

SIXTEENTH ANNUAL  
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

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## MEMORANDUM FOR CLAIMANT

**On Behalf Of:**

**MR. JOSEPH TISK**  
**RELIABLE AUTO IMPORTS**  
113 Outer Ring Road  
Fortune City  
Mediterraneo

**CLAIMANT**

**Against:**

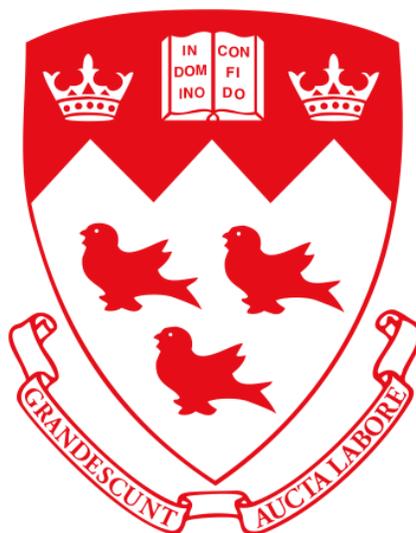
**UAM DISTRIBUTORS**  
**OCEANIA LTD.**  
125 Ocean Boulevard  
Port City  
Oceania

**FIRST RESPONDENT**

**And against:**

**UNIVERSAL AUTO**  
**MANUFACTURERS, S.A.**  
47 Industrial Road  
Oceanside  
Equatoriana

**SECOND RESPONDENT**



**FACULTY OF LAW, MCGILL UNIVERSITY**

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ÉLISE BÉLAND · ANJA GRABUNDZIJA · ERIC VAN EYKEN · PAULA VIOLA



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## LIST OF ABBREVIATIONS

¶ / ¶¶	Paragraph / Paragraphs
Art. / Arts.	Article / Articles
ch.	Chapter
CISG	United Nations Convention on Contracts for the International Sale of Goods, 11 April 1980
Clar.	Clarification
Cl.Ex.	Claimant's Exhibit
Ed. / Eds.	Editor / Editors
<i>e.g.</i>	<i>Exempli gratia</i> (for example)
emph. add.	Emphasis added
<i>et seq.</i>	<i>Et sequential</i> [and following]
ICC Rules	Rules of Arbitration of the International Chamber of Commerce, in force as from 1 January 1998
n.	Note
Model Law	UNCITRAL Model Law on International Commercial Arbitration, 21 June 1985
Model Law on Insolvency	UNCITRAL Model Law on Cross-Border Insolvency, 1997.
Model Law on Arbitration	UNCITRAL Model Law on International Commercial Arbitration, 1985.
p. / pp.	Page / Pages
Proc. Ord.	Procedural Order
St. of Cl.	Statement of Claim
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Arbitration Rules
UNIDROIT	UNIDROIT Principles of International Commercial Contracts 2004



*v.*

*Versus*

Vienna Convention

UN Convention on the Law of Treaties, Vienna, 1969.



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## STATEMENT OF FACTS

1. Mr. Joseph Tisk operates a small car dealership under the trade name Reliable Auto Imports in Fortune City, Mediterraneo [St. of Cl. ¶ 1]. On **January 18, 2008** Mr. Tisk purchased 100 Tera cars from UAM Distributors Oceania Ltd. (“UAM”) for a price of USD 760,000. The cars were to be shipped as space became available “CIF Incoterms 2000 Fortune City” [Cl.Ex. 1]. As required, Mr. Tisk paid a deposit of USD 380,000 to UAM on **January 23**.
2. The Tera cars were a new model developed by Universal Auto Manufacturers, S.A. (“Universal”), a major manufacturer of automobiles in Equatoriana [St. of Cl. ¶ 5, 6 & 9]. Universal sells its products through subsidiaries, main importers and franchised dealers in more than 120 countries [St. of Cl. ¶ 6]. Fifteen years ago, Universal established UAM (collectively “Respondents”) as a joint venture to market its cars in Oceania, Patria and Mediterraneo [St. of Cl. ¶ 30]. Universal owned 10 percent of UAM’s shares and represented 20 percent of UAM’s Governing Board [Proc. Ord. 2 ¶ 12].
3. Mr. Tisk received the first shipment of 25 cars from UAM on **February 18** [St. of Cl. ¶ 10]. When he drove the cars to his showroom, the engines misfired severely, making the cars almost impossible to drive. He immediately called a mechanic, who was unable to determine the cause of the defects, but indicated that a problem with the Engine Control Unit (“ECU”) was likely [St. of Cl. ¶ 11].
4. First thing the following morning, on **February 22**, Mr. Tisk notified UAM of the defect, stressing the urgency of a solution. [St. of Cl. ¶ 12]. Numerous intermingled exchanges between Mr. Tisk, UAM and Universal ensued.
5. On **February 27**, UAM informed Mr. Tisk that it was unable to determine the source of the problem, although ECU problems were suspected [St. of Cl. ¶ 13]. UAM then consulted Universal, who directed one of its engineers to contact Mr. Tisk. Universal’s engineer speculated that the source of the problem was the new brand of ECUs with which Universal was experimenting in its Tera cars. [St. of Cl. ¶ 13]. These problems were later confirmed [Cl.Ex. 12]. The engineer then advised Mr. Tisk that on-site inspection by Universal technicians would be necessary to determine the duration of repairs [St. of Cl. ¶ 14].
6. The next day, Mr. Steiner, Regional Manager for Universal, informed Mr. Tisk that Universal would undertake the repairs, which called for special equipment and technical expertise that UAM lacked [Cl.Ex. 4].
7. Mr. Tisk was concerned about what a lengthy delay would mean for his business, since banks in



Mediterraneo did not finance working capital, obliging small retailers like Mr. Tisk to rely on a quick turnover of their inventory [Proc. Ord. 2, ¶ 17]. For these reasons, Mr. Tisk sought assurances from Mr. Steiner concerning the duration of the repairs. However, Mr. Steiner could offer no assurances. When Mr. Tisk pressed the issue, stressing its importance for his business, Mr. Steiner confessed his uncertainty as to whether the defects could be remedied at all without first examining one car. Mr. Steiner further admitted that a possible strike at Mediterraneo's only international airport could aggravate the delays.

