



TC Beirne School of Law
The University of Queensland

**Ninth Annual Willem C. Vis International Commercial Arbitration Moot
2001-2002
Juridicum, University of Vienna
Vindobona, Danubia**

MEMORANDUM FOR THE CLAIMANT

On Behalf Of:

Futura Investment Bank
395 Industrial Place
Capitol City
Mediterraneo

CLAIMANT

Against:

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

RESPONDENT

Sabine Erkens
Ryan Allan Goss
Andrew Edward Hodge
Marion Alice Jane Isobel
Benjamin John Jackson
Siobhan Maree McKeering
Elena Christine Zaccaria

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LIST OF ABBREVIATIONS

§	Section
A.	Atlantic Reporter
A.2d	Atlantic Reporter, Second Series
AAA Rules	American Arbitration Association International Arbitration Rules, 1993
ABGB	Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code)
A.D. 2d	New York Supreme Court Appellate Division Reports, Second Series
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BLR	Business Law Reports
BOBBINS	West Equatoriana Bobbins S.A.
Cal.	California
CISG	The United Nations Convention on Contracts for the International Sale of Goods 1980
Ch.	High Court of Justice (Chancery Division) (England)
1 st Cir.	United States Court of Appeal First Circuit
2d Cir.	United States Court of Appeal Second Circuit
8 th Cir.	United States Court of Appeal Eighth Circuit
9 th Cir.	United States Court of Appeal Ninth Circuit
Co.	Company
Corp.	Corporation
N.Y.Ct.App.	New York Court of Appeal
D.L.R.(4 th)	Dominion Law Reports, Fourth Series
D.N.Y.	United States District Court, Southern District of New York
D.Colo	United States District Court, District of Colorado
D.Del	United States District Court, District of Delaware
ed.	Editor
eds.	Editors
E.D.Pa	United States District Court, Eastern District of Pennsylvania
F.2d	Federal Reporter, Second Series
F.3d	Federal Reporter, Third Series
F. Supp.	Federal Supplement
Fla.Dist.Ct.App. 1 st Dist.	Court of Appeal of Florida, First District
H.C.J.	High Court of Justice
HG	Handelsgericht

Inc.	Incorporated
ICC	International Chamber of Commerce
ICC Rules	Rules of Arbitration of the International Chamber of Commerce 1998
ICDR	International Center for Dispute Resolution
I.C.S.I.D.	International Center for the Settlement of Investment Disputes
INVESTMENT	Futura Investment Bank
J.B1	Juristische Blätter
J.D.I.	Journal du droit international
K.B.	High Court of Justice (King's Bench) (England)
LCIA Rules	London Court of International Arbitration Rules 1998
Lloyd's Rep.	Lloyd's Reports
Ltd.	Limited
Minn.	Minnesota
Misc.2d	Miscellaneous Reports (New York), Second Series
Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985
N.H.	New Hampshire
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
NIPR	Nederlands Internationaal Privaatrecht
NJW	Neue Juristische Wochenschrift
No.	Number
Nos.	Numbers
N.Y.	New York Court of Appeal Reports <i>or</i> New York
N.Y.App.Div. 1 st Dep't	Supreme Court of New York, Appellate Division, First Department
N.Y.Ct.App.	New York Court of Appeal
N.Y.Sup.Ct.	New York Supreme Court
OGH	Oberster Gerichtshof (Austria)
Ont.Div.Ct	Ontario Divisional Court
Pa.Super.Ct.	Superior Court of Pennsylvania
Pty	Proprietary
Q.B.	High Court of Justice (Queen's Bench) (England)
Rev.Arb.	Revue de l'arbitrage
R.G.	Revue générale de droit international public
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen (Germany)
RIW	Recht der Internationalen Wirtschaft

S.D.N.Y.	United States District Court, Southern District of New York
S.D.Ohio	United States District Court, Southern District of Ohio
Sez.	Sezione
So.2d	Southern Reporter, Second Series
S.p.A.	Società per azioni
S.r.l.	Società a responsabilità limitata
Sup.Ct. Pa.	Supreme Court of Pennsylvania
TAILTWIST	Tailtwist Corp.
Trib.civ.	Tribunale Civile
U.C.C.Rep.Serv.2d (Callaghan)	Uniform Commercial Code Reporting Service Second Series (Callaghan)
UK	United Kingdom
ULIS	Uniform Law on the International Sale of Goods 1978
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts, 1994
U.S.	United States Supreme Court Reports
U.S.Dist.	United States District Court
U.S.Sup.Ct.	United States Supreme Court
v.	versus
W.N.	Weekly Notes
Y.B.	Yearbook Commercial Arbitration
ZR	Zivilrecht

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STATEMENT OF PURPOSE

The Claimant, Futura Investment Bank (INVESTMENT), has prepared this Memorandum in compliance with the Arbitral Tribunal's Procedural Order No. 1, issued on 6 October 2001.

It is argued that:

- A legally valid arbitration agreement exists between INVESTMENT and the Respondent, West Equatoriana Bobbins S.A. (BOBBINS);
- INVESTMENT is entitled to payment of \$2,325,000 from BOBBINS;
- INVESTMENT is entitled to payment of the final installment of \$930,000 from BOBBINS;
- INVESTMENT is entitled to claim interest on the sum of \$3,255,000; and that
- BOBBINS should bear the costs of the arbitration.

In arguing these propositions, INVESTMENT will demonstrate the legal and factual bases for its claim, and will respond to BOBBINS' affirmative defences.

ARGUMENTS

1. THERE IS A VALID ARBITRATION AGREEMENT BETWEEN *INVESTMENT AND BOBBINS*

1.1 THE ARBITRAL TRIBUNAL HAS AUTHORITY TO RULE ON ITS OWN JURISDICTION

This dispute concerns an arbitration clause originally contained in a contract concluded between TAILTWIST and BOBBINS on 1 September 1999.¹ That clause incorporated the American Arbitration Association International Arbitration Rules (AAA Rules).² Article 15(1) AAA Rules states that “The tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.”³ INVESTMENT and BOBBINS recognised the authority of the Arbitral Tribunal to rule on its own jurisdiction in the Notice of Arbitration⁴ and in the Statement of Defense⁵ respectively. Furthermore, the AAA International Center for Dispute Resolution accepted INVESTMENT’s Demand for Arbitration on 5 June 2001.⁶ Therefore, the Arbitral Tribunal has the authority to rule on its own jurisdiction in the dispute between INVESTMENT and BOBBINS.

¹ Claimant’s Exhibit No. 1.

² Claimant’s Exhibit No. 1: The contract states that “Any controversy or claim between [TAILTWIST] and [BOBBINS] arising out of or relating to this contract shall be determined by arbitration by the American Arbitration Association”. Article 1(1) AAA Rules states that “Where parties ... have provided for arbitration of an international dispute by the American Arbitration Association without designating particular rules, the arbitration shall take place in accordance with these rules”. BOBBINS and TAILTWIST, parties to the original arbitration agreement, are from Equatoriana and Oceania respectively, while INVESTMENT is from Mediterraneo. Therefore this dispute is international in nature and the AAA Rules apply.

³ This is an articulation of a principle in international arbitration that provides that an arbitral tribunal is competent to rule on its own jurisdiction. This principle is usually referred to as ‘competence-competence’. It allows the tribunal to make such inquiries as are necessary to resolve the dispute regarding its jurisdiction. See Craig, Park & Paulson, 59; Derains & Schwartz, 99-102. The principle is also embodied in various arbitration rules, for example, ICC Rules 15(1); LCIA Rules 23.1.

⁴ Notice of Arbitration, No. 11.

⁵ Statement of Defense, No. 5.

⁶ See letter of 5 June 2001 from Eleni Lappa, ICDR Supervisor.

1.2 THERE IS A VALID ARBITRATION AGREEMENT BETWEEN *TAILTWIST* AND *BOBBINS*

In order to prove the existence of a valid arbitration agreement between INVESTMENT and BOBBINS, it is first necessary to establish the existence of a valid arbitration agreement between TAILTWIST and BOBBINS. BOBBINS and TAILTWIST included in their contract of 1 September 1999 a clause which stated that “Any controversy or claim between [TAILTWIST] and [BOBBINS] arising out of or relating to this contract shall be determined ... by a panel of three arbitrators with the place of arbitration being Vindobona, Danubia and the language of the arbitration English.”⁷ Danubia, the country of arbitration,⁸ has adopted the UNCITRAL Model Law on International Commercial Arbitration (Model Law),⁹ which applies to all international commercial arbitrations conducted in Danubia.¹⁰ Danubia is also a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).¹¹

According to Article 7(1) Model Law, “An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.” The arbitration agreement between TAILTWIST and BOBBINS appears in the form of a clause in their contract, and thus satisfies Article 7(1) Model Law. Article 7(2) Model Law stipulates that “The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties”.¹² A writing

⁷ Claimant’s Exhibit No. 1.

⁸ Notice of Arbitration, No. 14 and Statement of Defense, No. 2. Further, the letters of 5 June and of 15 June 2001 from Eleni Lappa, ICDR Supervisor, recognised that the arbitration agreement provides for the arbitration to be held in Vindobona, Danubia.

⁹ Notice of Arbitration, No. 18.

¹⁰ This dispute falls within the Model Law’s definitions of “international” (see Article 1(3)(a)), “commercial” (see note to Article 1(1) Model Law) and “arbitration” (see Article 2(a) Model Law). The relevant provisions of the Model Law for the purposes of this dispute are contained in Articles 7 and 19 Model Law. Article 19(1) Model Law states that “*Subject to the provisions of this Law*, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings” [emphasis added]. Article 19(1) Model Law was described by the UNCITRAL Secretariat as “the most important provision of the Model Law”: Model Law Commentary (A/CN.9/264), No. 1. In subjecting the procedure in the arbitral proceedings to the “provisions” of the Model Law, Article 19(1) effectively limits the discretion of the Arbitral Tribunal to determine the conduct of the proceedings. In particular, the discretion of the Arbitral Tribunal is limited by the “mandatory” provisions of the Model Law. “Mandatory [provisions] cannot be derogated from by the contract”: Hill, 491. The mandatory provisions were not enumerated in the Model Law because of “drafting difficulties”: Fourth Secretariat Note (A/CN.9/WG.II/WP.50), No. 9; Holtzmann & Neuhaus, 1119-1120. However, commentators consistently identify Article 7(2) Model Law, which contains the ‘in-writing’ requirement, as a mandatory provision: Redfern & Hunter, 141; Holtzmann & Neuhaus, 260.

¹¹ Notice of Arbitration, No. 19.

¹² The specification that “An agreement is in writing if it is contained in a document signed by the parties” is one of several examples of an agreement “in writing” contained in Article 7(2) Model Law. The full text of Article 7(2) Model Law provides that “The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a

requirement is also contained in Article II(1) and Article II(2) New York Convention. Article II(1) provides that “Each contracting State shall recognize an agreement in writing”. According to Article II(2), “The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties”.¹³ On 1 September 1999 both TAILTWIST and BOBBINS signed the contract containing the arbitration clause.¹⁴ The clause thus constitutes a written arbitration agreement under Article 7(2) Model Law and Article II(1) and Article II(2) New York Convention. BOBBINS has not disputed the existence of this agreement.¹⁵ Therefore, a valid arbitration agreement exists between TAILTWIST and BOBBINS.

1.3 THE ARBITRATION CLAUSE WAS TRANSFERRED FROM *TAILTWIST* TO *INVESTMENT* WITH THE ASSIGNMENT OF THE RIGHT TO RECEIVE PAYMENT

a) The right to receive payment was validly assigned from TAILTWIST to INVESTMENT under the Convention on the Assignment of Receivables in International Trade

The law applicable to the contract of assignment concluded between TAILTWIST and INVESTMENT is the Convention on the Assignment of Receivables in International Trade (Receivables Convention).¹⁶ Under Article 1(1)(a) Receivables Convention, the Convention applies to “Assignments of international receivables and to international assignments of receivables ... if, at the time of conclusion of the contract of assignment, the assignor is located in a Contracting State”.¹⁷

document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.”

¹³ Equatoriana, Oceania, Mediterraneo and Danubia are all party to the New York Convention: Notice of Arbitration, No. 19. Under Article I(1) New York Convention, the writing requirement of Article II(2) of this Convention must be adhered to if the arbitral award is “made in the territory of a State other than the State where the recognition and enforcement of such awards are sought”.

