence.

RESPONDENT on the other hand has organized its internal communication procedure in a reasonable way. Although the notification was sent by the assignee, a company totally unknown to RESPONDENT, Mr. Black reacted immediately. He dictated a memorandum which was delivered to the accounting department by the internal messenger service. This messenger service was reasonably organized and was the routine procedure followed by the company.<sup>68</sup> The memorandum Mr. Black sent to the accounting department was a payment termination order. It is reasonable to require written form for such important orders to ensure a ‘paper track’ for record reasons. Due to its sheer amount, information cannot be delivered personally. Executive personnel, including Mr. Black, particularly depend on an automatic messenger service to transmit its orders. The memorandum to the accounting department was only one of several he had to dictate on the morning of 19 April 2000.

RESPONDENT was not legally obliged to deviate from the usual business routine as established at its office. According to a UCC decision<sup>69</sup> on a similar case “an organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines”<sup>70</sup>. CLAIMANT itself seems to have relied on its own routine. No indications are apparent that CLAIMANT made any efforts to compensate for the loss of time caused by the attempt to notify RESPONDENT by using the German language. The notification was immediately dealt with by RESPONDENT and the necessary orders were given at once. CLAIMANT may not assert that communicating the termination order to the accounting department within two and a half hours lacked diligence when three weeks passed until RESPONDENT received the required information concerning the assignment.

---

<sup>65</sup> CLAIMANT’s Exhibit No.1.

<sup>66</sup> Procedural Order No. 2, para. 20.

<sup>67</sup> The contract provided for the fourth installment to become due two month after delivery of the equipment.

<sup>68</sup> Procedural Order No. 2, para. 30.

<sup>69</sup> The UCC may of course not govern the interpretation of the Receivables Convention, but there are significant similarities between Art. 9 UCC and the Receivables Convention. Reference to well established provisions, though they constitute national law only, is very helpful when interpreting the Receivables Convention.

<sup>70</sup> *Bay Area Factors v. Target Stores*, 987 F.Supp. 734.

### **THIRD ISSUE: CLAIMANT DOES NOT HAVE THE RIGHT TO DEMAND PAYMENT OF THE FIFTH INSTALLMENT**

Contrary to its submissions, CLAIMANT is not entitled to demand payment of the 5<sup>th</sup> installment. This sum has never become due as the contractual preconditions have never been fulfilled [A]. Even if it ever had become due, no payment has to be made. As a result of the deficiencies in the performance of the contract, RESPONDENT was entitled to exercise the remedy of price reduction [B]. Contrary to CLAIMANT's assertions, nothing in the CISG or the contract precludes RESPONDENT from exercising this remedy. Neither does Art. 39 CISG bar RESPONDENT from exercising remedies generally [C]. Nor does the waiver-clause contained in the original contract preclude RESPONDENT from exercising its rights specifically against CLAIMANT as assignee [D].

#### **A. No sum due under the contract – no right to claim payment of the 5<sup>th</sup> installment**

The final payment which CLAIMANT demands from RESPONDENT is not to be paid as it never became due. The contract between RESPONDENT and TAILTWIST provides that payment of the last installment is only to be made after a three-month period of satisfactory performance. The relevant clause of the contract states that the price was to be paid in five separate installments the last of which was only to be made *“after three months of satisfactory performance. Each stage to be certified by consultants for West Equatoriana Bobbins S.A.”*<sup>71</sup> The three-month provision was included in the contract to avoid exactly the situation which RESPONDENT is facing now: To pay the full price for defective goods. The provision thus was intended to provide security for RESPONDENT. The quality of complex machinery can only be assessed by monitoring it for a certain period. The three-month clause provided such a period. RESPONDENT was not obliged to pay the full price until that period had elapsed. In the present case, there were no three months of satisfactory performance. In fact, the equipment has never worked satisfactorily. Consequently, consultants for RESPONDENT have never given the required certification. Therefore, the final amount never became due.

#### **B. RESPONDENT was entitled to reduce the price by 10% in accordance with Art. 50 CISG**

Irrespective of the question whether the final payment ever became due according to the three-months provision, no payment has to be made because RESPONDENT validly exercised its right of price reduction under Art. 50 CISG. The machinery does not work at the capacity which was stipulated<sup>72</sup> in the contract. The contract contained detailed specifications in its annexes as to the performance of the equipment.<sup>73</sup> The machinery failed to comply with these specifications. This constitutes a deficiency in the

---

<sup>71</sup> See CLAIMANT's Exhibit No. 1.

<sup>72</sup> See Procedural Order No. 2, para 34.

<sup>73</sup> Ibid.

sense of Art. 35 (1) CISG, which requires the seller to “*deliver goods which are of the quantity, quality and description required by the contract*”. In this context it is irrelevant whether the deficiencies in performance were caused by a defect of the machine itself or the deficient training as the result is in both cases the same. Machinery performing as the TAILTWIST equipment was performing would have cost approximately 10% less than equipment working at a capacity like the one promised in the contract.<sup>74</sup> RESPONDENT was therefore justified in reducing the price by the said amount.<sup>75</sup>

### **C. RESPONDENT did not lose its right of price reduction as a consequence of Art. 39 CISG**

Contrary to CLAIMANT’s assertions, RESPONDENT did not lose its right to price reduction as a consequence of Art. 39 (1) CISG. This provision stipulates that the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller within reasonable time. In the present case, however, Art. 39 (1) CISG does not lead to a loss of the right of price reduction either because of not having notified the deficiencies in the performance of the machinery [I] or the deficiencies in the training [II].