8. Faced with the likelihood of insolvency, Mr. Tisk was forced to cancel the contract in order to avoid suffering irreparable damage should the cars turn out to be beyond repair [Cl.Ex. 10 & 11]. On **February 29**, Mr. Tisk sent a declaration of avoidance to both UAM and Universal. He also requested reimbursement of his USD 380,000 deposit from UAM, together with storage costs that would be incurred. Mr. Tisk was then in a position to mitigate UAM's breach by contracting with Patria Importers Ltd, a supplier he had relied upon in the past [Cl.Ex. 9].
9. UAM did not return Mr. Tisk's deposit before declaring insolvency on **April 9** [St. of Cl. ¶ 28]. Five days later, Business News of Equatoriana reported that Universal had already established a new joint venture to distribute its cars into the market previously allocated to UAM [Cl.Ex. 15]. The interview with Mr. Steiner revealed that Universal's interference in UAM's affairs had caused UAM's demise [Cl.Ex. 16]. Specifically, by refusing to provide part of the capital UAM required to expand its operations and prohibiting UAM from selling other manufacturers' cars, preventing them from adapting to the small market UAM was supplying, Universal's interference pushed UAM into insolvency by causing UAM to default on its obligations. [Proc. Ord. ¶ 32].
10. Having still not obtained his deposit, Mr. Tisk (hereinafter "Claimant") filed a request for arbitration with the Stockholm Chamber of Commerce pursuant to his arbitration agreement with UAM [Cl.Ex. 1]. UAM's insolvency representative, Ms. Judith Powers, has refused to comply with this request based on her assumption that Oceania's Bankruptcy Law removes the Tribunal's jurisdiction. Mr. Tisk seeks only to recover from Respondents his deposit and storage expenses, amounting to USD 382,000, plus interest and costs.



## SUMMARY OF ARGUMENTS

### **THE TRIBUNAL MUST DETERMINE THE LAW APPLICABLE TO THE JURISDICTIONAL ISSUES AND TO THE MERITS**

11. As the parties have not explicitly designated a law applicable to their contract, the Tribunal should apply transnational legal principles to the jurisdictional issues in keeping with the transnational character of the parties' relationship. The Tribunal should apply the CISG to the merits and supplement it with transnational legal principles for issues not explicitly settled by the CISG. The localization rules of private international law do not lead to the application of any specific domestic law.

### **UAM'S INSOLVENCY PROCEEDINGS IN OCEANIA DO NOT AFFECT THE TRIBUNAL'S JURISDICTION OVER THIS DISPUTE**

12. Respondents cannot rebut the presumption of validity of the arbitration clause underlying Art. 2 of the NY Convention and Art. 8 of the Model Law on Arbitration. Respondents cannot point to any transnational legal principle or principle of international public policy that would invalidate or stay the proceedings. The Model Law on Insolvency does not invalidate or stay the proceedings, and there is no other applicable rule of law that could affect the Tribunal's jurisdiction.

### **UNIVERSAL IS BOUND TO THE CONTRACT BETWEEN CLAIMANT AND UAM**

13. The Tribunal should use the group of companies doctrine to bind Universal to the arbitration agreement and to UAM's contractual obligations. Respondents' integrated relationship demonstrates that they functioned as a single economic entity, satisfying the doctrinal requirements of consent and control. In the alternative, the Tribunal should find that UAM transferred to Universal the obligation to provide conforming cars.

### **CLAIMANT WAS JUSTIFIED IN AVOIDING THE CONTRACT FOLLOWING THE FUNDAMENTAL BREACH BY UAM**

14. UAM's delivery of 25 defective cars constituted a fundamental breach with respect to the first instalment, which entitled Claimant to avoid it. UAM's breach was of such a nature as to give Claimant good grounds to conclude that fundamental breach would occur with respect to future instalments. Claimant rightfully avoided the contract retroactively and for the future.



## ARGUMENT

### I. THE TRIBUNAL MUST DETERMINE THE LAW APPLICABLE TO THE JURISDICTIONAL ISSUES AND TO THE MERITS

15. Since the parties did not explicitly designate an applicable law in their contract, the Tribunal should apply transnational legal principles to the jurisdictional issues (1), and to the merits of the case as a supplement to the CISG (2).

#### 1. TRANSNATIONAL PRINCIPLES APPLY TO THE JURISDICTIONAL ISSUES

16. The jurisdictional issues in this case are whether Universal is bound to the arbitration clause and whether UAM's pending bankruptcy proceedings remove the Tribunal's jurisdiction over this dispute. Both of these issues relate to the existence and validity of the arbitration agreement.
17. Respondents contend that Oceania's law invalidated the arbitration agreement upon commencement of UAM's insolvency proceedings. This claim is erroneous. The Tribunal should not apply Oceania's law to the arbitration agreement (a). Rather, it should apply transnational principles (b).

##### a. Oceania's law does not apply to the arbitration agreement

18. The Tribunal should not apply Oceania's law or any of its mandatory provisions to determine the existence and validity of the arbitration agreement. Applying Oceania's law conflicts with the parties' intentions (i). Oceania's law is not closely connected to the arbitration agreement (ii). Applying Oceania's law conflicts with transnational legal principles (iii). Finally, applying Oceania's law is unfair (iv).

##### i) Applying Oceania's law conflicts with the parties' intentions

19. Since the Tribunal is appointed by the parties and is not under any particular state's authority, it is not bound to apply any national law unless the parties have expressly chosen it [Fouchard ¶ 444]. An international arbitration agreement clearly expresses the parties' intention to withhold their disputes from any national jurisdiction [see generally Law]. By agreeing to submit all disputes arising from their contract to arbitration, the parties implicitly agreed to exclude Oceania's national policies from governing their arbitration agreement. The choice to locate the seat of arbitration in Danubia, a neutral state, and the absence of an express choice of law to govern their disputes further reinforces the parties' intent to exclude the national law of Oceania as applicable to their disputes.
20. Moreover, Oceania's law would invalidate the arbitration agreement. Thus, applying Oceania's law



is contrary to the well-recognized principle that parties intend to create a valid and binding agreement rather than an invalid one [van den Berg, *The New York Convention of 1958* 1235-137 (1981)].

**ii) Oceania's law is not closely connected arbitration agreement**

21. Where the parties have not designated an applicable law, the existence and validity of the arbitration agreement may be governed by the legal system with which it has the closest connection [Fouchard ¶ 425]. This is determined by the place where the arbitration agreement was concluded, the seat of arbitration and any other factors specific to the arbitration agreement, such as whether the parties selected a standard arbitration clause from a particular arbitral institution [Fouchard ¶ 425-426]. Oceania is not the seat of arbitration nor is there any indication that the contract was formed there. There is no evidence that the parties selected a standard arbitration clause from Oceania's arbitral institutions. No other specific factors connect Oceania's law to the arbitration agreement.