¹⁴ Claimant’s Exhibit No. 1.

¹⁵ Statement of Defense, No. 3.

¹⁶ Note that Procedural Order No. 2, Clarification No. 1 states that “Even though at the time of distribution of the Problem the text [was] in fact a Draft Convention, for the purposes of the Moot the Convention is in force ... at all relevant times.”

¹⁷ This provision has the effect of ensuring both the “broad applicability of the ... Convention, and a sufficient level of certainty and predictability for all interested parties”: Report on Twenty-Sixth Session (A/CN.9/434), No. 20. The territorial scope of the application of the draft Convention has been the subject of detailed discussion in the Working Group: Report on Twenty-Fourth Session (A/CN.9/420), Nos. 30-31; Report on Twenty-Fifth Session (A/CN.9/432), Nos. 29-32; Report on Twenty-Seventh Session (A/CN.9/445), Nos. 131-136. See also Sigman & Smith, 345; Smith, 478; Bazinas (2001), 271. The Working Group considered allowing the application of the draft Convention only when all three

Under Article 2(a) Receivables Convention, “assignment” is defined as “the transfer by agreement from one person (‘assignor’) to another person (‘assignee’) of all or part of an undivided interest in the assignor’s contractual right to payment of a monetary sum (‘receivable’) from a third person (‘the debtor’).” Under Article 3 Receivables Convention, a receivable is “international” if “the assignor and the debtor are located in different States”. An assignment is “international” under Article 3 Receivables Convention if “the assignor and the assignee are located in different States.”

TAILTWIST, the assignor, was located in Oceania, a “Contracting State” under Article 1(1)(a) Receivables Convention.¹⁸ On 29 March 2000 TAILTWIST transferred to INVESTMENT its contractual right to receive payment from BOBBINS of \$3,255,000¹⁹ and hence this transaction fulfils the requirements of an “assignment” under Article 2(a) Receivables Convention. INVESTMENT paid TAILTWIST the sum of \$3,150,000 in exchange for the assignment.²⁰ Under Article 3 Receivables Convention, both the receivable and the assignment are international because at the time of the conclusion of the original contract TAILTWIST, BOBBINS, and INVESTMENT, as the assignor, debtor, and assignee respectively, were all located in different States.²¹ Accordingly, under Article 1(1)(a) Receivables Convention, this Convention is the law applicable to the contract of assignment between TAILTWIST and INVESTMENT.

BOBBINS does not dispute that INVESTMENT is the rightful assignee of the right to receive payment.²² TAILTWIST’s Administrator in Insolvency, Dr Strict, confirmed the assignment on 17

parties had their places of business in Contracting States. However, it was decided that this would “unduly narrow the scope of the draft Convention”: Report on Twenty-Sixth Session (A/CN.9/434), No. 22. Furthermore, the place of business of the debtor should not be a factor in determining the applicability of the Convention. The debtor receives sufficient protection from the Convention, which is not aimed at changing the debtor’s legal position: Report on Twenty-Sixth Session (A/CN.9/434), No. 23. See also Ferrari (2000)(Melbourne Journal), 17.

¹⁸ Notice of Arbitration, No. 17.

¹⁹ Notice of Arbitration, No. 7.

²⁰ Respondent’s Exhibit No. 4.

²¹ Article 5(h) Receivables Convention states that “A person is located in the State in which it has its place of business.” INVESTMENT is located in Mediterraneo (Notice of Arbitration, No. 1); BOBBINS is located in Equatoriana (Notice of Arbitration, No. 2) and TAILTWIST was located in Oceania (Notice of Arbitration, No. 3). Furthermore, Article 1(3) Receivables Convention provides that the Convention does not affect the rights and obligations of the debtor [BOBBINS] unless “the law governing the original contract is the law of a Contracting State.” The law governing the original contract between TAILTWIST and BOBBINS is “the United Nations Convention on Contracts for the International Sale of Goods [CISG] and, in regard to any questions not governed by it, to the law of Oceania” which is a Contracting State: Claimant’s Exhibit No. 1; Notice of Arbitration, No. 17. See also Procedural Order No. 2, Clarification No. 5.

²² Statement of Defense, No. 4, states that BOBBINS “has no reason to contest that [INVESTMENT] is the assignee of the right to payment under the contract between [TAILTWIST] and [BOBBINS]”.

October 2000.²³ Accordingly, the right to receive payment of \$3,255,000 from BOBBINS was validly assigned from TAILTWIST to INVESTMENT.

b) BOBBINS is obliged to arbitrate this dispute with INVESTMENT for legal reasons

(i) The arbitration clause was automatically transferred to INVESTMENT

Where a contractual right to receive payment has been validly assigned to a third party, other rights deriving from the original contract are automatically transferred with the assigned right.²⁴ This rule is commonly referred to as the ‘automatic transfer rule’.²⁵ Specifically, an arbitration clause is automatically transferred with a validly assigned contractual right to receive payment because arbitration clauses would be rendered ineffective and irrelevant “if either party [to a contract] ... could escape the effect of such a clause by assigning a claim subject to arbitration between the original parties to a third party.”²⁶

There are several reasons that support the application of the automatic transfer rule to arbitration clauses. First, an arbitration clause can be classed either as an accessory right or as analogous to an accessory right, and because of this, the clause is automatically transferred with an assigned claim.²⁷ This reasoning has been employed by, for example, courts in Germany,²⁸ Austria,²⁹ Switzerland³⁰ and France.³¹ Second, courts in the United States³² and the United Kingdom³³ have determined that an

²³ Respondent’s Exhibit No. 4.

²⁴ Girsberger & Hausmaninger, 122-123.

²⁵ Girsberger & Hausmaninger, 122-123.

²⁶ *Hosiery Manufacturing Corp. v. Goldston* 238 N.Y. 22 (N.Y.Ct.App. 1924), 28. See also *GMAC Commercial Credit LLC v. Springs Industries, Inc.* 44 U.C.C. Rep. Serv. 2d (Callaghan) 903 (S.D.N.Y. 2001).

²⁷ This position is supported by Article 10(1) Receivables Convention, which states that “A personal or property right securing payment of the assigned receivable is transferred to the assignee without a new act of transfer.”

²⁸ The German Federal Supreme Court has drawn an analogy between an arbitration clause and a security interest (under §401 Bürgerliches Gesetzbuch [BGB]) and has held that an arbitration clause is an attribute of the right to receive payment (‘claim’). As such, the arbitration clause is assigned automatically with the claim: Bundesgerichtshof: III ZR 2/96 of 2 October 1997, Bundesgerichtshof: III ZR 18/77 of 28 May 1979, NJW 1979, 1166; Bundesgerichtshof: III ZR 103/73 of 18 December 1975; Reichsgericht: VII ZR 321/09 of 8 December 1903.

²⁹ Austrian law characterises an arbitration clause as an accessory right which is attached to the claim and is automatically transferred with the assignment of the claim: §1394 Allgemeines Bürgerliches Gesetzbuch [ABGB] provides that “the assignee’s rights are identical to the assignor’s rights with respect to the assigned claim” [Translated from German by the authors of this Memorandum]. See Girsberger & Hausmaninger, 127.

³⁰ Article 170(1) Schweizerisches Obligationenrecht (Switzerland) states that “The assignment of a claim includes the transfer of the privileges and accessory rights” [Translated from German by the authors of this Memorandum].

³¹ Article 1692 Code Civil (France) states that “The sale of assignment of a claim includes all accessories attaching thereto” [Translated from French by the authors of this Memorandum]. Traditionally, French courts have approved the

arbitration clause will be transferred automatically because otherwise the assignment of a contractual right would change the fundamental nature of that right, given that it would be subject to a different dispute resolution mechanism to that agreed upon in the original contract. Finally, arbitral tribunals have held that, as a matter of common sense, an arbitration clause travels with an assignment of a contractual right.³⁴

There are several exceptions to the automatic transfer rule. The rule does not apply if the contractual provision containing the right subject to transfer stipulates that it does not bind an assignee.³⁵ Nor does the rule operate if the right requires “some performance ... of the assignor personally which cannot be rendered by an agent or assignee”.³⁶ Finally, the right subject to transfer is not automatically transferred if the assignee gives notice to the debtor that the assignee does not intend to be bound by

automatic transfer rule. See *Société C.C.C. Filmkunst GmbH c/ Société Etablissement de Diffusion Internationale de Films* in 1988 Rev. Arb. 565, 568; *Société Clark International Finance c/ Société Sud Matériel Service et Autre* in Rev. Arb. 570, 571. In *Fraser v. Compagnie européenne des Pétroles*, Cour de Cassation Première Section Civile of 6 November 1990, it was decided that an arbitration clause does not travel with the assignment of contractual rights unless the assignee has expressly or implicitly agreed to be bound by that clause. This principle was endorsed in *SMABTP v. Statinor*, Cour d’Appel de Paris of 22 March 1995. At the time of the assignment from TAILTWIST, INVESTMENT knew of the terms of the contract between BOBBINS and TAILTWIST: Procedural Order No. 2, Clarification No. 20. INVESTMENT therefore implicitly agreed to be bound by the arbitration clause.

³² *GMAC Commercial Credit LLC v. Springs Industries, Inc.* 44 U.C.C. Rep. Serv. 2d (Callaghan) 903 (S.D.N.Y. 2001), 16: “an assignment cannot alter a contract’s bargained-for remedial measures, for then the assignment would change the very nature of the rights assigned”; *Cone Constructors Inc. v. Drummond Community Bank* 754 So. 2d 779 (Fla. Dist. Ct. App. 1st Dist. 2000), 780; *Banque de Paris et des Pays-Bas v. Amoco Oil Company* 573 F. Supp. 1464 (S.D.N.Y. 1983), 1469; *Robert Lamb Hart Planners and Architects v Evergreen Ltd.* 787 F. Supp. 753 (S.D. Ohio 1992). See also Coe, 138.

³³ *Montedipe S.p.A. and Another v. JTP-RO Jugotanker (‘The Jordan Nicolov’)* [1990] 2 Lloyd’s Rep. 11, 15-16 states that the assignee should have “the benefit of the arbitration clause as well as other provisions in the contract”. United Kingdom law provides that a benefit to be obtained under a contract is assignable and that an arbitration clause will be automatically assigned with the assignment of such a benefit. See Section 8 *Contracts (Rights of Third Parties) Act 1999*; *Schiffahrtsgesellschaft Detlef von Appen GmbH v. Wiener Allianz Versicherungs-AG and Voest Alpine Intertrading GmbH* [1997] 2 Lloyd’s Rep. 279, 285-286; *Shayler v. Woolf* [1946] 1 Ch. 320; *Aspell v. Seymour* [1929] W.N. 152.

³⁴ ICC Arbitration Case No. 3281 of 1981; ICC Arbitration Case No. 1704 of 1977; ICC Arbitration Case No. 2626 of 1977. It should be noted at this point that the doctrine of separability does not affect the transfer of the arbitration clause. The doctrine aims to protect and preserve the agreement to arbitrate and to encourage the use of arbitration, thus using it to preclude the transfer would be contrary to these intentions: Weinacht, 9-10; *A.I. Trade Finance Inc. v. Bulgarian Foreign Trade Bank Ltd.*, Stockholm Chamber of Commerce, Arbitration Award of 5 March 1997; *Hosiery Manufacturing Corp. v. Goldston* 238 N.Y. 22 (N.Y. Ct. App. 1924).

³⁵ ICC Arbitration Case No. 3281 of 1981. See also Reichsgericht: VII ZR 321/08 of 8 December 1903.