### **I. RESPONDENT is not precluded from exercising the right of price reduction as a consequence of not having notified TAILTWIST of the deficiencies in the performance of the machinery**

RESPONDENT is not barred from exercising the remedy of price reduction because of the deficient performance of the machinery for two independent reasons. *Firstly*, RESPONDENT submits that Art. 39 is to be interpreted in light of its purpose and does not lead to a loss of remedies in cases like the present one [1]. *Secondly*, and irrespective of this argument, RESPONDENT is in any case excused for not giving notice according to Art. 44 CISG [2].

#### **1. Art. 39 does not bar RESPONDENT from exercising the remedy of price reduction**

RESPONDENT contests that it lost the right of price reduction because no notice of the deficiencies in the performance of the machinery was given. Although it may be true that no notice was given, no notice could have been required in the present case. The opening of the insolvency proceedings had an immediate effect on TAILTWIST’s ability to perform its obligations under the contract.<sup>76</sup> Thus, from the opening of the insolvency proceedings on 20 April 2000 onwards, it is unlikely that TAILTWIST would have been able to react to a notice effectively. From 16 June 2000 onwards, TAILTWIST had definitely lost any ability to

---

<sup>74</sup> See Procedural Order No. 2, para 45.

<sup>75</sup> Article 50 states: “*If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.*”.

<sup>76</sup> Thus TAILTWIST had to call back two of the four training instructors and to dismiss them immediately on their return. For further implications of these acts see part C II 3.

react upon a notice. By that day, TAILTWIST ceased to be an operating entity and the only activities carried out were in connection with the liquidation<sup>77</sup>. No after-sales servicing was available.<sup>78</sup>

RESPONDENT will show that no notice had to be given before 16 June 2000 [a]. After that date, a notice was rendered useless in relation to all the functions it might have had before. As Art. 39 is not intended to deprive the buyer of his legitimate rights in cases where a notice is rendered useless, RESPONDENT is not barred from exercising the remedy of price reduction [b].

**(a) No notice had to be given before the date when the business activities of TAILTWIST were terminated**

In the present case, no notice had to be given before TAILTWIST ceased to be an operating business on 16 June 2000 as can be shown even on the basis of CLAIMANT's own assertions [i]. The time when a notice has to be given is determined by Art. 39 and 38 CISG. According to Art. 39 (1) CISG, the seller has to give notice of the lack of conformity within "reasonable time". In the present case, one month must be seen as reasonable [ii]. The one-month period granted by Art. 39 (1) CISG, however, does not start to run immediately upon delivery of the goods. It only begins to run after the buyer has discovered the lack of conformity or ought to have discovered it<sup>79</sup> [iii].

**(i) Even according to CLAIMANT's own submissions no notice had to be given before 16 June 2000**

CLAIMANT initially asserts that TAILTWIST did not remedy the deficiencies in good faith only *because* no notice of them was ever given to TAILTWIST.<sup>80</sup> CLAIMANT thereby implies that a notice had to be given at a time when TAILTWIST was still in existence. CLAIMANT then, however, has to admit that no notice had to be given before TAILTWIST had ceased to exist. CLAIMANT accepts that TAILTWIST lost its ability to cure on 16 June 2000.<sup>81</sup> At the same time, CLAIMANT explicitly accepts that in no case a notice had to be given before the end of June 2000.<sup>82</sup> To avoid any doubts as to the exact time, RESPONDENT will show in detail that no notice had to be given before 16 June 2000.

**(ii) Meaning of "within a reasonable time" under Article 39 (1) CISG**

Article 39 (1) CISG requires the buyer to notify the seller of a lack of conformity "within a reasonable time". Although regard must be paid to the individual circumstances<sup>83</sup>, a period of one month must generally be seen as reasonable in the sense of Art. 39 (1) CISG.<sup>84</sup>

---

<sup>77</sup> See Statement of Defense para. 19.

<sup>78</sup> See Procedural Order No. 2 para. 39.

<sup>79</sup> See *Honnold* Arts. 39, 40, 44 para. 257; *Schlechtriem/Schwenger* Art. 39, para. 19.

<sup>80</sup> See Memorandum for CLAIMANT, p. 18.

<sup>81</sup> See Memorandum for CLAIMANT, p. 25.

<sup>82</sup> See Memorandum for CLAIMANT, p. 21.

<sup>83</sup> See *Andersen* p. 156; *Honnold* Arts. 39, 40, 44, para. 257; *Staudinger/Magnus* Art. 39, para 42; *Schlechtriem/Schwenger* Art. 39, para 16; *Soergel/Lüderitz/Schüßler-Langeheine* Art. 39, para 3.

Employing a one-month period avoids excessive divergences which could otherwise result from the influence of domestic legal systems on the interpretation of “reasonable time”. As there are no hints in the CISG itself as to the meaning of reasonable time<sup>85</sup>, national courts that refer to their own law for guidance could interpret “reasonable time” as anything from a week up to several years.<sup>86</sup> For example, American<sup>87</sup> or French<sup>88</sup> courts might accept periods of several months or even years, due the influence of their domestic concepts. Such differences in interpretation which would “jeopardize the uniform application of the CISG”<sup>89</sup> have to be avoided by applying a one-month period as a compromise solution.

This position is also supported by international case law on Art. 39 (1) CISG. For example, French Courts have granted a period of at least one month for giving notice.<sup>90</sup> A recent judgement of a Swiss Court explicitly states that generally a period of one month should be applied in order to avoid divergences in interpretation caused by the influence of national law.<sup>91</sup> German Courts have now explicitly accepted the one-month period as the regular time-frame granted by Art. 39 (1) CISG.<sup>92</sup>

As CLAIMANT itself submits<sup>93</sup>, the one-month period also applies in the present case. No special circumstances exist which would justify a shorter period.