**iii) Oceania's law conflicts with transnational principles.**

22. Oceania's law does not reflect international consensus, but rather the domestic policies of Oceania. There is no transnational law or international public policy principle by which an international arbitration agreement becomes invalid or inoperable upon the commencement of bankruptcy proceedings against one of the parties [Poudret, ¶ 362; Fouchard 1998 p.489]. Moreover, arbitrators have repeatedly refused to apply domestic laws to invalidate international arbitration agreements where an insolvency proceeding was pending against one of the parties [Mantillo-Serrano 1995 p.69; ICC 5996; ICC 5954; ICC 6057].
23. Applying Oceania's law is also inconsistent with the well-established international principle of applying the law which gives effect to the arbitration clause rather than the law that denies it [Fouchard ¶ 1552; ICC 4145, 4996, 8450].

**iv) Applying Oceania's law is unfair**

24. The arbitrators should avoid applying a national rule that the parties have not explicitly chosen where it would result in unfairness to one of the parties. Applying Oceania's law would unfairly subject Claimant to an event (i.e. UAM's bankruptcy) over which it had no control and for which it is not responsible [Rosell; ICC 2139].

**b. Transnational Legal Principles Apply to the Jurisdictional Issues**

25. To determine whether it has jurisdiction, the Tribunal should apply transnational legal principles in conformity with the parties' intent to give their agreement an international character (i). Applying transnational principles is appropriate since no domestic law is strongly connected to the arbitration



agreement (ii). Finally, applying transnational principles is consistent with the international source of the arbitrators' powers (iii).

**i) Applying transnational legal principles is consistent with the parties' intent**

26. Applying transnational rules is consistent with the intention of the parties not to be governed by any domestic law. The parties indicated this intention by choosing to resolve their disputes through international arbitration in a neutral state, and by failing to designate a law applicable to their agreement.
27. In cases similar to this one, arbitral tribunals have found the application of transnational legal principles to be consistent with the parties' intent. Transnational principles have been used to extend arbitration agreements to non-signatories in keeping with the reasonable expectations of litigants from diverse legal cultures [Park, p.565; Poudret 2002 ¶ 292; ICC Case of February 14, 2001; IUSCT *Ocean Air*]. Courts have also approved arbitral awards where the tribunal applied transnational principles to extend an arbitration clause to a non-signatory [*Municipalité de El Mergeb v. Dalico; Jaguar France*].
28. Similarly, arbitral tribunals faced with a bankrupt party have applied transnational principles in conformity with the parties' intent not to be governed by any particular domestic law [Fouchard, ¶ 580]. In IUSCT *Bebring International*, the Tribunal rejected the argument that arbitral proceedings could "in any way be regulated by the municipal [bankruptcy] law of either the United States or Iran" and instead looked to international principles. The court continued:

"[T]he very purpose of establishing the Tribunal was to remove certain claims from the jurisdiction of the courts of the United States. [...] Plainly, permitting United States law to continue to regulate proceedings with respect to claims filed here and otherwise within our jurisdiction would contravene such intent" [IUSCT 382 pp.349-58].

**ii) Applying transnational principles is appropriate since no domestic law is strongly connected to the arbitration agreement**

29. Applying transnational principles is appropriate since the arbitration agreement is not strongly connected to any one jurisdiction [Fouchard ¶ 434]. Connecting factors, such as the place of formation of the arbitration agreement, the seat of arbitration and other relevant factors, such as whether the parties relied on a standard arbitration clause from a particular arbitral institution, do not establish a strong connection with any one jurisdiction [Fouchard ¶ 443]. Indeed, it is unclear from the facts where the arbitration agreement was negotiated and formed or whether the parties relied on a standard arbitration clause from any arbitral institution [St. of Cl. 9 & 27]. Although the parties chose Danubia as the seat of arbitration [Cl.Ex. 1], Danubia has no other connection with



the parties or the arbitration agreement.

**iii) Applying transnational principles is consistent with the international source of the arbitrators' powers**

30. Arbitrators may apply transnational legal principles since they belong to no national legal order and are therefore not bound to apply the substantive or choice of law rules of any one jurisdiction [Fouchard ¶ 443]. There is “a strong tendency in arbitral case law to examine the existence and validity of the arbitration agreement exclusively by reference to transnational substantive rules, in keeping with the transnational nature of the source of the arbitrators’ powers” [Fouchard ¶ 444 n.169 *e.g. Indian Cement et seq.*]. In this regard, arbitrators may apply any law or rule of law which they consider to be appropriate in determining their own jurisdiction and in discharging their duty to comply with fundamental requirements of justice [Fouchard ¶ 444; ICC Rules Arts. 6(2) and 6(4); *Dow Chemical*].

**2. TRANSNATIONAL PRINCIPLES SUPPLEMENT THE CISG AS THE LAW APPLICABLE TO THE MERITS**

31. The two issues relating to the merits of this case are whether UAM fundamentally breached the contract and whether Universal is liable for UAM’s breach.
32. Since the parties are located in different jurisdictions and have not derogated from the CISG, the CISG governs their relationship [Arts. 1(1)(a) & 6]. Any gaps in the CISG must be settled by reference to transnational principles [see *e.g. Gotanda*]. Article 7(2) expresses this point by stating that “matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based”.
33. UAM’s fundamental breach is governed exclusively by the CISG since the CISG expressly settles this issue [Arts. 25, 49 & 73]. However, Universal’s liability is not expressly settled by the CISG. Although the Convention defines many of the rights and obligations of parties to a contract, it does not cover the extension of liability to third parties. Therefore, this issue must also be governed by transnational principles. Arbitral tribunals have often used transnational principles to fill the gaps in the CISG [*e.g. ICC 11295 (gap: transfer of rights); ICAC 147 (gap: specific performance); ICC 9117 (gaps: course of dealing and modification of contract)*].