³⁶ *Canister Co. v. National Can Corporation* 71 F. Supp. 45 (D. Del. 1947), 49. BOBBINS must establish that when it entered into the contract, TAILTWIST’s identity was a fundamental consideration. Generally, BOBBINS must demonstrate that it viewed TAILTWIST “as possessing the good faith and procedural loyalty necessary for an arbitration to run smoothly and that the assignee [INVESTMENT] may not share those qualities”: Gaillard & Savage, 434. There will not be an arbitration clause ‘intuitu personae’ where there was no particular skill required from the assignor, and where performance of the contract was not based on any relationship of personal confidence between the contracting parties: *Application of Reconstruction Finance Corp. In re Harrisons & Crosfield, Ltd.* 106 F. Supp. 358 (D.N.Y. 1952), 360. See also Kelso, 89. In *Maritime Co. Spetsai’ S.A. v. International Commodities Export Corporation* 348 F. Supp. 258 (S.D.N.Y. 1972), 259, the court stated that “it is relatively clear today that an agreement to arbitrate such as the one now before this Court is not an unassignable, personal contract”.

that clause.³⁷ In the present case, the arbitration clause concluded between TAILTWIST and BOBBINS and contained in their contract of 1 September 1999 does not stipulate that it will not bind TAILTWIST's assignees. Further, the arbitration clause does not require some personal performance by TAILTWIST, especially given that "the prevailing rule today is ... that [arbitration agreements] are entered into because of non-personal reasons, such as expediency, cost-efficiency and other perceived advantages of the arbitration process."³⁸ Finally, INVESTMENT has not notified BOBBINS that it intends not to be bound by the arbitration clause.³⁹ Therefore, in this case, there is no applicable limitation to the operation of the automatic transfer rule and, accordingly, the arbitration clause in the contract of 1 September 1999 was automatically transferred from TAILTWIST to INVESTMENT together with the assignment of the right to receive payment.

(ii) The transfer of the arbitration clause to INVESTMENT does not affect its validity

The arbitration clause remains valid even though INVESTMENT is not a party to the original contract of 1 September 1999. Indeed, once the arbitration clause satisfies the in-writing requirement of Article 7(2) Model Law, the clause's validity is not compromised by its transfer to a third party to whom the right of payment has been assigned.⁴⁰ At law, an arbitration clause signifies a party's consent to arbitrate a dispute, rather than to arbitrate with a specific party.⁴¹ In the present case, both INVESTMENT and BOBBINS have consented to arbitration of "any controversy or claim ... arising

³⁷ The assignee may solicit the debtor's consent to take the claims free from the arbitration requirement: *GMAC Commercial Credit LLC v. Springs Industries, Inc.* 44 U.C.C. Rep. Serv. 2d (Callaghan) 903 (S.D.N.Y. 2001), 10. Alternately, the assignee may be released from the requirement if it can show that it has given "proper notice of the limited nature of its involvement, or by obtaining a separate and legally sufficient agreement with the account debtor that the debtor will pay without asserting offsets or counterclaims": *Banque de Paris et des Pays-Bas v. Amoco Oil Company* 573 F. Supp. 1464 (S.D.N.Y. 1983), 1466.

³⁸ *Girsberger & Hausmaninger*, 141. See also *American Manufacturing & Trading, Inc. v. Democratic Republic of the Congo*, ICSID Arbitration Case ARB/93/1, in 22 Y.B. 60; *Asian Agricultural Products Ltd. v. Democratic Socialist Republic of Sri Lanka*, ICSID Arbitration Case ARB/87/3, in 17 Y.B. 106; *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Arbitration Case ARB/84/3, in 19 Y.B. 51; *Maritime Co. 'Spetsai' S.A. v. International Commodities Export Corporation* 348 F. Supp. 258 (S.D.N.Y. 1972), 259; *Cottage Club Estates v. Woodside Estates Co.* (1928) 2 K.B. 463; *In the Matter of Lowenthal* 233 N.Y. 621 (N.Y.Ct.App. 1922). See also Weinacht, 12.

³⁹ In fact, INVESTMENT has given notice that it seeks to rely on the clause. Notice of Arbitration, No. 12.

⁴⁰ *Fisser v. International Bank* 282 F.2d. 231 (2d Cir. N.Y. 1960), 233; Bundesgerichtshof: III ZR 2/96 of 2 October 1997. This is because an assignee is sufficiently warned in relation to the transfer of an arbitration agreement. The assignee is able to inquire about the existence of an arbitration clause before entering into the contract of assignment: *Girsberger & Hausmaninger*, 143.

⁴¹ The key is that the party is in fact a party to the arbitration agreement, even though there is no agreement to arbitrate *with each other*. "A natural person or a company who did *not* sign an arbitration agreement may ... be precluded from alleging that they are not parties to such an agreement; they may hence be bound and entitled to appear either as defendants or as claimants in the ensuing arbitration proceedings": Sandrock in *Dominicé, Patry and Reymond*, 635.

out of or relating to [the original] contract” concluded between TAILTWIST and BOBBINS.⁴² BOBBINS consented to arbitrate “any controversy or claim” by incorporating an arbitration clause in the contract of 1 September 1999.⁴³ INVESTMENT also indicated its willingness to arbitrate by referring the dispute to the AAA’s International Center for Dispute Resolution.⁴⁴

In addition, the automatic transfer of the arbitration clause does not contravene the principle of debtor protection found in Article 15(1) Receivables Convention, which states that “an assignment does not, without the consent of the debtor, affect the rights and obligations of the debtor”.⁴⁵ The automatic transfer of the arbitration clause means that INVESTMENT now stands in TAILTWIST’s position and assumes TAILTWIST’s right to arbitration.⁴⁶ However, the fact that INVESTMENT seeks to exercise its right to arbitration does not alter BOBBINS’ legal position. The dispute between INVESTMENT and BOBBINS relates to the same goods, the same prices and the same obligations that were governed by the contract between TAILTWIST and BOBBINS. Therefore, BOBBINS has not been disadvantaged by the fact that the claim is made by INVESTMENT rather than TAILTWIST.⁴⁷

c) BOBBINS is also obliged to arbitrate this dispute with INVESTMENT for policy reasons

There is a strong presumption in favour of arbitration in the field of international commerce.⁴⁸ As a matter of policy, it is strongly desirable that “having made the bargain to arbitrate,”⁴⁹ BOBBINS

⁴² Claimant’s Exhibit No. 1.

⁴³ Claimant’s Exhibit No. 1.

⁴⁴ Letter sent from Joseph Langweiler (INVESTMENT’s Lawyer) to ICDR on 5 June 2001.

⁴⁵ While under Article 1(3) Receivables Convention, the Convention may apply generally to the rights and obligations of the debtor (see Note 21 above), this provision is subject to the principle of debtor protection, which is articulated in the more specific provisions of Article 15(1) Receivables Convention. Under Article 15(1) Receivables Convention, the debtor’s rights and obligations may only be affected with “the consent of the debtor”. See also Procedural Order No. 2, Clarification No. 5.

⁴⁶ *Technetronics Inc. v. Leybold-Gaeus GmbH, Leybold AG and Leybold Technologies, Inc* 1993 US Dist LEXIS 7683 (E.D.Pa. 1993). See also *Boart Sweden AB v. NYA Stromnes AB* (1988) 41 B.L.R. 295 (Ont. (H.C.J.)); *Rumpu (Panama) SA and Belzetta Shipping Co. SA v. Islamic Republic of Iran Shipping Lines (‘The Leage’)* [1984] 2 Lloyd’s Rep. 259; *Fisser v. International Bank* 282 F.2d 231 (2d Cir. N.Y. 1960); *Walker v. Mason* 116 A. 305 (Pa.Super.Ct.1922).

⁴⁷ BOBBINS retains the defences and counterclaims it would have had, prior to the assignment, against TAILTWIST pursuant to the contract of 1 September 1999, as well as any it may have against INVESTMENT separately. An analogous situation was discussed in *Smith v. Cumberland and Mass Construction Group* 687 A.2d. 1167 (Pa.Super.Ct. 1997).

⁴⁸ *Smith v. Cumberland and Mass Construction Group* 687 A.2d. 1167 (Pa.Super.Ct. 1997); *ABN AMRO Bank Canada v. Krupp Mak Maschinenbau GmbH* 135 D.L.R. (4th) 130 at 135-136 (Ont.Div.Ct. 1996); *Filanto S.p.A. v. Chilewich International Corp.* 789 F. Supp. 1229 (S.D.N.Y. 1992); *Teledyne Inc. v. Kone Corp.* 892 F.2d 1404 (9th Cir. Cal. 1989), 1410; *First City Capital Ltd. v. Petrosar Ltd.* 42 D.L.R. (4th) 738 (H.C.J. 1987); *Westland Helicopters Ltd. (U.K.) v. Arab Organisation for Industrialisation, United Arab Emirates, Kingdom of Saudi Arabia, State of Qatar, Arab Republic of Egypt and Arab British Helicopter Co. (Egypt)* Chamber of National and International Arbitration of Milan of 2 February

should be held to this commitment. BOBBINS agreed to a clause that compelled it to refer to arbitration “any controversy or claim between [TAILTWIST] and [BOBBINS] arising out of or relating to this contract”.⁵⁰ BOBBINS claims that because it would never have entered into an arbitration agreement with INVESTMENT, BOBBINS should not be bound to arbitrate this dispute with INVESTMENT.⁵¹ However, before signing the contract with TAILTWIST, BOBBINS was aware of the possibility that TAILTWIST might assign the right to payment and that the arbitration agreement could thus be transferred.⁵² Furthermore, as a business engaged in the textile trade in Equatoriana,⁵³ BOBBINS should have been particularly aware of this possibility because arbitration is frequently used as a dispute resolution mechanism in the textile trade,⁵⁴ and because assignment of trade credit is commonly used as a form of business financing in Equatoriana.⁵⁵ Anticipating the assignment and the subsequent transferral of the arbitration clause, BOBBINS could have chosen to

1986, in (1986) 11 Y.B. 127, 133; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (U.S.Sup.Ct. 1985), 631; *Scherk v. Alberto Culver Co.* 47 U.S. 506 (U.S.Sup.Ct. 1974); *Borough of Ambridge Water Authority v. Columbia* 328 A.2d 498 (Sup.Ct.Pa. 1973), 501; *Bremen v. Zapata Off-Shore Co.* 407 U.S. 1 (U.S.Sup.Ct. 1972). See also Bortolotti, 233.

⁴⁹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (U.S.Sup.Ct. 1985), 626.

⁵⁰ Claimant’s Exhibit No. 1.

⁵¹ Letter sent from Smart & Smart, lawyers for BOBBINS, to ICDR on 13 June 2001: “my client [BOBBINS] ... has never entered into any arbitration agreement with the claimant [INVESTMENT]. Furthermore, I can assure you that my client would not enter into an arbitration agreement with it [INVESTMENT].”

⁵² Statement of Defense, No. 18: “During the negotiation of the contract [TAILTWIST] ... anticipated that it might wish to assign the right to receive the payment from [BOBBINS]”. This was recognised in the signed contract between TAILTWIST and BOBBINS, which included a provision covering the situation: “If [TAILTWIST] should assign the right to the payments due from [BOBBINS]”: Claimant’s Exhibit No. 1.

⁵³ Notice of Arbitration, No. 2.

⁵⁴ Procedural Order No. 2, Clarification No. 47. BOBBINS is involved in the textile trade: Notice of Arbitration, No. 2. In *Helen Whiting Inc. v. Trojan Textile Corp.* 307 N.Y. 360 (N.Y.Ct.App. 1954), 367, the Court stated that “we can almost take judicial notice that arbitration clauses are commonly used in the textile industry”. This has been affirmed in subsequent cases. The Court in *Pervel Industries Inc. v. T.M. Wallcovering Inc.* 871 F.2d 7 (2d Cir. N.Y. 1989), 8, noted that the specialised nature of the products of the textile industry has led to the widespread use of arbitration clauses. Similarly, in *Genesco Inc. v. T. Kakiuchi & Co.* 815 F.2d 840 (2d Cir. N.Y. 1987), 846: “The widespread use of arbitration clauses in the textile industry puts a contracting party ... on notice that its agreement probably contains such a clause”; *Avdon Eng’g v. Seatex* 112 F. Supp. 2d 1090 (D. Colo. 2000), 1096; *Commercial Credit LLC v. Springs Industries Inc.* 2001 U.S. Dist. LEXIS 5152 (S.D.N.Y. 2001), 27-28; *Chelsea Square Textiles Inc., Kenneth Lazar, Lester Gribetz v. Bombay Dyeing and Manufacturing Co. Ltd.* 189 F.3d 289 (2d Cir. 1999), 296-297; *Leadertex v. Morganton Dyeing & Finishing Corp.* 67 F.3d 20 (2d Cir. 1995), 25: “arbitration is a widespread practice in the textile industry”; *Imptex International Corp v. Lorprint Inc.* 625 F. Supp. 1572 (S.D.N.Y. 1986), 1572; *Avila Group Inc. v. Norma J. of California* 426 F. Supp. 537 (S.D.N.Y. 1977), 541 n. 10; *Gaynor-Stafford Industries Inc. v. Mafco Textured Fibres, a Division of MacAndrews & Forbes Company* 52 A.D.2d 481 (N.Y.App.Div.1st Dep’t 1976), 485: “arbitration is common in the textile industry”; *N&D Fashions Inc. v. DHJ Industries Inc.* 548 F.2d 722 (8th Cir. Minn. 1976), 726 n. 7; *C.M.I. Clothesmakers Inc. v. A.S.K. Knits Inc.* 85 Misc. 2d 462 (N.Y.Sup.Ct. 1975), 464-465; *Loudon Mfg. Inc. v. American and Efirid Mills Inc.* 46 A.D.2d 637 (N.Y.App.Div.1st Dep’t 1974), 638; *Tanbro Fabrics Corp. v. Deering Milliken Inc.*, 35 A.D.2d 469 (N.Y.App.Div.1st Dep’t 1971), 473 (dissent); *Trafalgar Square Ltd. v. Reeves Bros Inc.* A.D.2d 194 (N.Y.App.Div.1st Dep’t 1970), 196; *Wachusett Spinning Mills Inc. v. Blue Bird Silk Manufacturing Co. Inc.* 12 Misc. 2d 938 (N.Y.Sup.Ct. 1958), 945.