### **(iii) The one-month period started to run at the end of June 2000**

The one-month period granted by Art. 39 (1) CISG, however, does not start to run immediately upon delivery of the goods. It only begins to run after the buyer has discovered the lack of conformity or ought to have discovered it.<sup>94</sup> In the present case, it was not before the end of June that RESPONDENT came to the conclusion that there was definitely a lack of conformity.<sup>95</sup> That means, that the deficiency in the performance of the machinery was not actually discovered before this date. From then on, the one-month period of Art. 39 started to run with the consequence that no notice had to be given before the end of July. Consequently, no notice had to be given at a time before TAILTWIST had definitely ceased to be an operating business.

<sup>84</sup> Schlechtriem/*Schwenger* Art. 39, para. 17; *Andersen*, p. 160, 161; German Supreme Court DB 2000, 569; BGHZ 129, 75 = Unilex 1995-9; OLG Stuttgart IPRax 1996, 139 = Unilex 1995-21.

<sup>85</sup> See *Andersen* p. 95.

<sup>86</sup> See Schlechtriem/*Schwenger* Art. 39, para 17.

<sup>87</sup> American courts often accept notices given after several months: cf. *White/Summers*, § 11 –10, p. 611 et seq.

<sup>88</sup> French courts even accept periods of up to two or three years as being within the period granted by Art. 1648 of the Code Civil, which requires the buyer to notify the seller with a brief delay (“dans un bref délai”): see Schlechtriem/*Schwenger* (2000), Art. 39, para 17 with further evidence in fn. 62.

<sup>89</sup> See *Andersen*, p. 136.

<sup>90</sup> See Cour d’appel Grenoble Unilex E. 1997-2; Cour d’appel de Versailles Unilex D.1998-4.

<sup>91</sup> See Obergericht Kanton Luzern, 8 January 1997 = Unilex E.1997-2.

<sup>92</sup> BGH ZIP 2000, p. 234; Stuttgart IPRax 1996, 139 = Unilex E.1995-21; BGHZ 129, 75 = Unilex E.1995-9 (obiter); AG Augsburg Unilex E.1996-2.3; OLG Köln VersR 1998, 1513, 1515; OLG München SZIER 1999, 199.

<sup>93</sup> See Memorandum for CLAIMANT, p. 19, 20.

<sup>94</sup> See *Honnold* Arts. 39, 40, 44 para. 257; Schlechtriem/*Schwenger* Art. 39, para. 19.

<sup>95</sup> See Procedural Order No. 2, para 39.

It cannot be argued that the lack of conformity was actually discovered before the end of June because deficiencies in performance had become evident after the end of the training period, i.e. after 10 May 2000. It is well established that a lack of conformity is not “discovered” when the buyer can initially suspect it because he has encountered the first problems with the goods.<sup>96</sup> A lack of conformity is only actually discovered when a reasonable person in the same position as the buyer would start to initiate the relevant legal procedures.<sup>97</sup> This was not the case when the deficiencies in performance could first be noticed after the end of the training period.<sup>98</sup> In cases like the present one, where complicated technical equipment is involved there is a need to monitor the performance for a certain time. Insufficient production results immediately after commissioning and the completion of a training program are not sufficient to establish the necessary certainty for initiation of legal procedures. In addition, time is needed to gather the relevant information to specify the lack of conformity sufficiently. Furthermore, RESPONDENT had to make sure that the deficiencies were not caused by its own failures in the handling of the machinery. It must be taken into account that RESPONDENT only received unsatisfactory training. This made the assessment of the machinery much more difficult. Only at the end of June, when RESPONDENT had established that it would not be able to make whatever adjustment might be necessary to reach the desired level of production, it was sufficiently certain that there was indeed a lack of conformity. Only then RESPONDENT had actually discovered the deficiency.

No other result is reached if one asks when RESPONDENT “ought to have discovered” the deficiency. This question is determined in accordance with Art. 38 CISG.<sup>99</sup> Article 38 CISG requires the buyer to examine the goods “within as short a period as is practicable in the circumstances”. This does not require an instant examination.<sup>100</sup> Instead, the circumstances of the individual case and the parties’ reasonable opportunities must be considered.<sup>101</sup> Thus, it is not unusual that even a period of several months is to be seen “as short a period as is practicable”, especially when complex machinery is involved as in the present case.<sup>102</sup> There is therefore no indication that RESPONDENT ought to have discovered the deficiencies before the time it actually did.<sup>103</sup>

---

<sup>96</sup> See Staudinger/*Magnus* Art. 39, para 32; Schlechtriem/*Schwenzer* Art. 39 para 20; *Achilles* Art. 39 para 8.

<sup>97</sup> See Staudinger/*Magnus* Art. 39, para 32.

<sup>98</sup> In the case BGH ZIP 2000, p. 234., the Court held that even in case of a complete breakdown of a machine, a period of one week must be granted to the buyer to decide about his further course of action. On top of this one week period the court granted a further two week period for the necessary examinations.

<sup>99</sup> See *Honnold* Arts. 39, 40, 44 para. 257; Schlechtriem/*Schwenzer* Art. 39, para. 19.

<sup>100</sup> See Schlechtriem/*Schwenzer* Art. 38, para 15.