**II. UAM’S INSOLVENCY PROCEEDINGS IN OCEANIA DO NOT AFFECT THE TRIBUNAL’S JURISDICTION OVER THIS DISPUTE**

34. Since it is not disputed that the arbitration agreement between Claimant and UAM was validly formed. Therefore, Respondents must rebut the presumption that the arbitration agreement is valid



under Art. 2 of the NY Convention and Art. 8 of the Model Law on Arbitration [van den Berg ¶ 1235-1237; Bachand p.463].

35. The commencement of insolvency proceedings in regard to UAM does not remove the Tribunal's jurisdiction over this dispute because neither transnational principles nor international public policy invalidates the arbitration clause or requires a stay of proceedings in this case (1). Moreover, the Model Law on Insolvency does not affect the Tribunal's jurisdiction in this case (2). In the alternative, no other applicable law removes the Tribunal's jurisdiction (3).

**1. THERE IS NO TRANSNATIONAL LEGAL PRINCIPLE OR PRINCIPLE OF INTERNATIONAL PUBLIC POLICY THAT WOULD REMOVE THE TRIBUNAL'S JURISDICTION ON THE BASIS OF UAM'S BANKRUPTCY**

36. There is no transnational legal principle or principle of international public policy by which an arbitration agreement is automatically invalidated by the commencement of insolvency proceedings against one of the parties. In fact, the opposite is true. It is a well-established international principle that the opening of insolvency proceedings does not by itself invalidate the arbitration or exclude the arbitrability of the dispute [Poudret ¶ 362; Brown-Berset / Lévy p.665; Fouchard, 1998 p.473].
37. First, arbitral tribunals have consistently rejected the argument that the insolvency representative is not party to the arbitration agreement and therefore cannot be bound by it. Rather, tribunals have consistently proceeded with arbitration in these circumstances [ICC.1350, 2139, 4415, 7337]. This is consistent with the well-established principle that the rights of the debtor are subrogated to the representative upon bankruptcy.
38. Moreover, there is no reference to bankruptcy in the NY Convention, nor is there any suggestion that, in the case of bankruptcy, the "public policy" of the forum is the kind of "public policy" that allows for non-recognition of foreign arbitral awards under Article V.2(b). Rather, it has been suggested that the public policy limitation in the New York Convention is to be construed narrowly, to be applied only where arbitration would violate the "most basic notions of morality and justice" [*Fotochrome* p.517; Fouchard, 1999 p.258; Rosell pp.429-432]. Therefore, arbitrators need not take bankruptcy into account when discharging their duty to render enforceable awards under the NY Convention [Rosell p.428].
39. International arbitration tribunals have repeatedly rendered awards despite the existence of pending insolvency proceedings against one of the parties. Indeed, the dominant trend in international arbitration is for arbitrators to proceed with arbitration despite the existence of parallel insolvency proceedings [Mantilla-Serrano p.57-8; Jarvin / Derains p.952; Rosell p.424;].



40. In ICC 4415, the tribunal refused to stay arbitration due to a pending bankruptcy, stating “it would not be considered consistent with general principles of law that a validly initiated arbitration proceeding should not continue to its conclusion for an unexpected cause [...] for which the claimant is not responsible” [See also ICC 2139 & 6057].
41. In another case involving a Bulgarian state enterprise and a French company, the tribunal rejected the trustee in bankruptcy’s request to terminate the arbitral proceedings where the claimant had brought the same claim before the French bankruptcy court. The tribunal held that the respondent’s bankruptcy did not constitute a procedural impediment for arbitral proceedings because the foreign judgment by which the respondent was declared bankrupt had no extraterritorial effect on tribunal, and could not impair its competence under the arbitration agreement, or release it from the duty to render an award [BCCI 152].
42. In *Casa v. Cambior*, the tribunal took jurisdiction over a dispute in which one of the parties was subject to a bankruptcy procedure in Luxembourg, stating that “the fact that one of the parties is subject to bankruptcy proceedings is not in itself sufficient to render a dispute non-arbitrable per se”. Similarly, in ICC 6632, an arbitral tribunal sitting in Brussels considered that the bankruptcy proceedings to which the Italian defendant was subject did not prevent the tribunal from hearing the parties’ dispute. Similar results were reached in ICC 6057 2139 & 7205.
43. A review of relevant case law indicates that a tribunal’s decision to proceed with arbitration despite a pending bankruptcy has never resulted in the non-recognition of a foreign arbitral award [Rosell p.429]. The preference for international arbitration was endorsed by the United States Circuit court in *Fotochrome*. In that case, the court upheld the arbitration agreement on the basis that the stay of proceedings under U.S. bankruptcy law “had no extraterritorial effect in international arbitrations” [Dameron p.337 *et seq*; Campbell 103] This reasoning was reinforced by the United States Supreme Court in the pre-eminent case *Mitsubishi Motors* where the court compelled arbitration in relation to an anti-trust claim despite the fact that one of the parties had filed for bankruptcy [See also *Mintze*; *MBNA*; *Shearson*; *Hays*; *National Gypsum*].

## **2. THE MODEL LAW INSOLVENCY DOES NOT REMOVE THE TRIBUNAL’S JURISDICTION ON THE BASIS OF UAM’S BANKRUPTCY**

44. Art. 20 of the Model Law on Insolvency, which recommends that “individual proceedings concerning the debtor’s assets, rights, obligations or liabilities be stayed” upon recognition of a main foreign bankruptcy proceeding, is neither a transnational principle nor a principle of international public policy.



45. The Model Law on Insolvency has not achieved sufficient international consensus to make it a truly transnational principle. Transnational principles express consensus in the international community concerning widely accepted commercial practices and procedures [Craig / Park / Paulsson pp.633-639; Derains pp.242-244; Fouchard ¶ 191]. The Model Law is very new, having only been adopted by UNCITRAL in 1997. Moreover, it has only been adopted by 15 countries and many of these adoptions have taken place within the last 5 years. Although the Model Law represents an “ambitious” attempt at global harmonization, the prospects of such harmonization are presently “so remote as to render it unlikely that even a basic quorum of states would regard it as justifiable to allocate resources to such a quest” [Fletcher p.445]. This is probably due to the highly variable nature of domestic bankruptcy laws around the world [Lazic pp.175-176]. For these reasons, Art. 20 cannot overcome the strong tendency in arbitral case law to proceed with arbitration despite pending bankruptcy proceedings.
46. In the alternative, even if the Tribunal concludes that Art. 20 of the Model Law is a transnational principle, a stay of proceedings is not required in this case. The Tribunal should not interpret Art. 20 as warranting a stay of proceedings for every action against the debtor. It should rather interpret Art. 20 as applicable only to situations where continuing with arbitration would have some impact on the bankruptcy proceedings. In the present case, arbitration would have no impact at all on the resolution of UAM’s bankruptcy proceedings because any arbitral award rendered by the Tribunal will not be enforced against UAM’s bankrupt estate. Since Claimant did not file his claim with the bankruptcy court in Oceania within the required 60 day time period [Proc. Ord. 2 ¶ 3], and there is no indication that this deadline is flexible, his claim against UAM’s bankrupt estate is extinguished. Since Claimant is barred from recovering against the bankrupt estate, proceeding with arbitration would have no detrimental impact on the resolution of UAM’s bankruptcy proceedings. As such, there is no reason for the Tribunal to stay the arbitration proceedings. The Tribunal should enforce the arbitration clause in order to allow Claimant to recover from Universal.