⁵⁵ Indeed, “on many occasions ... creditors of BOBBINS had assigned to someone else the right to receive payment from BOBBINS. Moreover, BOBBINS had also on occasion financed its current operations by assigning its receivables to a financing company”: Procedural Order No. 2, Clarification No. 14.

restrict the application of the clause in the original contract by expressly providing that the clause would not apply to an assignee.⁵⁶ However, the wording of the clause is particularly wide.⁵⁷ BOBBINS chose not to restrict the clause; BOBBINS chose to arbitrate.

In conclusion, the assignment from TAILTWIST to INVESTMENT of the right to receive payment automatically transferred the right to arbitration from TAILTWIST to INVESTMENT. As a result, a valid arbitration agreement now exists between INVESTMENT and BOBBINS. There are no applicable legal or policy reasons that should exempt BOBBINS from its obligation to arbitrate. BOBBINS must therefore arbitrate this dispute with INVESTMENT.

2. INVESTMENT IS ENTITLED TO PAYMENT OF \$2,325,000 FROM BOBBINS

2.1 THE RECEIVABLES CONVENTION IS THE LAW APPLICABLE TO THE NOTICE OF ASSIGNMENT

Article 29 Receivables Convention states that “The law governing the original contract determines ... the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor’s obligations have been discharged.” Article 5(a) Receivables Convention defines the “original contract” as “the contract between the assignor and the debtor from which the assigned receivable arises”. The law governing the original contract of 1 September 1999 is the United Nations Convention on Contracts for the International Sale of Goods (CISG) because TAILTWIST and BOBBINS had their places of business in Oceania and Equatoriana respectively, both of which are ‘Contracting States’ within the meaning of Article 1(1)(a) CISG.⁵⁸

⁵⁶ See, for example, ICC Arbitration Case No. 2626 of 1977; *United States of America v. Panhandle Eastern Corp.* 672 F. Supp. 149 (D.Del.1987).

⁵⁷ The wording of the clause is “any controversy or claim ... arising out of or relating to this contract”: Claimant’s Exhibit No. 1. This clause has been widely drafted. This is noticeable especially when it is contrasted with, for example, an arbitration agreement applying to all disputes “arising under” the contract: *McCarthy v. Azure* 22 F.3d 351 (1st Cir. N.H. 1994). The phrase “any controversy or claim” has been held in the United States to have a wide meaning: *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* 388 U.S. 395 (U.S. Sup. Ct. 1967). Similarly, in the United Kingdom, the word “claims” has been held to convey a wide meaning: *Woolf v. Collis Remerill Service* [1948] 1 K.B. 11, 18. Furthermore, the phrase “arising out of” conveys a wide meaning: *Ethiopian Oilseeds & Pulses Export Co. v. Rio Del Mar Foods Inc* [1990] 1 Q.B. 86. See also Redfern & Hunter, 160-162.

⁵⁸ Article 1(1)(a) CISG states that “This Convention applies to contracts of sale of goods between parties whose places of business are in different States ... when the States are Contracting States”. Both Oceania and Equatoriana are parties to the CISG (Notice of Arbitration, No. 16) and have incorporated the CISG into domestic law (Procedural Order No. 2, Clarification No. 2). Article 3(2) CISG states that the CISG “does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.” This provision does

Additionally, the original contract expressly provided that it was subject to the CISG “and, in regard to any questions not governed by it, to the law of Oceania.”⁵⁹ Thus the CISG and the law of Oceania govern the relationship between the assignee, INVESTMENT, and the debtor, BOBBINS.

For the purposes of determining whether INVESTMENT is entitled to payment of \$2,325,000 from BOBBINS, the central issue is the notification of assignment provided by INVESTMENT to BOBBINS.⁶⁰ However, the CISG does not govern the question of assignment, and therefore the applicable law is the domestic law of Oceania. As Oceania has adopted the Receivables Convention and incorporated it into its domestic law,⁶¹ the Receivables Convention is the law applicable to the relationship between INVESTMENT and BOBBINS with regard to the payment of \$2,325,000.

2.2 THE NOTICE OF ASSIGNMENT SENT BY *INVESTMENT* TO *BOBBINS* WAS VALID

On 29 March 2000 TAILTWIST assigned to INVESTMENT its right to receive payment of the two outstanding installments due from BOBBINS.⁶² On 5 April 2000 INVESTMENT sent BOBBINS a notice of assignment and ordered that the two remaining payments totaling \$3,255,000 be made to INVESTMENT instead of to TAILTWIST.⁶³ BOBBINS received this notice on 10 April 2000.⁶⁴ On the afternoon of 19 April 2000, nine days after receipt of this notice, BOBBINS paid the first outstanding installment of \$2,325,000 to TAILTWIST.⁶⁵

not negate the applicability of the CISG to the contract of 1 September 1999. Services will constitute the “preponderant part of the obligations” under Article 3(2) CISG if they constitute “considerably more than 50% of the price”: Schlechtriem (1986), 31. Honnold, 58-59, considers that services will be a preponderant part of the obligations if they constitute more than 15% of the price. See also ICC Arbitration Case No. 7153 of 1992; Bonell and Ligouri, 1; Ferrari (1995), 11; Gabriel, 18-19; Herber in Schlechtriem (1998), 39. The services in the contract of 1 September 1999 account for \$80,000 out of \$9,300,000 (Claimant’s Exhibit No. 1); this is less than 1% of the contract price and clearly is not the preponderant part of the obligations of TAILTWIST, the party who furnished the goods.

⁵⁹ Claimant’s Exhibit No. 1.

⁶⁰ The issue is expressed in Procedural Order No. 3 as “Whether the notice of assignment ... was effective to obligate [BOBBINS] to pay the \$2,325,000 to [INVESTMENT] rather than to [TAILTWIST].” See also Procedural Order No. 1, No. 4; Notice of Arbitration, Nos. 7 and 8; Statement of Defense, Nos. 7-11.

⁶¹ Notice of Arbitration, No. 17; Procedural Order No. 2, Clarification No. 2.

⁶² Claimant’s Exhibit Nos. 2 & 3; Notice of Arbitration, No. 7.

⁶³ Claimant’s Exhibit No. 2; Notice of Arbitration, No. 7.

⁶⁴ The notice of assignment was received and signed for on 10 April 2000. Statement of Defense, No.7.

a) INVESTMENT had the right to notify BOBBINS of the assignment

The contract of assignment between INVESTMENT and TAILTWIST provided that INVESTMENT would notify BOBBINS of the assignment.⁶⁶ However, BOBBINS claims that it required confirmation from TAILTWIST that the assignment had taken place,⁶⁷ and that because the confirmation did not arrive until 17 October 2000, the notice of assignment was ineffective.⁶⁸ This claim is unfounded due to Article 13(1) Receivables Convention, which states: ‘*Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor notification of the assignment and a payment instruction*’ [emphasis added]. Hence, Article 13(1) Receivables Convention recognises that parties to a contract of assignment can agree as to whom will inform the debtor. In their contract of assignment, INVESTMENT and TAILTWIST validly exercised their right to agree who would inform BOBBINS of the assignment.⁶⁹ Hence INVESTMENT’s right to notify, and to request payment⁷⁰ from, BOBBINS without the cooperation or authorisation of TAILTWIST is protected by Article 13(1) Receivables Convention.⁷¹

If BOBBINS was concerned by the fact that the notice of assignment came from INVESTMENT rather than TAILTWIST,⁷² BOBBINS could have requested proof of the assignment from INVESTMENT under Article 17(7) Receivables Convention, which states that “the debtor is entitled to request the assignee to provide within a reasonable period of time adequate proof that the

⁶⁵ Notice of Arbitration, No. 8; Statement of Defense, No. 9.

⁶⁶ Procedural Order No. 2, Clarification No. 19.

⁶⁷ Mr Black expressed an intention to confirm the assignment with TAILTWIST: Statement of Defense, No. 8.

⁶⁸ TAILTWIST’s Insolvency Administrator, Dr Strict, confirmed the assignment in the letter of 17 October 2000: Respondent’s Exhibit No. 4.

⁶⁹ Procedural Order No. 2, Clarification No. 19.

⁷⁰ Commentary to the draft Receivables Convention Part II (A/CN.9/WG.II/WP.106), No. 18; Bazinas (1998), 339-340; Bazinas (2001), 277; Trager, 636. In order to facilitate receivables financing and avoid an increase in the cost of credit, the Working Group widely considered that a notice of assignment could be sent by either the assignor or the assignee, without affecting the notification’s validity. This principle exists in many legal systems. See Article 1264 *Codice Civile* (Italy); §409 *BGB* (Germany); Article 2036 *Codigo Civil para El Distrito Federal en Materia Comun y para toda La Republica en Materia Federal* (Mexico); Article 1689 *Code Civil* (France). For a comment of these provisions see Torrente & Schlesinger, 40.

⁷¹ An assignee does not have to prove that it has authority from the assignor when notifying the debtor of the assignment. The Working Group decided that forcing the assignee to always provide proof of the assignment would make the assignment process “excessively cumbersome”: Report on Twenty-Sixth Session (A/CN.9/434).

⁷² According to BOBBINS “It was not clear to Mr Black [Vice-President of BOBBINS] what actions should be taken in regard to the purported assignment, especially since the notice had been sent by [INVESTMENT] and not by [TAILTWIST]”: Statement of Defense, No. 8.

assignment ... [has] been made”.⁷³ BOBBINS, however, chose not to take this reasonable and relatively simple step.⁷⁴ BOBBINS requested no such proof from INVESTMENT, nor did it attempt to confirm the assignment.

b) The initial notice of assignment fulfilled the requirements of the Receivables Convention

BOBBINS received INVESTMENT’s initial notice of assignment on 10 April 2000.⁷⁵ BOBBINS claims that because this notice was written in German, none of its personnel could read it, and as a result the notice was “totally deficient”.⁷⁶ However, there is no requirement in the Receivables Convention that the notification must be drafted in the language of the original contract, nor that it must be in a language that the debtor is able to understand.

Article 16(1) Receivables Convention states that “Notification of the assignment or payment instructions is effective ... if it is in a language that is reasonably expected to inform the debtor about its contents.” The reference in Article 16(1) to ‘reasonable’ expectations “is an attempt to introduce an objective standard that must be determined according to the relevant circumstances”.⁷⁷ The essence of this objective standard may be gleaned from Article 5(d) Receivables Convention, which requires that the notice must reasonably identify the assignee and the assigned receivables.⁷⁸ In the circumstances of this case, the notice received by BOBBINS on 10 April 2000⁷⁹ fulfilled the requirements of Articles 16(1) and 5(d) Receivables Convention. Indeed, it identified the assignee by making specific reference to INVESTMENT; it also explicitly referred to TAILTWIST and BOBBINS and to the date on which the contract between TAILTWIST and BOBBINS was concluded. In fact, Mr Black, Vice-President of BOBBINS, acknowledged that the notice contained “the name of [TAILTWIST] and the date 1 September 1999, which is the date of a contract between

⁷³ This Article aims to protect the debtor. A debtor should not be subjected to the risk of receiving a notice of assignment and a payment instruction from a party not known to the debtor. The debtor has a right, not a duty, to request additional information. Commentary to the draft Receivables Convention Part II (A/CN.9/WG.II/WP.106), No. 47.