<sup>101</sup> *Ibid.*

<sup>102</sup> See Schlechtriem/*Schwenzer* Art. 38, para. 17.

<sup>103</sup> There is even authority for the position that “if the necessary operating instructions for technical equipment are missing or if the seller has not provided the contractually agreed instructions, so that the buyer is not in a position to make a proper examination of the goods, the period for examination cannot begin to run”: see Schlechtriem/*Schwenzer* Art. 38 para. 19; cf. also OLG Hamm, CR 1991, 335.

Consequently, the one-month period of Art. 39 did not start to run until the end of June 2000. Therefore, no notice had to be given before the end of July 2000, which is significantly after the date when TAILTWIST had ceased to be an operating concern.

**(b) Art. 39 CISG does not bar RESPONDENT from relying on deficiencies in performance of the machinery**

CLAIMANT wrongly alleges that under Art. 39 CISG, notice has to be given irrespective of the insolvency proceedings.<sup>104</sup> RESPONDENT submits that contrary to CLAIMANTs assertions, Art. 39 CISG cannot be interpreted as an absolute requirement that applies regardless of whether its purpose can still be fulfilled<sup>105</sup>.

Article 39 CISG is designed to fulfill certain functions. As can be seen from its legislative history the provision is primarily intended to “inform the seller what he must do to remedy the lack of conformity”<sup>106</sup>. It also intends to give him “the basis on which to conduct his own examination of the goods”<sup>107</sup>, and in general to “gather evidence for use in any dispute with the buyer over the alleged lack of conformity”<sup>108</sup>. All these functions are rendered useless in the present case. As TAILTWIST was in the process of being liquidated at the time a notice had to be given, it was in no position to “remedy deficiencies” in any way. It would therefore not have been able to prevent RESPONDENT from exercising the remedy of price reduction anyway. This is supported by the insolvency law of Oceania, according to which “TAILTWIST would have claims against Bobbins only to the extent that it had fulfilled its contractual obligations”<sup>109</sup>. Furthermore, TAILTWIST did not need notice to conduct its “own examinations” of the goods or to “gather or preserve evidence” as there was no one left to gather evidence or to conduct examinations and all business operations were terminated.<sup>110</sup> TAILTWIST had ceased to be an operating business and the only activities carried out were in connection with the liquidation.<sup>111</sup> No after-sales servicing was available.<sup>112</sup> No one was left to whom an *effective* notice could have been sent.<sup>113</sup>

In such a situation, RESPONDENT cannot be required to comply with the notice requirement. It has to be kept in mind that Art. 39 (1) CISG is applied in a situation where *the seller and not the buyer* has failed to comply with his obligations.<sup>114</sup> Having this in mind, it becomes clear that there is no justification to apply the harsh consequences of Art. 39 in cases where a notice would not have fulfilled any purpose. To apply

---

<sup>104</sup> Memorandum for CLAIMANT, p.26.

<sup>105</sup> According to Staudinger/*Magnus* Art. 39 CISG, para 6; Art. 39 has to be applied with sufficient flexibility.

<sup>106</sup> See Secretariat’s Commentary Art. 37, para. 4.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> See Procedural Order No. 2, para 23.

<sup>110</sup> See Procedural Order No. 2, para. 21; see also Statement of Defense, para. 19.

<sup>111</sup> *Ibid.*

<sup>112</sup> See Procedural Order No. 2 para. 39.

<sup>113</sup> Even if the notice would have been sent to the insolvency administrator, who would have been the only one to whom a notice theoretically could have been sent, the notice would have been without any effect.

<sup>114</sup> See Staudinger/*Mangus* Art. 39 CISG para 2; *Magnus*, IPrax 1993, p. 390, 392.

Art. 39 in such a situation would allow the seller to deprive the buyer of its legitimate rights by abusing a formal legal position. In other words, the notice requirement “may not become an instrument which deprives the buyer of his legitimate rights in the absence of any compelling interests of the seller that would be worth protecting”.<sup>115</sup>

This principle is very well shown by a case<sup>116</sup> decided by a German Court of Appeals in which the business of the seller was closed because of the annual vacation shutdown. Although the notice of defective performance given by the buyer could formally be regarded as being too late, the Court held that the seller could not rely on Art. 39 (1) CISG.<sup>117</sup> It stated that when the seller is unable to react upon a notice anyway, so that a delay in giving notice is not disadvantageous for him, the seller’s reliance on Art. 39 (1) CISG qualifies as an abuse of law and is to be disregarded.<sup>118</sup>

This principle is even more applicable in the present case, where as a consequence of the insolvency proceedings none of the functions of Art. 39 (1) CISG could be fulfilled anymore. There were no interests of TAILTWIST left which could have been protected by a notice. Any ability to react upon a notice was irreversibly lost. Insisting on a notice under such circumstances is a violation of the purpose of Art. 39 (1) CISG and would amount to an abuse of law. Consequently, RESPONDENT was under no duty to give notice of the deficiencies in the performance of the machinery.

CLAIMANT fails to take these circumstances into account when stating that a notice should have been given anyway because “the function of the notification is not only to allow for a remedy but also to allow the other party to weigh its options – which could include doing nothing...”<sup>119</sup>. There was nothing left to weigh for TAILTWIST as it had no other “option” than to do nothing.

## **2. RESPONDENT is in any case excused for not giving notice pursuant to Art. 44 CISG**

In addition, RESPONDENT is in any case excused for not giving notice in accordance with Art. 44 CISG. This provision explicitly allows the buyer to exercise a right of price reduction even when no notice was given.<sup>120</sup> Under the exceptional circumstances caused by the insolvency proceedings, RESPONDENT was justified in assuming that no notice had to be given and must be regarded as having a reasonable excuse in the sense of Art. 44 CISG.