**3. IN THE ALTERNATIVE, NO OTHER RULE OF LAW APPLICABLE TO THIS DISPUTE REMOVES THE TRIBUNAL’S JURISDICTION ON THE BASIS OF UAM’S BANKRUPTCY**

47. In the alternative, even if the Tribunal does not apply transnational principles, there is no other law applicable to this dispute by which the arbitration agreement was automatically invalidated upon commencement of UAM’s insolvency proceedings. Oceania’s domestic bankruptcy laws do not apply to this dispute and hence do not remove the Tribunal’s jurisdiction over this dispute [see above ¶ 18-24]. Even if the Tribunal applies the law of the seat, there is no evidence that Danubia’s law contains a rule that would invalidate the arbitration agreement [Proc. Or. 2 ¶ 4].



### III. UNIVERSAL IS BOUND TO THE CONTRACT BETWEEN CLAIMANT AND UAM

48. Relying on transnational principles, the Tribunal should use the group of companies doctrine to bind Universal to the arbitration agreement and to the contractual obligations undertaken by UAM (1). In any event, if the Tribunal rejects the group of companies doctrine, Universal is bound to both agreements because Universal accepted a transfer of UAM's obligation to provide Claimant with conforming cars (2).

#### 1. THE TRIBUNAL SHOULD USE THE GROUP OF COMPANIES DOCTRINE TO BIND UNIVERSAL TO THE ARBITRATION AGREEMENT AND TO THE CONTRACTUAL OBLIGATIONS

49. The Tribunal should use the group of companies doctrine because it is consistent transnational principles. It is a well-established principle that a party who consents to arbitration is bound to that agreement. It is also widely recognized that persons should bear the cost of the damages they cause to others. The group of companies doctrine is a modern expansion of these principles. It goes beyond the artificial distinctions between related legal entities and adapts legal reasoning to modern commercial reality.
50. Group of companies doctrine is an established means of demonstrating a third party's consent to an arbitration clause and imposing liability where the commercial activities of the third party and the signatory are highly integrated (a). The relationship between Universal and UAM meets the requirements of the doctrine because their group relationship (b) was of such a symbiotic nature that Universal implicitly consented to the arbitration agreement and exercised sufficient control to be held liable for UAM's breach of contract (c). Finally, applying the group of companies doctrine is fair (d).

#### a. The group of companies doctrine is an established method of binding a third party to an arbitration agreement and to contractual obligations

51. A group of companies exists where two separate legal entities conduct commercial activities in such a highly integrated manner that one of them exercises *de facto* control over the other's commercial activities. In these situations, arbitrators may use *de facto* control to establish the controlling company's consent to arbitration (i). The doctrine is also used to bind the controlling company to contractual obligations where its control over the dependent company has contributed to the latter's breach of contract and the plaintiff's loss (ii).

#### i) The group of companies doctrine is used to extend arbitration agreements to third parties

52. When considering whether a non-signatory should be bound by an arbitration agreement, arbitral



tribunals have adopted the test of implied consent [Hanotiau 2007 p.343]. If the companies are in a group, are aware of the arbitration agreement and implicate themselves in the conclusion, performance or termination of the contract, then they are presumed to have consented to the agreement [Hanotiau 2007 p.343-344; e.g. *Dow Chemical* and *Société Sponsor A.B.*; ICC 6519, 11209, 7604, 7610, 9517 & 9719].

53. The doctrine has been widely accepted amongst arbitrators. In *Dow Chemical*, the tribunal held that a group of companies constituted a single economic reality capable of binding non-signatories to an arbitration agreement [van den Berg 343]. This reasoning has been acknowledged in “many awards and been discussed in scholarly articles” [ICC 10758 ¶ 17] and has become so widely accepted that Boissésou comments (on the topic of the group of companies doctrine):

“Can a party that has signed an arbitration agreement and is a claimant in arbitration proceedings based on that agreement name as a respondent a party that has not signed the arbitration agreement? There again, the answer is obviously yes” [Boissésou p.19 *empb. add.*]

54. In ICC 5721, the Swiss arbitration tribunal overcame a historical reticence towards the doctrine and accepted its validity when the facts of the case permit. Finally, the tribunal in ICC 6000 stated that the group of companies doctrine “is largely admitted [...] by virtue of [...] international trade” [p.34].
55. Group of companies doctrine has also been adopted by courts in upholding arbitral awards. In France, *Dow Chemical* has been so widely adopted that the Court of Appeal for Pau has characterized it as “admitted law” [*Société Sponsor A.B.*]. The United States has also embraced the doctrine, in part because of the federal rules favouring arbitration [Townsend p.359]. Most importantly, United States courts have considered “economic integration” of corporations in establishing their jurisdiction over foreign corporations whose subsidiaries were active in the United States [Blumberg p.67; e.g. *JJ. Ryan & Sons and Burlington Ins.*]. In Canada, courts have upheld arbitral awards that applied the group of companies’ doctrine [*Xerox* ¶ 51]. The Spanish Supreme Court has accepted the doctrine in *ITSA v. Satcan & BBVA* [Hanotiau 2007 p.352 n.25]. Finally, the Swiss Federal Court has recently “considerably relaxed its jurisprudence” on the topic [Hanotiau 2007 p.351].
56. The reasoning behind the rejection of group of companies by some courts is inapplicable in this case. The rejection of the doctrine in some civilian jurisdictions, such as the Netherlands, Germany and Switzerland, is based on a traditional interpretation of a procedural and constitutional right for parties to seek justice from the courts [Samuel p. 92 n100; Hanotiau 2007 p.352 .25; Hoge Raad; Poudret 2002 233-4]. Such thinking is outdated as “arbitration can no longer be regarded as an



exception to [a]... court[s] jurisdiction in international commerce” [Samuel p.95 n. 104]. Civilian courts have recognized this criticism, but have considered themselves barred from adopting the doctrine due to constitutional and procedural impediments [ICC 5920 of 1989 from ICC Bulletin vol.2 no.2 Nov.1991 p.30].