⁷⁴ Procedural Order No. 2, Clarification No. 25.

⁷⁵ Notice of Arbitration, No. 7; Statement of Defense, No. 7.

⁷⁶ Claimant’s Exhibit No. 4.

⁷⁷ Bazinas (2001), 280.

⁷⁸ Article 5(d) Receivables Convention states that “‘Notification of the assignment’ means a communication in writing that reasonably identifies the assigned receivables and the assignee”. The Working Group noted the close relationship between Article 16(1) Receivables Convention and Article 5(d) Receivables Convention: Report on Twenty-Sixth Session (A/CN.9/434), No. 167. Sigman & Smith, 350.

⁷⁹ Notice of Arbitration, No. 7; Statement of Defense, No. 7

[TAILTWIST] and ourselves.”⁸⁰ Further, the notice identified the receivables by referring to the figure of \$3,255,000.⁸¹ Given that these basic details were apparent to a person who could not understand the German language, then under an objective standard, these details could reasonably be expected to inform the recipient about the content of the notice. Consequently, under Articles 5(d) and 16(1) Receivables Convention, this notice of assignment was effective.

c) Changing the country of payment does not invalidate the notice of assignment nor prevent payment to INVESTMENT

The contract of 1 September 1999 specified that payment was to be made to TAILTWIST’s bank account in Oceania.⁸² The payment instructions sent by INVESTMENT to BOBBINS required payment of the two remaining installments to INVESTMENT to be made in Mediterraneo.⁸³ BOBBINS claims that the change of the country of payment from Oceania to Mediterraneo renders the notice of assignment formally defective under the Receivables Convention.⁸⁴ Article 15(2)(b) Receivables Convention states that “A payment instruction may not change ... the State specified in the original contract in which payment is to be made to a State other than that in which the debtor is located.”

A conceptual distinction must be drawn between the payment instruction and the notice of assignment.⁸⁵ Article 5(d) Receivables Convention makes this distinction by limiting the definition of “notification of the assignment” to “a communication in writing that reasonably identifies the assigned receivables and the assignee”.⁸⁶ In accordance with the fact that the payment instruction and the

⁸⁰ Respondent’s Exhibit No. 1.

⁸¹ The document’s heading also contained the German word ‘Zession’ (Claimant’s Exhibit No. 2). ‘Zession’ bears a strong resemblance to the English word ‘cession’. ‘Cession’ is synonymous with ‘assignment,’ and to equivalent words in several European languages: in French and Spanish, ‘cession’; in Italian, ‘cessione’. These words derive from the Latin root ‘cessio’. The use of ‘Zession,’ therefore, was another aspect of the document that should have alerted Mr Black to the nature of the document.

⁸² Procedural Order No. 2, Clarification No. 12.

⁸³ Claimant’s Exhibit Nos. 2 & 3.

⁸⁴ Statement of Defense, No. 11.

⁸⁵ Proposal by United States of America (A/CN.9/WG.II/WP100), No. 1 states that “a clear distinction should be drawn between the notification of the assignment and payment instructions.”

⁸⁶ Proposal by United States of America (A/CN.9/WG.II/WP100), No. 2 discusses expressly the possibility of defining payment instruction and notice of assignment separately. This demonstrates that the notice of assignment and the payment instruction are independent documents, and that the invalidity of the payment instruction does not invalidate the notice of assignment. See also the Commentary to the draft Receivables Convention Part I (A/CN.9/WG.II/WP.105), No. 55, “a notification containing no payment instruction is effective under the draft Convention.”. See Report on Twenty-Third Session (A/CN.9/486), No. 13: “In response to a question as to the relationship between a notification and a payment

notice of assignment are distinct, the letter sent to BOBBINS on 5 April 2000 refers to the notice of assignment in the first paragraph and the payment instruction in the second.⁸⁷ The document of 5 April 2000 is thus constituted of two parts, each separate and distinct from the other. Therefore, contrary to BOBBINS' claim, a technical deficiency in the payment instruction does not invalidate the notice of assignment.

In any event, policy considerations also suggest that a technical deficiency such as changing the country of payment should not invalidate the notice of assignment.⁸⁸ Under Article 7(1) Receivables Convention, "In interpretation of [the Receivables Convention], regard is to be had to its object and purpose as set forth in the preamble". The Preamble to the Receivables Convention notes that the Convention's aims include reducing technical formalities,⁸⁹ increasing the availability and cost effectiveness of credit in international trade⁹⁰ and facilitating the availability of credit in greater volume and at lower interest rates.⁹¹ It would be contrary to these aims to allow a deficiency in the payment instruction to render a notice of assignment invalid, especially considering that the change of the country of payment was in no way prejudicial to BOBBINS.⁹²

Finally, under the Receivables Convention "a payment instruction may be changed or corrected until the debtor pays."⁹³ In this case, any deficiency in the payment instruction was corrected by INVESTMENT on 5 July 2000 by directing that "You are hereby instructed to make future payments to Oceania Commercial Bank, Port City, Oceania, account of Futura Investment Bank, account

instruction it was noted that ... a notification did not need to contain a payment instruction but a payment instruction could only be given in a notification or subsequent to a notification by the assignee." See also Commentary to the draft Receivables Convention Part I (A/CN.9/WG.II/WP.105), No. 22.

⁸⁷ Claimant's Exhibit Nos. 2 & 3.

⁸⁸ Article 7(1) Receivables Convention states that "In the interpretation of this Convention, regard is to be had to its object and purpose as set forth in the preamble, to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." See Ferrari (2000)(Private Law), 182; Commentary to the draft Receivables Convention Part I (A/CN.9/WG.II/WP.105), Nos. 63-64.

⁸⁹ The Preamble to Receivables Convention states: "*Considering* that problems created by uncertainties as to the content and the choice of legal regime applicable to the assignment of receivables constitute an obstacle to international trade." See also Bazinas (1998), 320; Bazinas (2001), 260-261, 265-266; Schwarz, 455-456; Oditah, 4-10.

⁹⁰ Preamble to Receivables Convention, Paragraph (5). See also Ferrari (2000)(Private Law), 182.

⁹¹ Commentary to the draft Receivables Convention Part I (A/CN.9/WG.II/WP.105), No. 8.

⁹² Procedural Order No. 2, Clarification No. 33.

⁹³ See Bazinas (2001), 281: "In the case of multiple payment instructions given with respect to one and the same assignment involving a correction or other change of the payment instructions, the debtor is discharged if it pays in accordance with the last payment instruction received by the debtor before payment."

number 345678, reference Tailtwist/Bobbins 010999.”⁹⁴ Consequently, there is no remaining impediment to BOBBINS making full and proper payment to INVESTMENT.

2.3 THE NOTICE OF ASSIGNMENT WAS RECEIVED BEFORE PAYMENT WAS MADE BY BOBBINS TO TAILTWIST

BOBBINS received the initial notice of assignment, written in German, from INVESTMENT on 10 April 2000.⁹⁵ Under Article 16(1) Receivables Convention, any notification or payment instruction will become effective when received by the debtor.⁹⁶ As BOBBINS received the initial German notice on 10 April 2000, it became effective nine days before BOBBINS paid TAILTWIST on 19 April 2000. Article 17(2) Receivables Convention provides that “After the debtor receives notification of the assignment ... the debtor is discharged only by paying the assignee”. Thus, in failing to make payment of \$2,325,000 to INVESTMENT, BOBBINS failed to discharge its obligation under this Article.

Furthermore, Mr Black, Vice-President of BOBBINS, received a facsimile of the English translation of the German notice on the morning of 19 April 2000⁹⁷ before any payment was made to TAILTWIST.⁹⁸ It was not until the early afternoon of 19 April 2000 that BOBBINS’ Accounting Department electronically instructed the Equatoriana Commercial Bank to pay \$2,325,000 to TAILTWIST.⁹⁹ Mr Black could have promptly ordered that the payment be stopped. Instead, he relied on BOBBINS’ usual office procedure¹⁰⁰ to instruct the Accounting Department “not to make any payments to [TAILTWIST] until further notice.”¹⁰¹ Mr Black’s instruction was in the form of an internal memorandum that took two and a half hours to arrive at the Accounting Department.¹⁰² However, this situation required more than the application of the usual office procedure. Mr Black had just received the English translation of a notice which implied that payment of \$2,325,000 to TAILTWIST would constitute payment to a company to whom the sum was no longer owed. He was

⁹⁴ Respondent’s Exhibit No. 5.

⁹⁵ Notice of Arbitration No. 7; Statement of Defense, No. 7.

⁹⁶ An analogous principle is articulated in Article 24 CISG.

⁹⁷ Respondent’s Exhibit No. 2; Statement of Defense, No. 7.

⁹⁸ Statement of Defense, Nos. 8 & 9.

⁹⁹ Statement of Defense, No. 9; Procedural Order No. 2, Clarification No. 32.

¹⁰⁰ Procedural Order No. 2, Clarification No. 30.

¹⁰¹ Statement of Defense, No. 8.

¹⁰² “The Memorandum ... took about two and a half hours from the time the Memorandum was signed to the time it was received in the Accounting Department”: Procedural Order No. 2, Clarification No. 30.

also aware that this payment would soon be due¹⁰³ and he had prior notice of a possible assignment.¹⁰⁴ Despite these significant facts, Mr Black chose not to use more rapid means of communication that would have facilitated a prompt halt to the payment, but rather chose to rely merely on the internal office messenger service.¹⁰⁵

In conclusion, INVESTMENT was entitled to send the notice of assignment under Article 13(1) Receivables Convention, and effective notice was received by BOBBINS before it made payment to TAILTWIST. In effecting payment to TAILTWIST, BOBBINS assumed the risk of paying twice. Therefore, BOBBINS has a duty to pay \$2,325,000 to INVESTMENT under Article 17(2) Receivables Convention.

3. INVESTMENT IS ENTITLED TO THE FINAL INSTALLMENT OF \$930,000

3.1 THE CISG IS THE LAW APPLICABLE TO PAYMENT OF THE FINAL INSTALLMENT OF \$930,000

In considering whether INVESTMENT is entitled to payment of \$930,000 from BOBBINS, the central issue is whether BOBBINS is precluded from “asserting [against INVESTMENT] the alleged deficiencies in the training and in the performance of the equipment.”¹⁰⁶ Under Article 29 Receivables Convention, the law governing the original contract applies to the relationship between the assignee and the debtor. The original contract “is governed by the [CISG] and, in regard to any questions not governed by it, by the law of Oceania.”¹⁰⁷ As BOBBINS’ reliance on the alleged deficiencies and its resulting declaration to reduce the contract price are governed by the CISG, the CISG is the law applicable to the relationship between INVESTMENT and BOBBINS with regard to the payment of \$930,000.

¹⁰³ Mr Black stated in the Memorandum to the Accounting Department that “One of [the payments due on the TAILTWIST contract] will soon be due”: Respondent’s Exhibit No. 3. See also Procedural Order No. 2, Clarification No. 31.

¹⁰⁴ The possibility of assignment had been raised in pre-contractual negotiations: Statement of Defense, No. 18.

¹⁰⁵ Procedural Order No. 2, Clarification No. 30.

¹⁰⁶ Procedural Order No. 3. See also Procedural Order No. 1, No. 5; Notice of Arbitration Nos. 9 & 10; Statement of Defense, Nos. 12-16.

¹⁰⁷ Claimant’s Exhibit No. 1.

Under the contract of assignment, INVESTMENT obtained the right to receive the final installment of \$930,000.¹⁰⁸ However, on 10 January 2001 BOBBINS informed the Administrator in Insolvency, Dr Strict, that it had been unable “to operate the equipment in a fully satisfactory manner” and that the problems “may lie in difficulties with the equipment itself or in the inadequate training given to our personnel.”¹⁰⁹ Consequently, BOBBINS declared a \$930,000 reduction of the contract price based on “deficiencies in the performance of the equipment”.¹¹⁰

BOBBINS’ declaration of a price reduction involves the application of several provisions of the CISG. In particular, BOBBINS claims that its asserted price reduction was in accordance with Article 50 CISG,¹¹¹ which states that “If the goods do not conform with the contract ... the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.” In order to rely on a lack of conformity under Article 50 CISG, a buyer must fulfill one of three requirements. First, under Article 39(1) CISG, the buyer must “give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.” Second, under Article 44 CISG, if the buyer does not give such notice, the buyer must have “a reasonable excuse for his failure to give the required notice.” Third, under Article 40 CISG, if the buyer neither gives such notice nor has a reasonable excuse, the buyer must be able to demonstrate that “the lack of conformity relates to facts of which [the seller] knew or could not have been unaware and which he did not disclose to the buyer.” As is argued in Parts 3.2, 3.3 and 3.4 of this Memorandum, BOBBINS has not fulfilled any of these applicable requirements, and thus there is no basis for the assertion of a reduction in price under Article 50 CISG.