Art. 44 CISG is a provision that has to be seen and interpreted in light of its legislative history.<sup>121</sup> The provision was included in the Convention because it was feared during the drafting process that the consequences of the notice requirement of Art. 39 CISG were too drastic and could lead to unjust

<sup>115</sup> See *Magnus*, IPrax 1993, p. 390, 392; see also *Piltz* § 5, para 49; cf. *Soergel/Lüderitz/Schüßler-Langeheine* Art. 39 CISG, para 2; see also BGH NJW 1982, p. 2730, 2731.

<sup>116</sup> See OLG Karlsruhe RIW 1984, p. 818. Although this case was decided under the ULIS, the reasoning is very well transferable to the present case, as Art. 39 ULIS is nearly identical with Art. 39 CISG.

<sup>117</sup> See OLG Karlsruhe RIW 1984, p. 818, 819.

<sup>118</sup> See OLG Karlsruhe RIW 1984, p. 818, 819.

<sup>119</sup> See Memorandum for CLAIMANT, p. 26.

<sup>120</sup> See *Schlechtriem/Huber* Art. 44, para. 1.

results.<sup>122</sup> Therefore, Art. 44 CISG must be understood as a provision that allows for the application of more individualised considerations than Art. 39 CISG.<sup>123</sup> Consequently, in order to establish whether or not there is a reasonable excuse, it is necessary to appraise the circumstances of the case by reference to notions of fairness.<sup>124</sup> “Excuse” may not be understood in the sense of an “absence of lack of care” as otherwise there would be no scope at all for the application of Art. 44 CISG in practise.<sup>125</sup> That means that even when the buyer’s conduct in itself is not in accordance with the rules, “it is excusable if in the circumstances of the specific case it deserves to be accorded a degree of understanding and leniency”.<sup>126</sup> When assessing the circumstances, particular regard must be given to the interests of each party insofar as they merit protection.<sup>127</sup>

Under the circumstances of the present case, RESPONDENT had reason to believe that it was simply not necessary to notify TAILTWIST. It is by no means unreasonable to conclude that a company being liquidated is in no position to react effectively to a notice of non-conformity. By not notifying TAILTWIST, RESPONDENT did not deprive TAILTWIST of any right that merits protection. It may be that under Art. 39 CISG a notice had to be given anyway, if the Tribunal should understand Art. 39 (1) CISG as an inflexible requirement. This is, however, no reason not to excuse the failure to give notice in accordance with Art. 44 CISG. On the contrary, it would be exactly in line with the purpose and legislative history of Art. 44 CISG to prevent a harsh and imbalanced result, like the one that would occur in the present case without an excuse. There are no interests of TAILTWIST left that merit protection. At the same time, all of RESPONDENT’s legitimate rights would be cut off to the result that it would have to pay full price for defective goods despite the fact that its conduct was perfectly understandable when judged by reference to notions of fairness.

## **II. RESPONDENT is not barred from exercising its right of price reduction as a consequence of not having notified TAILTWIST of the deficiencies in the training**

CLAIMANT cannot submit that RESPONDENT is precluded from exercising the right of price reduction because no notice of the deficiencies was given. Firstly, RESPONDENT contests that there is a duty to notify deficiencies in the training separately under Art. 39 CISG [1]. In case there should have been the obligation to notify TAILTWIST of the deficiencies in Training separately, RESPONDENT submits that it complied with this obligation by notifying TAILTWIST’s employees [2]. Besides, TAILTWIST was aware of the deficiencies in the training and is thus precluded from relying on Art. 39 by virtue of Art. 40 CISG

<sup>121</sup> See *Honnold* Arts. 39, 40, 44, para. 261.

<sup>122</sup> See *Honnold* Arts. 39, 40, 44, para. 261; *Schlechtriem/Huber* Art. 44, para 2.

<sup>123</sup> See *Honnold* Arts. 39, 40, 44, para 261.

<sup>124</sup> See *Schlechtriem/Huber* Art. 44, para 5; *Staudinger/Magnus* Art.44 para 10; *Resch* ÖJZ 1992,479.

<sup>125</sup> See *Herber/Czerwenka* Art. 44 para 2; *Schlechtriem/Huber* Art. 44, para 5.

<sup>126</sup> See *Schlechtriem/Huber* Art. 44, para 5.

<sup>127</sup> See *Schlechtriem/Huber* Art. 44, para. 5; *Achilles* Art. 44 para 3; *Karollus* p. 128.

[3]. In any case, RESPONDENT would be excused for not giving notice in accordance with Art. 44 CISG [4].

### 1. No independent notice requirement for the deficiencies in services

RESPONDENT contests that it was required to notify the training independently, i.e. before the problems concerning the performance of the machinery were ascertained. The CISG only states a notice requirement as far as *goods* are concerned. This is not surprising, as it is not possible to deal with services in the same way as with goods. Article 39 states, for example, that the period for giving notice begins to run when the buyer “ought to have discovered” the lack of conformity. When a buyer “ought to have discovered” a lack of conformity is determined in accordance with Art. 38 CISG. Thus, the period for giving notice starts after the time for examination as provided by Art. 38 has elapsed. This produces serious difficulties when applied to services. How does one examine services? Do they have to be examined while they are still conducted? How can they be examined after their completion? Is there a duty to monitor services constantly?