57. Similarly, the conclusion in *Peterson*, where the High Court rejected group of companies doctrine as “form[ing] no part of English law”, is inapplicable to this case. A close analysis of the case suggests that its reasoning rests more with the goal of “denying indirect damages” than with the group of companies theory [Park p.581]. Thus, “it remains to be seen whether a plea based on the group of companies doctrine will be recognized in other contexts in proceedings involving English law” [Davis p.271]. Furthermore, in *Roussel-Uclaf v. Searle*, an English a court allowed the doctrine on the basis of a “common sense” approach [Poudret 2002 p.238. n.516].

**ii) The group of companies doctrine is used to bind third parties to substantive contractual obligations**

58. Arbitral and judicial bodies have adopted the group of companies doctrine to extend liability to third parties. They have adopted the test of control when deciding whether to extend liability to a member of a group [Antunes p.293; Wooldridge p.1].
59. The test of control can be applied in two ways. The controlling company of a group may be found liable for a dependent company’s obligation if its position of general control enabled it to correct the dependent company’s behaviour before it caused the loss. The test of control may also be applied contextually. Where separate legal entities conduct commercial activities in such a highly integrated manner that one of them exercises *de facto* control over the other’s performance of its contractual obligations, the controlling member is liable for the consequences of a breach of those obligations [Antunes pp.294, 493-6]. This test has been applied in distribution relationships like the one between Universal and UAM [Blumberg p.142-144; Collins p. 733] .
60. The contextual approach to control has been adopted most strongly by Germany, with its test of “dominating influence”, but can also notably be seen in Greece, Brazil and Portugal, where the legislation allows for various forms of corporate control [Art. 17(1) Aktiengesetz p.43; Rokas p. 707; Antunes pp. 324-326; Antunes 2008 pp. 4-5]. The doctrine has been used in many cases to attribute responsibility to a member of the corporate group whose control contributed to the fault committed by another member [*Imperial Chemical Industries, Commercial Solvents, Johnson & Johnson, Peroxygen Products*, ICC 5103 and in *Société Kis France*]. In most of these cases the controlling and controlled companies were held jointly and severally liable for the damage [*Commercial Solvents, Johnson & Johnson*, ICC case no. 5103 and *Société Kis France*].

**b. Universal and UAM formed a group of companies**

61. To determine whether Universal and UAM are sufficiently integrated so as to form a group of companies, the Tribunal should consider the existence of an integrated distribution network (a); the use of a common trademark (b); the exercise of control by one company over another (c); the highly integrated nature of their activities (d); and whether communications to Universal and UAM were intermingled (e). These factors all point to the clear conclusion that Universal and UAM formed a group of companies.

**i) Universal relies on a global distribution network**

62. Universal cannot survive without its distribution network, consisting of main importers, subsidiaries and franchise dealers allocated to specific markets [St. of Cl. 4]. Universal's profits are derived directly from sales performed by its distributors rather than direct sales to consumers [St. of Cl. ¶ 4]. Universal's dependence on these sales is evidenced by the speed with which Universal secured a new distributor in Patria once UAM's financial situation became precarious.

**ii) "UAM" and "Universal Automobile Manufacturers" form part of the same trademark**

63. UAM is the acronym for Universal Automobile Manufacturers [Proc. Ord. 2 ¶11]. As such, the two names form part of the same trademark. Trademark usage usually requires an official license by its owner, as a company's trademark is one of its most important assets [Hosson p.398]. Since Universal created UAM for the purpose of distributing its cars, the Tribunal should infer that Universal consented to UAM's use of its trademark. In *Sarbank* responsibility was extended from "Oracle Systems Ltd" to "Oracle Corporation" on the basis that "contractual relations cannot take place without the consent of the parent company owning the trademark by and upon which transactions proceed" [Hanotiau 2007 p.356 n.41]. The Tribunal should use the shared trademark to infer the existence of a corporate group.

**iii) Universal exerted control over UAM**

64. Universal exerted control over UAM in two ways. Formally, Universal owned 10% of UAM and controlled 20% of the votes on the corporate board [Proc. Ord. 2 ¶ 12].

65. Furthermore, Universal exerted greater influence over UAM as the sole supplier of products to UAM [Proc. Ord. 2 ¶ 32]. Universal also exercised control over UAM through its distribution agreement [Proc. Ord. #2 ¶ 13]. Furthermore, Universal reviewed the standard form contract upon which such sales were based to ensure its compliance with Universal's policies [Proc. Ord. 2 ¶ 16]. Insofar as UAM's primary day-to-day business was to sell vehicles, these vehicles being sold in accordance with terms approved by Universal, this amounts to *de facto* control of UAM's daily affairs. Finally, Universal was responsible for the quality of the cars UAM sold; UAM had no



control over the means of production of the cars or the choice of their components.

**iv) UAM relies on Universal's technical capacities**

66. UAM does not have the engineering capability to repair Universal's produced automobiles [Cl.Ex. 4] The CISG imposes an obligation to deliver goods that are fit for the purpose they are destined to [Art. 35(2)(a) & (b)]. UAM was not actually capable of fulfilling this commitment, both in Claimant's situation as well as in at least one prior situation [Proc. Ord. 2 ¶ 15]. Both times, Universal stepped in to assist UAM in fulfilling its obligations [Proc. Ord. 2 ¶ 15]. Indeed, when Claimant notified UAM of the engines' misfiring, UAM referred Claimant to Universal technicians and it was an engineer from Universal who informed him of possible diagnostics and of repair procedures [Cl.Ex. 3]. The complexities of the modern automobile require computerized diagnostic equipment that is not available in Oceania [St. of Cl. ¶ 16]. Therefore, UAM cannot cope with the complexities of the automobiles it sells without the support of Universal.