In any event, in the contract of 1 September 1999 BOBBINS agreed not to assert any defences against an assignee of TAILTWIST unless TAILTWIST did not in good faith attempt to remedy the deficiency.¹¹² As is argued below, BOBBINS’ failure to fulfil the requirements of Articles 39(1), 40 and 44 CISG meant that TAILTWIST was given no opportunity to remedy the deficiency and thus,

¹⁰⁸ Claimant’s Exhibit Nos. 2 & 3; Respondent’s Exhibit No. 4. The payment of \$930,000 was to be paid by BOBBINS “after three months satisfactory performance” by the “Spin-a-Whizz” equipment: Claimant’s Exhibit No. 1.

¹⁰⁹ Claimant’s Exhibit No. 5.

¹¹⁰ Claimant’s Exhibit No. 5.

¹¹¹ Statement of Defense, No. 16. A price reduction under CISG is separate from an award of damages: Bergsten & Miller, 1; Burnett, 22.

¹¹² Claimant’s Exhibit No. 1.

under the contract of 1 September 1999, there is no basis for BOBBINS' assertion of a price reduction against INVESTMENT.

3.2 BOBBINS FAILED TO NOTIFY TAILTWIST OF THE LACK OF CONFORMITY WITHIN A REASONABLE TIME UNDER ARTICLE 39(1) CISG

Article 39(1) CISG states that the buyer will lose the right to rely on a lack of conformity “if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he discovered it or ought to have discovered it.”¹¹³ BOBBINS identifies the lack of conformity on which it seeks to rely as “deficiencies in the performance of the equipment.”¹¹⁴ BOBBINS identifies two possible causes of the lack of conformity: first, the inadequacy of the training provided by the TAILTWIST personnel or, second, a problem in the equipment itself. BOBBINS further asserts that, while it is not clear which of these two possible causes created the lack of conformity in the performance of the equipment, the result “is the same in either case.”¹¹⁵

a) BOBBINS discovered the lack of conformity in the performance of the equipment as from 10 May 2000

In the event that the inadequate training caused the lack of conformity, an examination of the record discloses that this inadequacy was manifest as from 10 May 2000, when the training period ended.¹¹⁶ Indeed, on 20 April 2000, on the commencement of the insolvency proceedings, two of the four TAILTWIST personnel were recalled from their positions and their employment was terminated immediately.¹¹⁷ The consequence of this was that the two remaining TAILTWIST personnel “would have had a difficult time at best to conduct the training that was called for under the contract for which four persons had been anticipated.”¹¹⁸ BOBBINS further asserts that the two remaining personnel, under the circumstances, “were *obviously* upset and concerned about their own future” [emphasis

¹¹³ Article 35(2)(a) CISG states that a lack of conformity will exist unless goods “are fit for the purpose for which goods of the same description would ordinarily be used”. In this case, Article 35(2)(a) may also be extended to apply to the provision of services under Article 3(2) CISG: See Footnote 58. Procedural Order No. 2, Clarification No. 34 states that, in annexes to the contract, “there were detailed specifications ... as to the performance of the ... equipment.”

¹¹⁴ Claimant’s Exhibit No. 5.

¹¹⁵ Claimant’s Exhibit No. 5.

¹¹⁶ Notice of Arbitration, No. 5.

¹¹⁷ Statement of Defense, No. 14.

¹¹⁸ Statement of Defense, No. 14.

added].¹¹⁹ Additionally, according to BOBBINS, it was apparent that the remaining personnel were unable “to give even the amount and quality of training that they otherwise might have given”¹²⁰ and that BOBBINS’ staff were later forced “to experiment with adjusting the equipment for different raw materials, with constant fear that an incorrect adjustment would result in damage to the product and perhaps to the equipment itself.”¹²¹ In order to make these assertions, BOBBINS must have been aware of the inadequacy of the training at the latest by the end of the training period on 10 May 2000. Hence, as from 10 May 2000, BOBBINS was certainly aware of one of the possible causes of the lack of conformity in the performance of the equipment.

If the lack of conformity was caused by problems with the equipment itself, the record discloses that these problems were also evident as from 10 May 2000. Indeed, BOBBINS asserts that the “equipment has not performed satisfactorily”¹²² and it is established that “full production was *never* achieved” [emphasis added].¹²³ Accordingly, as from 10 May 2000 at the latest, when the training period ended, BOBBINS was aware that the equipment was not working at full capacity and that, therefore, there was a lack of conformity in the performance of the equipment. Thus, to the extent that the inadequacy of the training did not in fact contribute to the lack of conformity in the performance of the equipment, the lack of conformity was necessarily caused by a problem with the equipment itself.

Although it is unclear which of the two possible causes in fact created the lack of conformity in the performance of the equipment, the record thus reveals that the inadequacy of the training and any problem with the equipment itself were both evident as from 10 May 2000. These two possible causes manifested themselves in the lack of conformity in the performance of the equipment, which also became evident as from 10 May 2000. As BOBBINS was aware of the lack of conformity as from 10 May 2000, it is immaterial that BOBBINS did not know “whether the problem lies in the equipment or in the inadequate training.”¹²⁴ Consequently under Article 39(1) CISG, the period during which TAILTWIST must be notified of the lack of conformity in the performance of the equipment began as from 10 May 2000.

¹¹⁹ Statement of Defense, No. 14.

¹²⁰ Statement of Defense, No. 14.

¹²¹ Statement of Defense, No. 15.

¹²² Statement of Defense, No. 15.

¹²³ Procedural Order No. 2, No. 39. See also Statement of Defense, No. 20; Procedural Order No. 2, Clarification No. 42.

¹²⁴ Statement of Defense, No. 20.

b) BOBBINS failed to notify TAILTWIST within a reasonable time

(i) BOBBINS was required to notify TAILTWIST of the lack of conformity within one month after 10 May 2000.

In order to claim a price reduction under Article 50 CISG, BOBBINS was required to give TAILTWIST notice of the lack of conformity in the performance of the equipment within a reasonable time after 10 May 2000. ‘Reasonable time’ under Article 39(1) CISG depends upon the circumstances of each case.¹²⁵ Substantial case authority supports the proposition that a reasonable time for giving notice may not be more than eight days.¹²⁶ While some courts adopt a more generous approach, the longest period generally accepted as a reasonable time for non-perishable goods is one month.¹²⁷ In the circumstances of this case, especially given that the TAILTWIST insolvency proceedings commenced on 20 April 2000,¹²⁸ of which BOBBINS was aware,¹²⁹ it was imperative that TAILTWIST be notified of the deficiencies in the equipment as soon as possible, thereby enabling those deficiencies to be remedied before the complete cessation of TAILTWIST'S business

¹²⁵ Ferrari (1995), 3; Honnold, 281; Magnus in Honsell, 431; Schwenger in Schlechtriem (2000), 415; Sono in Bianca & Bonell, 309; Wautelet in Van Houtte (1997), 177.

¹²⁶ Oberlandesgericht Karlsruhe: 1 U 280/96 of 25 June 1997; *Sport D’Hiver di Genevieve Culet v. Ets. Louyes et Fils* Tribunale Civile di Cuneo: 45/96 of 31 January 1996; Bundesgerichtshof: VIII ZR 159/94 of 8 March 1995; Amtsgericht Kehl: 3 C 925/93 of 6 October 1995; Handelsgericht Zürich: HG 920670 of 26 April 1995; Hungarian Chamber of Commerce and Industry, Court of Arbitration Award: Vb 94131 of 5 December 1995; Oberlandesgericht München: 7 U 3758/94 of 8 February 1995; Amtsgericht Riedlingen: 2 C 395/93 of 21 October 1994; Oberlandesgericht Düsseldorf: 17 U 136/92 of 12 March 1993; Oberlandesgericht Saarbrücken: 1 U 69/92 of 13 January 1993; Oberlandesgericht Düsseldorf: 17 U 82/92 of 8 January 1993; Landgericht Berlin: 99 O 29/93 of 16 September 1992; Landgericht Mönchengladbach: 7 O 80/91 of 22 May 1992; *Fallini Stefano & Co. S.N.C. v. Foodik BV*. Arrondissementsrechtbank Roermond: 900366 of 19 December 1991; Landgericht Bielefeld: 15 O 201/90 of 18 January 1991; Landgericht Aachen: 41 O 198/89 of 3 April 1990.

¹²⁷ Obergericht Kanton Luzern: 11 95 123/357 of 8 January 1997; Amtsgericht Augsburg: 11 C 4004/95 of 29 January 1996; Hungarian Chamber of Commerce and Industry, Court of Arbitration Award: Vb 94131 of 5 December 1995; Amtsgericht Kehl: 3 C 925/93 of 6 October 1995; *M. Caiato Roger v. La Société française de factoring international factor France “S.F.F.” (SA)* Cour d’appel Grenoble: 93/4126 of 13 September 1995; Oberlandesgericht Stuttgart: 5 U 195/94 of 21 August 1995; Handelsgericht Zürich: HG 920670 of 26 April 1995; Landgericht Landshut: 54 O 644/94 of 5 April 1995; Bundesgerichtshof: VIII ZR 159/94 of 8 March 1995; Oberlandesgericht München: 7 U 3758/94 of 8 February 1995; Amtsgericht Augsburg: 11 C 4004/95 of 29 January 1995; *Calzaturificio Moreo Juniro S.r.l. v. S.P.R.L.U. Philmar Diff.* Tribunal Commercial de Bruxelles: R.G. 1.205/93 of 5 October 1994; Oberlandesgericht Innsbruck: 4 R 161/94 of 1 July 1994; Landgericht Düsseldorf: 31 O 231/94 of 23 June 1994; Oberlandesgericht Düsseldorf: 6 U 32/93 of 10 February 1994; Landgericht Köln: 86 O 119/93 of 11 November 1993; *Gruppo IMAR S.p.A. v. Protech Horst*. Arrondissementsrechtbank Roermond: 920159 of 6 May 1993; Oberlandesgericht Saarbrücken: 1 U 69/92 of 13 January 1993; Landgericht Berlin: 99 O 123/92 of 30 September 1992; Landgericht Berlin: 99 O 29/93 of 16 September 1992; *Fallini Stefano & Co. S.N.C. v. Foodik BV*. Arrondissementsrechtbank Roermond: 900366 of 19 December 1991.

¹²⁸ Statement of Defense, No. 19.

¹²⁹ BOBBINS learned of the opening of the insolvency proceedings on 23 April 2000: Procedural Order No. 2, Clarification No. 21.

activities. Thus, in accordance with Article 39(1) CISG, BOBBINS was required to notify TAILTWIST of the lack of conformity as soon as possible as from 10 May 2000, or at the very latest within a period of one calendar month.

(ii) The complaints made to TAILTWIST's personnel did not constitute notice under Article 39(1) CISG

BOBBINS made “various statements” to TAILTWIST's personnel indicating that “the training being given was not sufficient.”¹³⁰ No additional complaints were made.¹³¹ For the “various statements” to constitute notice under Article 39(1) CISG, they must possess two distinct characteristics: first, the notice must be specific; and second, the notice must be in an appropriate form.

First, in order to be sufficiently specific, the notice must describe the lack of conformity in detail and the manner in which the buyer wishes it to be remedied.¹³² Arbitral tribunals and courts have consistently interpreted the requirement of specificity strictly.¹³³ However, in the provision of notice to the seller, “Especially in the case of machines and technical apparatus, the buyer can only be required to give an indication of symptoms, not to indicate their cause”.¹³⁴ Therefore, in the present case, which deals with machines and technical apparatus, BOBBINS need not have provided TAILTWIST with specific details of the *causes* of the lack of conformity in the equipment’s performance, but merely with a specific description of the *consequences* of these causes. As BOBBINS knew the consequences of whatever caused the lack of conformity,¹³⁵ it is irrelevant that

¹³⁰ Procedural Order No. 2, Clarification No. 39.