CLAIMANT simply refers to Art. 3 (2) CISG and states that the CISG is applicable to the whole contract because “the training portion of the contract is only accessory”<sup>128</sup>. However, this does not mean that every provision of the CISG automatically applies to the service part as well.<sup>129</sup> On the contrary, the fact that the training cannot be seen as forming a separate contract, the fact that it is only accessory, indicates that there is no independent obligation to notify a lack of conformity of the training. Only where the deficiencies in the training do lead to deficiencies in the performance of the machinery – which is not necessarily the case – notice must be given. This, however, is not a notice given because of the training, but a notice given because of the deficiencies in performance of the machinery.

### 2. RESPONDENT validly notified TAILTWIST of deficiencies in training

Irrespective of the question whether notice had to be given, RESPONDENT submits that it validly notified the seller by orally notifying the employees of TAILTWIST. There are no specific form requirements under Art. 39 CISG to comply with.<sup>130</sup> Thus, it is irrelevant whether a notice is given by fax, telex, telegram, post or by phone or orally.<sup>131</sup> Furthermore, contrary to CLAIMANT’s allegations<sup>132</sup>, RESPONDENT did neither inform the wrong addressee [a], nor did the notice lack specificity [b].

---

<sup>128</sup> See Memorandum for CLAIMANT, p. 18, fn. 52.

<sup>129</sup> Staudinger/*Magnus* Art. 39 para 29; Schlechtriem/*Ferrari* Art. 39 para 16.

<sup>130</sup> See Schlechtriem/*Schwenzer*, Art. 39, para. 11; Staudinger/*Magnus* Art.39 para 51; Soergel/*Lüderitz/Schüßler-Langeheine* Art. 39 para 10; *Karollus* p.78; *Achilles* Art. 39 para 6; OGH Wien ZfRV 1999,63.

<sup>131</sup> See Schlechtriem/*Schwenzer*, Art. 39, para. 11; Herber/*Czerwenka* Art.39 para 12; Staudinger/*Magnus* Art.39 para 51; Soergel/*Lüderitz/Budzikiewicz* Art.27 para 4.

<sup>132</sup> See Memorandum for CLAIMANT, p. 21.

**(a) RESPONDENT informed the proper addressee**

The notice under Art. 39 (1) CISG must be communicated to the seller or someone directly identifiable with the seller, i.e. someone employed by him.<sup>133</sup> As the training personnel was directly employed by TAILTWIST, it cannot be doubted that RESPONDENT complied with this requirement. It may not be sufficient to inform somebody who is indirectly involved in the execution of the contract, like a driver of the seller or a forwarding agent. The involvement of the training instructors, however, is by no means indirect. They were the expert personnel explicitly directed by the seller to conduct the contractually agreed training.

It was furthermore in compliance with the purpose and the special circumstances of the case to inform the training personnel. As has been stated already, Art. 39 CISG mainly serves to place the seller in a position in which he may remedy the lack of conformity of the goods<sup>134</sup>. The instructors were the only persons who could remedy the deficiencies in the training: they were the ones giving the training and had the expert knowledge regarding the machine. Had RESPONDENT sent notice to TAILTWIST's principal office, the only possible way for TAILTWIST to remedy the lack of conformity in the performance of the training would have been to give notice to the instructors to improve the training. Particularly in light of the fact that the two instructors who had been called back from RESPONDENT's site were already dismissed, it is unlikely that TAILTWIST had any other alternatives. Thus, by directly informing the training personnel RESPONDENT proceeded in the most effective manner possible under the circumstances.

**(b) Notification fulfils specificity requirement under Art. 39 (1) CISG**

CLAIMANT wrongly asserts that the notification did not fulfil the specificity requirement of Art 39 (1) CISG. The requirements for a specification of a lack of conformity should not be exaggerated.<sup>135</sup> In case of complex machinery, for example, the buyer is only required to indicate the symptoms of the deficiency and not its causes<sup>136</sup>. In the present case, it has to be taken into account that a notification of deficiencies in *services* is in question, not of *goods*. Even if one does not accept that for this reason no notice has to be given at all, this fact must still be taken into account. Training is a continuous process. It is impossible to examine it in the same concrete way that goods can be examined. Consequently, it is in general not possible to give notice in the same specific way as with goods. Additionally, the discrepancies in knowledge must be taken into account. The training was meant as a transfer of knowledge from TAILTWIST to RESPONDENT. Due to Taitwist's failure to perform this transfer properly, RESPONDENT was in no position to specify the deficiencies in the training in detail.

---

<sup>133</sup> See *Andersen* p.83; see also *Staudinger/Magnus* Art. 39, para. 53.

<sup>134</sup> See *Herber/Czerwenka*, Art. 39, para. 2; *Schlechtriem/Schwenzer*, Art. 38, para. 4; *Bianca/Bonell/Sono*, Art.39, para. 2.3.

<sup>135</sup> See *Schlechtriem/Schwenzer* Art. 39, para. 6; *Staudinger/Magnus* Art.39, para. 24; *Resch* ÖJZ 1992, 475.

<sup>136</sup> See *BGH ZIP* 2000, 234 (236); *Schlechtriem/Schwenzer*, Art. 39, para. 8; *Witz/Salger/Lorenz/Salger*, Art. 39, para. 8.