**v) Communications to Universal and UAM were intermingled**

67. Claimant, UAM and Universal exchanged communications indiscriminately when discussing the cars' defect (Cl.Ex. 2-6, 10 & 11). This is similar to the case of *in re Holiday Inns*, where the court approved the arbitral tribunal's finding that the fact that "correspondence was addressed indistinctively to mother companies [and] to subsidiaries" pointed to the existence of a group of companies. In this case, the Tribunal should infer that the intermingled communications also establishes a group relationship between Universal and UAM.

**c. The group relationship between UAM and Universal satisfies the doctrine's requirements of consent and control**

68. Due to Respondents' highly integrated relationship, the Tribunal should find that Universal implicitly consented to the arbitration agreement (i) and exercised sufficient control over UAM's affairs to bear liability for Claimant's loss (ii).

**i) Universal implicitly consented to the arbitration agreement**

69. Universal was aware of the arbitration clause in the contract between UAM and Claimant (a). Knowing this, Universal chose to participate in the conclusion (b), performance (c) and termination (d) of the contract. In so doing, Universal implicitly consented to the arbitration clause [see above ¶ 52].

**(a) Universal was aware of the arbitration agreement**

70. Universal was aware of the arbitration clause in UAM's contract since it reviewed UAM's contracts to ensure that they complied with its policies. The contract between Claimant and UAM was a form



contract that was reviewed by Universal [Proc. Ord. 2 ¶ 16].

(b) Universal was implicated in the conclusion of the contract

71. Universal's approval of the contractual terms used by UAM, including the arbitration clause, implicated Universal in the drafting of the general terms of the contract. Being actively involved in the negotiation of a contract allows for extension to a non-signatory [ICC 6519]. The contract in question is one of adhesion, with most of the terms being approved prior to negotiation of the details of the contract [Proc. Ord. 2 ¶16]. As such, while not at the bargaining table, Universal clearly approved the terms by which the contract was executed.
72. By creating UAM, the vehicle by which the contract was concluded, Universal also demonstrated its interest in selling automobiles in Mediterraneo. As such, Universal is the party who placed UAM at the bargaining table, and granted it use of its corporate name to conclude contracts.
73. Furthermore, by having a representative on the Board of UAM, Universal implicitly approved the terms of the contract between UAM and Claimant. Alternatively, the Board authorized UAM's representatives to sign the contract with Claimant on its behalf.
74. In summary, Universal was aware of the terms of the contract of sale, created the legal personality under whose authority the contract was signed, likely approved of the contract through its representative on UAM's Board. Universal was therefore actively involved in this conclusion of the contract.

(c) Universal was implicated in the performance of the contract

75. Universal was implicated in the performance of the contract by offering to repair the vehicles. In ICC 6610, the question of the capacity of the signatory to undertake the obligations was a decisive factor in determining extension through performance. In this case, UAM did not have the capacity to repair the defective vehicles [Cl.Ex. 4].
76. Furthermore, the exchange of communications between Claimant, UAM, and Universal demonstrates a total confusion as to whom was to undertake the repair of the vehicles. This was a basis for determining implication in the performance of a contract in ICC 5103. Similarly, in ICC 10758, the tribunal looked at the level of "cooperation and communication" between the parties to determine implication in performance [¶ 26].
77. Universal was involved in diagnosing problem with the defective cars, communicating with Claimant, and informing him of the steps needed to solve the issue. Universal was also directly involved in the performance of the contract by being the manufacturer of the products that were sold. The Tribunal should find that all of these facts constitute performance of UAM's obligations.



(d) Universal was implicated in the termination of the contract

78. Universal was implicated in the termination of the contract since it was Universal's inability to guarantee repairs within a specific timeline that caused Claimant to terminate the agreement. [Cl.Ex. 11]. Had this guarantee been offered, Claimant would not have terminated the contract.

**ii) Universal's control contributed to Claimant's loss**

79. Applying the group of companies doctrine, the Tribunal should find that Universal's and UAM's highly integrated economic activities led Universal to exercise most of the control that caused Claimant's loss. Many facts in Respondents' group relationship point to this conclusion. First, Universal's presence on UAM's Corporate Board gave it influence over UAM's decision-making process. Proof of this is that Universal was able to refuse UAM's request to sell other manufacturers' cars.
80. Most significantly, Universal was solely responsible for the defect that was at the heart of Claimant's avoidance of the contract. It was Universal's poor assembly of the cars that resulted in the engine's severe misfiring. UAM had no say in the method of manufacturing, the choice of the employees on the assembly line or any other matter affecting the quality of the cars.
81. A third example of Universal's control is that UAM did not alter the cars once it had received them from Universal. When the distributor does not alter the distributed goods in any way, it is only acting as an intermediary between the manufacturer and purchasers; it does not engage with the goods in a significant manner and is thus but a tool of the manufacturer. In *Johnson & Johnson*, it was emphasized that the subsidiaries only took part in the assembly, packing and marketing of the parent company's products, thereby proving the highly integrated nature of the economic activities and the parent's control [p. 26]. Similarly, UAM merely distributed Universal cars without modifying them in any way. Because the cars remained unchanged as they passed through UAM's hands, Universal controlled UAM's ability to perform its contractual obligations. Looking to the true source of Claimant's damage, the Tribunal should hold Universal jointly and severally liable with UAM for UAM's breach of contract.

**d. The group of companies doctrine is justified by sound policy underpinnings**

82. The group of companies doctrine is used by arbitral and judicial bodies alike to respond to factual situations like the present one. Universal meets all the doctrine's requirements and should therefore be held liable in this forum. The Tribunal should follow the doctrine because it expands upon recognized legal principles (i) in order to serve the needs of the parties (ii), respond to modern commercial reality (iii) and protect creditors (iv).

**i) The doctrine builds on a recognized legal foundation**

83. Involving third parties in legal disputes is a widely accepted practice. Rules such as agency, incorporation by reference, alter ego, piercing of the corporate veil, estoppel and assignment all allow for third-party inclusion in arbitration proceedings and for findings of liability when the facts of the case permit [Várady 197-9; *Thompson CSF*; Hanotiau sections II, IV, VI and IX]. The group of companies doctrine does not create anything new, it merely builds upon this legal foundation.