¹³¹ Procedural Order No. 2, Clarification No. 39.

¹³² Oberlandesgericht Koblenz: 2 U 31/96 of 31 January 1997. See also Magnus in Honsell, 429; Resch, 475; Schwenger in Schlechtriem (2000), 413; Wautelet in Van Houtte (1997), 182-183.

¹³³ The requirement that notice under Article 39(1) CISG must be specific has been strictly interpreted. For example, in Oberlandesgericht München: 7 U 2070/97 of 9 July 1997, it was held that a notice is not sufficiently specific if the deficiencies are not adequately described. In Landgericht München: 10 HKO 23750/94 of 20 March 1995, a complaint stating that “the goods are rancid” was deemed to be insufficiently specific. In addition, in Landgericht München: 17 HKO 3726/89 of 3 July 1989, a complaint about the quality of goods which accused the seller of “poor workmanship and improper fitting” was deemed insufficient. Similarly, in Oberlandesgericht Koblenz: 2 U 31/96 of 31 January 1997, a complaint that “five rolls of acrylic blankets are missing” was not sufficiently specific because it did not indicate the manner in which the buyer wished the seller to cure the deficiency. See also Bundesgerichtshof: VIII ZR 306/95 of 4 December 1996, which stated that “in order to meet the requirements of [Article 39(1) CISG], the [buyer] would have been obligated to describe the defect in such detailed manner that any misunderstandings were impossible and to enable the seller to determine unmistakably what was meant.”

¹³⁴ Schwenger in Schlechtriem (1998), 312; Schwenger in Schlechtriem (2000), 413.

¹³⁵ “The [TAILTWIST] equipment has not performed satisfactorily”: Statement of Defense, No. 15; “full production was never achieved”: Procedural Order No. 2, Clarification No. 39.

BOBBINS may not have known whether the cause was the inadequacy of the training or a problem in the equipment itself.¹³⁶ The record discloses only that the “various statements” made by BOBBINS to TAILTWIST’s personnel stated that the training was “not sufficient.” Such statements do not contain the required description of the lack of conformity in order for them to be considered as notice under Article 39(1) CISG.

Second, notice given under the provisions of the CISG must be in a form appropriate to the circumstances.¹³⁷ Given that in this case the lack of conformity concerned equipment worth \$9,220,000,¹³⁸ and that the lack of conformity resulted in the equipment not attaining full capacity,¹³⁹ any notice should have been communicated directly to TAILTWIST’s management, rather than to two personnel who were not even located at TAILTWIST’s principal office.¹⁴⁰ Consequently, the “various statements” made to the TAILTWIST personnel do not constitute notice under Article 39(1) CISG.

BOBBINS has failed to give notice under Article 39(1) CISG and is thus prevented from relying on a lack of conformity in the performance of the equipment to assert a price reduction under Article 50 CISG.

3.3 BOBBINS HAS NO REASONABLE EXCUSE FOR ITS FAILURE TO GIVE NOTICE OF THE LACK OF CONFORMITY UNDER ARTICLE 44 CISG

Under Article 44 CISG, if a buyer does not give notice under Article 39(1) CISG, the buyer may still rely on Article 50 CISG if “he has a reasonable excuse for his failure to give the required notice.” However, arbitral tribunals and courts have only recognised a reasonable excuse under Article 44 CISG in exceptional circumstances.¹⁴¹ Further, any buyer who discovered a lack of conformity but

¹³⁶ Statement of Defense, No. 20.

¹³⁷ Article 27 CISG imputes a requirement of ‘appropriate means’ to the entire Convention: Schwenzer in Schlechtriem (1998), 313. Further, “In circumstances in which a buyer is expected to give notice quickly, the buyer has to choose a more rapid means of communication than under regular circumstances, e.g. sending a fax instead of a letter”: Wautelet in Van Houtte (1997), 182.

¹³⁸ Claimant’s Exhibit No. 1. The full contract price is \$9,300,000 minus \$80,000 for the training provided.

¹³⁹ Statement of Defense, No. 15; Procedural Order No. 2, Clarification No. 39.

¹⁴⁰ TAILTWIST’s principal office was located in Sea Port, Oceania: Notice of Arbitration, No. 3. “Notice given to the employees who install equipment or to the driver who delivers the goods are considered to be given to the incorrect addressee”: Magnus in Honsell, 433.

¹⁴¹ In most cases courts have rejected claims of a ‘reasonable excuse’ under Article 44 CISG. For examples see: *Rheinland Versicherungen v. S.r.l. Atlarex and Subalpina S.p.A* Tribunale di Vigevano: No. 405 of 12 July 2000; Bundesgerichtshof: VIII ZR 259/97 of 25 November 1998; NIPR 1998, 226; Oberlandesgericht Koblenz: 2 U 580/96 of 11 September 1998;

failed to notify the seller of this deficiency within a reasonable time will always be considered to have acted “without the care required of a businessman.”¹⁴² However, it is necessary to take into account all the circumstances of an individual case to determine whether the careless actions of the buyer deserve to be treated with leniency.¹⁴³ Such circumstances include first, the seriousness of the breach of the duty to notify; second, the nature of the buyer's business; and third, the experience of the buyer in its business.¹⁴⁴

First, a reasonable excuse under Article 44 CISG may exist if, for example, the notification of deficiency is delivered only slightly late.¹⁴⁵ However, BOBBINS' breach of its contractual obligation to notify the seller under Article 39(1) CISG is not a similarly minor breach.¹⁴⁶ Indeed, BOBBINS did not provide notification to TAILTWIST until it wrote to TAILTWIST's Administrator in Insolvency on 10 January 2001.¹⁴⁷ Second, BOBBINS' situation as a manufacturer involved in multi-million dollar international transactions¹⁴⁸ can be contrasted with situations in which a reasonable excuse has been applied because the buyer was a sole trader, with few employees and limited resources.¹⁴⁹ Third, for the same reasons, BOBBINS cannot be considered an inexperienced trader with little experience in the purchase of valuable equipment, or in the procedure for giving notice under Article 39(1) CISG.¹⁵⁰

Oberlandesgericht Bamberg: 8 U 4/98 of 19 August 1998; Thüringer Oberlandesgericht: 8 U 1667/97 of 26 May 1998; Oberlandesgericht München: 7 U 4427/97 of 11 March 1998; Oberster Gerichtshof: 2 Ob 328/97 of 12 February 1998; Landgericht Erfurt: 6 O 1642/97 of 28 October 1997; Oberlandesgericht München: 7 U 2070/97 of 9 July 1997; Oberlandesgericht Karlsruhe: 1 U 280/96 of 25 June 1997; Obergericht des Kantons Luzern: 11 95 123/357 of 8 January 1997; Oberlandesgericht München: 7 U 3758/94 of 8 February 1995; Landgericht Oldenburg: 12 O 674/93 of 9 November 1994; ICC Award No. 7331 of 1994; Oberlandesgericht Saarbrücken: 1 U 69/92 of 13 January 1993. The fact that the seller had no opportunity to examine the goods, because they were sent immediately to a sub-contractor, cannot be seen as a reasonable excuse under Article 44 CISG. See NIPR 1997, 284. Kennedy, 319; Sono in Bianca & Bonnell, 328. “Examples of exceptional circumstances have included cases of a sole trader who became ill and thus was unable to give notice, and cases where notice was given incorrectly to a prior agent of the seller”: Magnus in Honsell, 466 [Translated from German by the authors of this Memorandum]; Gillies & Moens, 24, n. 24; Resch, 479.

¹⁴² Huber in Schlechtriem (1998), 350; Kuoppala, 28. In Oberlandesgericht Koblenz: 2 U 580/96 of 11 September 1998, the Court held that a “reasonable excuse” required the buyer to act with reasonable care in providing for prompt examination of the goods. The buyer could not prove that it had acted with reasonable care, and thus Article 44 CISG did not apply.

¹⁴³ Huber in Schlechtriem (1998), 350; Kuoppala, 28.

¹⁴⁴ Huber in Schlechtriem (1998), 350; Kuoppala, 28.

¹⁴⁵ In Oberlandesgericht München: 7 U 3758/94 of 8 February 1995 the buyer gave notice two months after discovery of non-conformities in the goods. The court rejected the claim of ‘reasonable excuse’ under Article 44 CISG, arguing that the normal limit for non-perishable goods was 8 days. See also ICC award No. 7331 of 1994.

¹⁴⁶ See for examples of a minor breach, Huber in Schlechtriem (1998), 350. See also ICC Award No. 7331 of 1994.

¹⁴⁷ Claimant's Exhibit No. 5.

¹⁴⁸ Claimant's Exhibit No. 1; Procedural Order No. 2, Clarification No. 46.

¹⁴⁹ See Huber in Schlechtriem (1998), 349-350; Sono in Bianca & Bonnell, 326; Honnold, 283; Magnus in Honsell, 466; Official Records, 320-323; Oberlandesgericht München: 7 U 3758/94 of 8 February 1995.

¹⁵⁰ In determining the existence of a “reasonable excuse”, it is important to consider the nature of the buyer's business. BOBBINS is a corporation involved in a multi-million dollar transaction. Further, this is not the first time that BOBBINS has been involved in such a transaction: Procedural Order No. 2, Clarification No. 46. See Oberlandesgericht München: 7

BOBBINS seeks to rely on a reasonable excuse, claiming that it did not send notice to TAILTWIST because “there was no one to whom to send any such notice.”¹⁵¹ This claim is unfounded. Although the insolvency proceedings commenced on 20 April 2000, it was not until 16 June 2000 that TAILTWIST was liquidated and its business activities terminated.¹⁵² Thus BOBBINS had a period of 36 days, between 10 May 2000 and 16 June 2000, in which it could have sent TAILTWIST notice of the lack of conformity. Even in the event that BOBBINS doubted TAILTWIST’s ability to remedy the lack of conformity, a telephone call would have sufficiently fulfilled the notice requirement under Article 39(1) CISG.¹⁵³

Furthermore, an interpretation of Article 44 CISG which allows a corporation to resile from its obligations under Article 39(1) CISG, despite having made no effort to comply with those obligations, is not in accordance with the need to observe good faith in international trade. Article 7(1) CISG, which is used as an interpretative tool, states that “In the interpretation of [the CISG], regard is to be had to ... the need to promote ... the observance of good faith in international trade”. In the circumstances of this case, it would be contrary to the need to promote good faith if BOBBINS’ failure to make efforts to comply with the notice requirements of Article 39(1) CISG was excused on the basis of Article 44 CISG. Consequently, BOBBINS has no “reasonable excuse” under Article 44 CISG for its failure to give notice of the lack of conformity, and thus cannot reduce the price in accordance with Article 50 CISG.

U 3758/94 of 8 February 1995. Article 44 CISG was introduced in response to concerns that buyers from developing countries may have difficulty in satisfying the notice requirements under Article 39(1) CISG: Enderlein & Maskow, 172; Honnold, 283; Schlechtriem (1986), 267-268; Schlechtriem (1991), 26; Van Houtte (1995), 137; Ziegel & Samson, 46-47. For example, difficulties might occur if buyers, lacking specialist knowledge, failed to discover the deficiencies in the goods or were unaware of the need to give notice within a reasonable time. BOBBINS clearly does not come within this category.

¹⁵¹ Statement of Defense, No. 21.

¹⁵² Statement of Defense, No. 19.

¹⁵³ Schwenger in Schlechtriem (1998), 313; Andersen in *Pace International Law Review*, 106-107. There are several cases in which notice of non-conformity given over the telephone was adequate in accordance with Article 39(1) CISG. However the buyer must prove that the seller received the notice. That is, the buyer must adduce evidence to show who took the telephone call on behalf of the seller, and the time of the telephone call. *Oberlandesgericht Frankfurt am Main*: 5 U 209/94 of 23 May 1995; *Landgericht Frankfurt am Main*: 3/3 O 37/92 of 9 December 1992; *Landgericht Stuttgart*: 3 KfH O 97/89 of 31 August 1989.

3.4 ARTICLE 40 CISG DOES NOT PREVENT INVESTMENT FROM RELYING ON ARTICLE 39(1) CISG

Article 40 CISG states that “The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.” Article 40 CISG “results in a dramatic weakening of the position of the seller,” and thus “should only be applied in special circumstances”.¹⁵⁴ The buyer bears the burden of proving that the seller knew or could not have been unaware of the lack of conformity and thus that it was unnecessary for BOBBINS to give notice under Article 39(1) CISG.¹⁵⁵ Under the CISG, the standard of “could not have been unaware” is close to the standard of actual knowledge, and thus there is little practical difference between the two standards.¹⁵⁶ Therefore, if TAILTWIST could not have been *aware* of facts related to the lack of conformity, it necessarily could not have had actual knowledge of those facts.