A second aspect must be taken into account. Under normal circumstances, the seller is not present at the site of the buyer nor is he able – the CISG dealing with *international* sales - to come to the seller's site without certain expenditures and effort. Thus, the specificity requirement has the function to enable him to comprehend the lack of conformity and to take the appropriate steps without being forced to be present at the site of the buyer.<sup>137</sup> Contrary to this setting, buyer and seller were in a *face to face situation* in the present case. TAILTWIST's experts for the training were already present at RESPONDENT's site. If the complaints were not specific enough, the instructors could have easily asked for more detailed information. In the age of electronic communication, even a seller not present at the buyer's site might be expected to inquire.<sup>138</sup> This is even more so if the experts of the seller are already present at the buyer's site.

### **3. No reliance on Art. 39 (1) CISG because TAILTWIST was aware of the facts to which the non-conformity relates according to Art. 40 CISG**

In addition to the arguments outlined above, TAILTWIST was in any case precluded from relying on Art. 39 CISG as a consequence of Art. 40. According to Art. 40 CISG, a *'failure to give notice as required by Art. 39 is of no consequence, if the seller knew of or could not have been unaware of the facts to which the lack of conformity relates'*<sup>139</sup>. As can be seen from the Secretariat Commentary, the notion behind Art. 40 CISG is that the seller has no reasonable basis for requiring the buyer to notify him of facts he already knew or should have known.<sup>140</sup> It would be unjust and contrary to good faith in international business to force the buyer to comply with the notice requirement in such a situation.<sup>141</sup> It is not necessary that the seller wilfully deceives the buyer.<sup>142</sup> To render Art. 40 applicable, it is sufficient that the seller acted with gross negligence.<sup>143</sup>

TAILTWIST itself caused the deficiencies in training open-eyed and was thus very well aware of them. TAILTWIST must have known that providing only two instructors was in breach of the contract and would not lead to the training asked for by the contract. It had been agreed between TAILTWIST and RESPONDENT that the training would be conducted by four people, each of them staying for a period of three weeks. It had been stated already during the oral discussions prior to the conclusion of the contract that the team should consist of four instructors. It was also mentioned that the price for each instructor would be \$20,000. The price for the training explicitly stipulated in the contract was accordingly \$80,000 (i.e. 4 x \$20,000). It is therefore clear that RESPONDENT and TAILTWIST had contractually agreed on

---

<sup>137</sup> See Schlechtriem/*Schwenzer* Art. 39, para. 6.

<sup>138</sup> See *Honnold* Arts. 39, 40, 44; Schlechtriem/*Schwenzer* Art. 39, para 7.

<sup>139</sup> See Schlechtriem/*Schwenzer* Art. 40 para. 2.

<sup>140</sup> See Secretariat Commentary, Art. 38, p. 425.

<sup>141</sup> See Staudinger/*Magnus* Art. 40 para. 1.

<sup>142</sup> See Schlechtriem/*Schwenzer* Art. 40 para. 2; Staudinger/*Magnus* Art. 40 para 5; Herber/*Czerwenka* Art. 40 para. 2.

<sup>143</sup> See Herber/*Czerwenka* Art. 40 para 2; Schlechtriem para. 5; Staudinger/*Magnus*, Art. 40 para 5; Soergel/*Lüderitz/Schüßler-Langeheine* Art. 40 para. 2.

four instructors, even though the number “four” was not explicitly stated in the contract.<sup>144</sup> It is obvious that this was also clear to TAILTWIST. TAILTWIST had originally sent four instructors in compliance with the contract. It then called two of them back on the day of the opening of the insolvency proceedings. It must have been clear to TAILTWIST that providing only half of the agreed number of instructors would not lead to the training stipulated by the contract. Additionally, TAILTWIST must have been aware of the fact that the remaining two instructors would be distracted by the insolvency proceedings. It is obvious that the prospect of losing a job in the very near future cannot be without influence on the performance of an employee. Thus TAILTWIST either knew or at least should have been aware of the facts to which the non-conformity relates.

#### **4. RESPONDENT is in any case excused under Art. 44 CISG**

In any case, RESPONDENT is excused under Art. 44 CISG and thus still entitled to exercise the remedy of price reduction.<sup>145</sup> RESPONDENT has already shown the exceptional circumstances of the present case in detail. The actual wording of Art. 39 did not require notice for services. Despite that, RESPONDENT did inform TAILTWIST or at least its personnel, even though RESPONDENT was convinced that TAILTWIST had no reasonable basis for requiring RESPONDENT to notify of the facts to which the non-conformity related. If the tribunal should decide that there was a notice requirement with which RESPONDENT failed to comply and on which TAILTWIST can rely, RESPONDENT submits that its behavior is to be regarded as being reasonably excused in accordance with Art. 44. Under such exceptional circumstances as in the present case it is a requirement of fairness not to deprive the buyer of all his legitimate rights but to regard his conduct with the appropriate degree of leniency and understanding.

#### **D. The waiver clause does not preclude RESPONDENT from exercising its right of price reduction**

Nothing in the contract between RESPONDENT and TAILTWIST bars RESPONDENT from exercising the remedy of price reduction in relation to CLAIMANT as assignee. RESPONDENT does not contest that the original contract with TAILTWIST contained a waiver-of-defense clause according to which RESPONDENT agreed not to assert defenses against assignees of TAILTWIST. This clause, however, was subject to an explicit condition: TAILTWIST was bound to remedy any deficiency that might occur in the performance of the contract. Due to the insolvency proceedings, there have been no such attempts. Consequently, there is no effective waiver on which CLAIMANT could rely [I]. In this context, it is irrelevant whether RESPONDENT notified TAILTWIST of the deficiencies. TAILTWIST was in the process of being liquidated and would not have reacted to a notice anyway [II].

---

<sup>144</sup>According to Art. 8 (3) CISG, due consideration also has to be given to circumstances prior to the conclusion of the contract, like negotiations, when interpreting the contract.

<sup>145</sup>For a detailed discussion of the purpose of Art. 44 see above section C. I. 2.

## **I. Defenses not waived as TAILTWIST did not attempt to remedy the deficiencies**

RESPONDENT only agreed to waive its defenses subject to a specific condition which is explicitly mentioned in the clause. According to this provision, RESPONDENT only agrees not to assert against an assignee of TAILTWIST *‘any defense it may have against TAILTWIST arising out of defective performance of this contract, unless TAILTWIST does not in good faith attempt to remedy the deficiency’*.”

This limitation is a crucial element since without such a condition, RESPONDENT would never have agreed to the waiver clause.<sup>146</sup> Originally, RESPONDENT did not wish to have a waiver clause included in the contract at all, since it would make reclamations against defective performance more difficult.<sup>147</sup> An unconditional waiver clause is a serious risk: RESPONDENT could be obliged to pay the full purchase price to a third party even if the machinery turned out to be completely dissatisfying. At the same time, RESPONDENT would have to deal with a seller whose financial interest in the bargain is already satisfied by assigning all the claims arising out of the contract to a third party. Thus, an unconditional waiver-clause could strip the buyer of his most effective weapon to enforce fulfillment of the contract: To withhold payment in case of unsatisfactory performance. To avoid being caught between the assignee claiming payment on the one side and the seller not fulfilling his obligations on the other, RESPONDENT agreed to the waiver clause only under the condition that TAILTWIST would be bound to attempt in good faith to remedy any deficiency that might occur in the performance of the contract. In case TAILTWIST would fail to do so, RESPONDENT should be entitled to assert all his defenses against assignees of TAILTWIST.

This is exactly the situation in the present case. As a consequence of the insolvency proceedings, TAILTWIST was not only unable to attempt in good faith to remedy the deficiencies, TAILTWIST was unable to make any attempts at all. Consequently, the condition under which the waiver clause becomes effective has not been fulfilled. RESPONDENT is therefore not barred from asserting its defenses against third parties like CLAIMANT.

## **II. Irrelevant that no notice was given – TAILTWIST would not have remedied the deficiencies anyway**

CLAIMANT asserts that RESPONDENT never notified TAILTWIST of the deficiencies and that therefore TAILTWIST never attempted to remedy them.<sup>148</sup> CLAIMANT thereby seems to imply that it was due to RESPONDENT’s own behavior that the condition for the waiver-clause to become effective was not fulfilled and that RESPONDENT would thus be precluded from relying on this fact. This position, however, is erroneous concerning all the deficiencies that occurred in the performance of the contract. Neither was the failure to cure the deficiencies in the performance of the machinery caused by a lack of

---

<sup>146</sup> See Statement of Defense, para 18.

<sup>147</sup> See Statement of Defense, para 18.

information [1] nor the failure to cure the deficiencies in the training [2]. RESPONDENT is therefore in no way responsible for TAILTWIST's failure to comply with its obligations. Consequently, CLAIMANT cannot assert that it was due to RESPONDENT's behavior that the condition was not fulfilled and RESPONDENT is not precluded from relying on this fact.

### **1. Failure to cure deficiencies in the performance not caused by lack of information**

CLAIMANT asserts that TAILTWIST did not attempt to remedy the deficiencies in the performance of the machinery because it has not been notified.<sup>149</sup> This, however, is not correct. At the time a notice would have been given, TAILTWIST was no longer in existence and could not have reacted to a notice.<sup>150</sup> The waiver clause does not contain an explicit notice requirement. It may be the case that the waiver clause does require a notice as a logical precondition. Even then, however, the time in which notice has to be given is to be determined in accordance with Arts. 38, 39 CISG. Without an explicit derogation from the CISG, recourse can only be taken to the provisions governing the notice requirement contained in the CISG. The contract did not contain "special provisions other than what is to be found in the CISG" as to the obligations of a party in case a problem of performance arose.<sup>151</sup> Therefore, Arts. 38 and 39 CISG apply. As has been shown in detail above<sup>152</sup>, no notice had to be given before the end of July according to these provisions. No different result can be reached in the context of the waiver clause. It is therefore clear that even if RESPONDENT would have given a notice, there would have been no attempts to cure by TAILTWIST.

### **2. Failure to cure deficiencies in the training not caused by lack of information**

Similarly, CLAIMANT cannot assert that the failure to remedy the deficiencies in the training was due to the absence of notice. Firstly, RESPONDENT has shown that CLAIMANT was effectively notified.<sup>153</sup> Secondly, as has been shown, TAILTWIST itself caused the deficiencies in the training open eyed.<sup>154</sup> For that reason, Tailwist is precluded from relying on the failure to give notice under Art. 39.<sup>155</sup> No other result can be reached in the context of the waiver clause. CLAIMANT cannot assert that RESPONDENT should be precluded from relying on the fact that TAILTWIST did not attempt to remedy the deficiencies just because RESPONDENT did not notify TAILTWIST of deficiencies this company could not have been unaware of anyway.

---

<sup>148</sup> See Statement of Defense, p. 18.

<sup>149</sup> See Memorandum for CLAIMANT, p. 18.

<sup>150</sup> See C I 1.

<sup>151</sup> See Procedural Order No. 2 para. 38.

<sup>152</sup> See section C I 2.

<sup>153</sup> See section C II 2.

<sup>154</sup> See section C II 3.

<sup>155</sup> Ibid.

**FOURTH ISSUE: COSTS**

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