The record gives no indication that TAILTWIST possessed information that would have alerted it to the lack of conformity in the equipment’s performance. In order to establish whether a seller had the requisite degree of knowledge, Article 40 CISG requires that there be an “obvious lack of conformity”¹⁵⁷ and that the seller “displayed more than gross negligence”¹⁵⁸ in not recognising this lack of conformity.¹⁵⁹ The lack of conformity in the performance of the equipment was not obvious to TAILTWIST. Indeed, the first indication that BOBBINS had experienced any problems with the equipment arose when BOBBINS asserted the price reduction in its letter of 10 January 2001 to

¹⁵⁴ *Beijing Light Automobile Co. Ltd. v. Connell Limited Partnership*, Stockholm Chamber of Commerce, Arbitration Award of 5 June 1998, 23. See also Wautelet in Van Houtte (1997), 187.

¹⁵⁵ Schwenger in Schlechtriem (1998), 324; Kuppola, 29; Wautelet in Van Houtte (1997), 186. *Fallini Stefano & Co. S.N.C. v. Foodik BV*. Arrondissementsrechtbank Roermond: 900366 of 19 December 1991.

¹⁵⁶ Honnold, 295, states that “could not have been unaware” seems to set a standard close to actual knowledge, in contrast to “ought to have known” which can imply a duty to inquire. This acts as a limitation on the seller’s responsibility. Similarly, the Law Commission of New Zealand, 40, states that “could not have been unaware” appears to be close to actual knowledge. It can be contrasted with “ought to have known” or “discovered” which is used in several other provisions of the convention”.

¹⁵⁷ Schwenger in Schlechtriem (1998), 321-322; Honnold, 308; Karollus, 128. The guidelines for determining conformity are contained in Article 35(2) CISG, and include the requirement that the goods must be “fit for the purposes for which goods of the same description would ordinarily be used”.

¹⁵⁸ Commentary on Article 40 Uniform Law on the International Sale of Goods [ULIS] demonstrates that a seller “could not have been unaware” where there are obvious deficiencies. Commentary on Article 40 ULIS can be used in the interpretation of Article 40 CISG because “Article 40 [CISG] was taken almost word-for-word from Article 40 ULIS”: Schwenger in Schlechtriem (1998), 321.

¹⁵⁹ TAILTWIST was not under an obligation to investigate whether there was any possibility of non-conformity. See also Law Commission of New Zealand, 40; Grosswald Curran, 2; Kuoppala, 30.

TAILTWIST's Administrator in Insolvency.¹⁶⁰ Prior to this letter, the last communication from BOBBINS to TAILTWIST was to the effect that BOBBINS' own technical consultant had certified "that the installation and commissioning tests of the TAILTWIST's equipment had been completed".¹⁶¹ Furthermore, BOBBINS never communicated to TAILTWIST that the equipment was not working at full capacity.

In addition, TAILTWIST was not grossly negligent in failing to recognise that the inadequacy of the training might lead to the lack of conformity in the performance of the equipment. TAILTWIST was not aware of the inadequacy of the training, nor that this inadequacy might potentially lead to a lack of conformity. Indeed, two of the TAILTWIST personnel remained on site at BOBBINS, which was an acceptable number under the contract,¹⁶² and there was never any indication given to TAILTWIST of the possibility that those two personnel were not performing their work satisfactorily. Although BOBBINS made statements to TAILTWIST's employees concerning the insufficient nature of the training,¹⁶³ the employees' knowledge of these complaints is not attributable to TAILTWIST itself because the knowledge of an employee cannot be considered to become automatically part of the knowledge of the employer.¹⁶⁴

TAILTWIST could not have been aware of the lack of conformity in the performance of the equipment. Consequently, Article 40 CISG does not provide an excuse for BOBBINS to escape its obligation to give notice in accordance with Article 39(1) CISG.

¹⁶⁰ Claimant's Exhibit, No. 5.

¹⁶¹ Statement of Defense, No. 9.

¹⁶² The contract between BOBBINS and TAILTWIST did not require a specific number of personnel for the training. The contract specified that "[TAILTWIST] *personnel* will remain on site for three weeks, during which [BOBBINS] personnel will be trained in the correct operation, adjustment and maintenance of the machinery" [emphasis added]: Claimant's Exhibit No. 1. BOBBINS claims that it had anticipated that four TAILTWIST personnel would conduct the training, but this is not reflected in the contract itself: Statement of Defense, No. 14; Claimant's Exhibit No. 5.

¹⁶³ Procedural Order No. 2, Clarification No. 39.

¹⁶⁴ The doctrine of *respondeat superior*, that is, that the acts and omissions of the employee are attributable to the employer, cannot be manipulated to suggest that the knowledge of an employee automatically becomes the knowledge of the employer: see, Kritzer, Highlights, 27. The notion of acts or omissions is clearly distinct from the concept of knowledge. See Grosswald Curran, 3. The record does not disclose whether TAILTWIST's employees may be considered as 'agents' or otherwise.

3.5 **BOBBINS MAY NOT ASSERT DEFENCES AGAINST INVESTMENT UNDER THE CONTRACT OF 1 SEPTEMBER 1999**

BOBBINS agreed in the contract of 1 September 1999 that it would not assert against an assignee of TAILTWIST “any defense it may have against [TAILTWIST] arising out of the defective performance of this contract, unless [TAILTWIST] does not in good faith attempt to remedy the deficiency.”¹⁶⁵ BOBBINS claims that this clause does not prevent it from asserting a price reduction in accordance with Article 50 CISG because TAILTWIST did not attempt in good faith to remedy the lack of conformity in the equipment’s performance. This clause is subject to Article 19(1) Receivables Convention which provides that “The debtor may agree with the assignor in a writing signed by the debtor not to raise against the assignee the defences ... that it could raise,” against the assignor prior to the assignment.¹⁶⁶ A waiver agreement between the debtor and assignor is formed when a specific clause is inserted at the time of the conclusion of the contract.¹⁶⁷ The contract concluded between BOBBINS and TAILTWIST contained a specific waiver clause, inserted into the written document, signed by both BOBBINS and TAILTWIST.¹⁶⁸ The clause is therefore valid under Article 19(1) Receivables Convention.

Hence the agreement between BOBBINS and TAILTWIST prevents BOBBINS from refusing payment to INVESTMENT on the basis of TAILTWIST's defective performance.¹⁶⁹ The only exception is if TAILTWIST did not attempt in good faith to remedy a deficiency in its contractual

¹⁶⁵ Claimant’s Exhibit No. 1.

¹⁶⁶ Article 19(1) Receivables Convention states that “The debtor may agree with the assignor in a writing signed by the debtor not to raise against the assignee the defences and rights of set-off that it could raise pursuant to article 18.” Article 18 Receivables Convention deals generally with the debtor’s defences and rights of set-off. The Working Group emphasised the importance of ensuring the validity of such an agreement, since it allows the assignor to increase the value of receivables and the debtor to obtain more credit or better payment terms. See Bazinas (2001), 282; Bazinas, (1998), 342; Commentary to the draft Receivables Convention Part II (A/CN.9/WG.II/WP.106), Nos. 55-56.

¹⁶⁷ The Working Group decided not to specify the point of time at which an agreement to assert to defences should be made. However during the drafting of Article 19 Receivables Convention the Working Group pointed out that in most cases an agreement not to assert defences is made at the time of the conclusion of the original contract. See Commentary to the draft Receivables Convention Part II (A/CN.9/WG.II/WP.106), Nos. 55-56; Report on Twenty-Fourth Session (A/CN.9/420), No. 138.

¹⁶⁸ Claimant’s Exhibit No. 1.

¹⁶⁹ As a consequence of this agreement, BOBBINS may not refuse to pay INVESTMENT on the ground that TAILTWIST’s performance is defective. BOBBINS would have a cause of action against TAILTWIST for breach of contract. Even where an assignor has become insolvent, the debtor is not allowed to make a claim against the assignee since the debtor cannot be placed in a better situation than it would be if the assignment had not taken place. Thus, under the Receivables Convention, “the debtor bears the risk of the financial inability of its contractual partner to pay.” See Bazinas (1998), 344-345, referring to Article 21 Receivables Convention. Article 21 Receivables Convention deals with

performance. However, BOBBINS gave TAILTWIST no opportunity to remedy any deficiency in performance. Indeed, under Articles 39(1), 40 and 44 CISG, BOBBINS failed to give notice of a lack of conformity;¹⁷⁰ did not provide a reasonable excuse for that failure;¹⁷¹ and is unable to claim that TAILTWIST was prevented from relying on this failure.¹⁷² TAILTWIST cannot be expected to remedy deficiencies in its performance if it was not even given the *opportunity* to remedy the deficiencies. Thus BOBBINS remains bound by its agreement not to assert defences against an assignee of TAILTWIST and cannot claim a price reduction in accordance with Article 50 CISG.

4. INVESTMENT IS ENTITLED TO CLAIM INTEREST ON THE SUM OF \$3,250,000

Article 78 CISG states that “If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it”. Under Article 78 CISG, payable interest begins to accrue on the date from which the sum is due.¹⁷³ The first installment of \$2,325,000 fell due on 18 April 2000, the date on which BOBBINS’ consultants certified the successful installation and commissioning tests.¹⁷⁴ The sum of \$930,000 fell due on 10 August 2000, upon completion of three months satisfactory performance of the equipment.¹⁷⁵ Therefore, BOBBINS is compelled to pay INVESTMENT interest on the installment of \$2,325,000 from 18 April 2000 and interest on the installment of \$930,000 from 10 August 2000 until it makes payment to INVESTMENT. In accordance with Procedural Order No. 3, issued on 8 November 2001, this Memorandum need not deal with the *rate* of interest that BOBBINS must pay INVESTMENT.¹⁷⁶

the situation where the debtor, having already payed the assignee, is not entitled to recover that sum if the assignor does not perform its obligation.

¹⁷⁰ See Part 3.2 above.

¹⁷¹ See Part 3.3 above.

¹⁷² See Part 3.4 above.

¹⁷³ Eberstein & Bacher in Schlechtriem (1998), 594; Corterier, 39.

¹⁷⁴ Claimant’s Exhibit No. 1; Statement of Defense, No. 12.

¹⁷⁵ Claimant’s Exhibit No. 1; Statement of Defense, No. 20.

¹⁷⁶ Procedural Order No. 3 states that “The memoranda ... should not consider the following issues ... The rate of interest that [BOBBINS] should pay to [INVESTMENT] if it has to pay [INVESTMENT] any amount of the purchase price assigned”.

5. BOBBINS SHOULD BEAR THE COSTS OF ARBITRATION

Article 31 AAA Rules provides procedural guidelines for the allocation of costs between the parties to an arbitration. This Article states that “The Tribunal may apportion such costs among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case.” Apart from the fees and expenses of the arbitrators and the expenses incurred by the administrator and the Tribunal, under Article 31(d), the Tribunal is also allowed to award to the successful party the costs of their legal representation.¹⁷⁷ The failure of BOBBINS to meet its obligations with regards to payment caused the dispute that has led to this arbitration.¹⁷⁸ In the interests of reasonableness, under Article 31 AAA Rules, BOBBINS should pay all costs of the Tribunal. In addition, in accordance with Article 31(d) AAA Rules, BOBBINS should bear INVESTMENT’s legal costs. In accordance with Procedural Order No. 3, this Memorandum need not address the calculation or apportionment of the costs of arbitration.¹⁷⁹

INVESTMENT commends the arguments in this Memorandum to the Arbitral Tribunal’s discretion in order to achieve a just and fair resolution of the dispute.

¹⁷⁷ According to Article 31(d) AAA Rules, the Tribunal may award “the reasonable costs for legal representation of a successful party.”

¹⁷⁸ The conduct of the parties is generally considered to be a relevant factor in allocating the costs of arbitration. See Huleatt-James & Gould, 104-105.

¹⁷⁹ Procedural Order No. 3 states that “The memoranda ... should not consider the following issues ... Any calculation or apportionment of the costs of the arbitration.”