**ii) Interrelated parties are best served by a single forum**

84. By binding third parties to arbitration, tribunals ensure that all parties to the dispute are present to disclose the evidence needed for the fair resolution of the dispute. Justice is best served before a single arbitrator “seized of all economical and legal aspects of the dispute” [*Jaguar*].
85. Binding third parties also ensures that the tribunal’s award will be applied to all parties involved in the dispute. This is important because a single dispute needs a single solution; different *fori* deciding the same dispute can lead to conflicting decisions. This is contrary to the pursuit of justice and the Tribunal’s duty to render an enforceable award.
86. Furthermore, a single forum saves costs for all parties involved, increasing access to justice. They should not be forced to litigate the same dispute twice.

**iii) The doctrine reflects business reality**

87. It is common practice for companies to externalize their activities in order to insulate themselves from liability. They divide their operations by creating subsidiaries or, in this case, authorized importers. This division of operations is common in the automotive industry, where manufacturers distribute their cars through franchises and distributorships [Collins p.733]. Dividing their operations allows them to limit risk to one importer. Although limited liability is an acceptable part of corporate law, group of companies doctrine prevents companies from abusing the corporate form to shield themselves from liability where they exert considerable control over a dependent company.
88. Universal should not be allowed to avoid liability by operating solely through its legal creations. As it is Universal’s defective manufacturing of the cars that caused UAM to breach its contract, this Tribunal should hold Universal liable for the breach.

**iv) The doctrine is particularly relevant in the context of insolvency**

89. The group of companies doctrine protects creditors from the unjust consequences of a debtor’s insolvency where, as in this case, a controlling member of the group is responsible for the dependent member’s insolvency. Although it is true that the insolvency representative can exercise a creditor’s claim against the controlling company, the money obtained is lessened by the fees



necessary to obtain it and is placed in a pool available to all the dependent company's creditors, reducing this particular creditor's chance of being fully compensated. This creditor should be entitled to full compensation from the controlling company because the latter's control was determinative in the dependent company's insolvency.

90. Creditors' interests explain why many countries have shown themselves particularly open to the group of companies doctrine in the context of insolvency. For example, German creditors may seek compensation from a "dominating" company when the latter induced the debtor (dependent company) to enter into a disadvantageous legal transaction or when it induced it to take a detrimental measure [Art. 317(4) Aktiengesetz p.369; Wooldridge p. 131; Hoffmann p. 222]. In New Zealand, the judge may order a related company to pay all or parts of the claims made in a liquidation, using his / her discretion to reach a "just and equitable" result [Art. 271(1)(a) Companies Act]. These countries have relaxed the principle of separate legal personality in the context of insolvency, recognizing that to do otherwise would be to make creditors suffer unjustly at the hands of controlling companies that were in a position to prevent the creditors' losses.
91. The facts of this case illustrate the fundamental unfairness to creditors. It was Universal who manufactured the defective cars that forced Claimant to avoid his contract with UAM and caused his loss. UAM then became insolvent, because of Universal's interference in UAM's affairs, which prevented UAM from remaining competitive in the market [see above ¶ 9]. The group of companies doctrine permits Claimant to obtain the compensation he deserves from the solvent company that truly caused his loss.
92. Filing a claim in bankruptcy proceedings was not a reasonable option for Claimant. Even though Universal bought the defective cars from UAM [Proc. Ord. 2 ¶ 21], this money was placed in a pool available to all creditors and, being an unsecured creditor, it is unlikely that Claimant would have obtained any compensation at all had he filed a claim. In the presence of a group of companies, it would be unfair to require Claimant to go through these proceedings since Universal caused Claimant's loss and largely contributed to UAM's insolvency.

## **2. IN THE ALTERNATIVE, UAM TRANSFERRED TO UNIVERSAL THE OBLIGATION TO PROVIDE CONFORMING CARS**

93. Universal and UAM, in addition to forming a group of companies, transferred from UAM to Universal the obligation to provide conforming cars to Claimant. This transfer, which was otherwise valid under UNIDROIT Principles, also included a transfer of the arbitration agreement. The Tribunal should therefore hold Universal jointly and severally liable for UAM's breach of the contract.



**a. There was a *de facto* transfer of the obligation**

94. Universal and UAM implicitly agreed to a transfer of the obligation to provide Claimant with quality cars. Universal reviewed UAM's contracts with car dealers and, being a sophisticated party, was aware that, in the absence of a choice of law clause, the CISG was applicable to contracts with foreign car dealers. Universal was also aware that, under the CISG, UAM's distribution operations entailed that it must provide cars that would be fit for the purpose of resale to car dealers [Art. 35(2)(b)]. Therefore, when Universal created UAM as its distributor and supplied it with cars that Universal knew would then be sold to car dealers, these two companies agreed to a transfer of obligations. Indeed, they tacitly agreed to transfer from UAM to Universal the CISG obligation to provide conforming cars to the car dealers.

**b. The transfer was valid under UNIDROIT Principles**

95. UNIDROIT Principles can be applied to assess the validity of the transfer because the CISG does not expressly settle the matter. The transfer was valid under UNIDROIT Principles.

**i) UNIDROIT Principles apply to the transfer**

96. The CISG does not expressly settle the matter of transfers of obligations. Part III of the Convention describes the offeror's and offeree's obligations under the contract, but does not provide for the modalities of transferring these obligations. This Tribunal must therefore look to transnational principles [*supra* ¶ 32]. An illustration of these transnational principles can be seen in the UNIDROIT Principles [*e.g.* ICC 10385 ¶73; ICC 12111; ICC 9797], which deal with the matter of transfers of obligations. The UNIDROIT principles have been used on numerous occasions to fill in the gaps of the CISG [see cases at ¶ 33]. The application of UNIDROIT Principles seems all the more natural as they are meant to supplement and interpret international uniform law instruments [UNIDROIT Preamble].

**ii) The transfer was valid**

97. The UNIDROIT Principles state that an obligation may be transferred from one person to another provided the obligee consents to the transfer. The original obligor becomes jointly and severally liable with the new obligor for the obligation unless the obligee discharges original obligor [Arts. 9.2.1 (a), 9.2.3 & 9.2.5].
98. Under UNIDROIT Principles, the tacit transfer of the obligation between UAM and Universal was valid since the agreement does not need to follow a particular form [Art. 1.2] and may be evidenced by the parties' conduct [Art. 2.1.1] [ICSID *African Holding*, ICSID *Ponderosa Assets*]. In *African Holding Company*, the contract had been lost, but was proved on the basis of oral testimony. The arbitral tribunal also looked at the facts of the case and found that there would have been no



transfer of money and no provision of services without legal obligations to do so, hence it accepted that there had been a contract between the parties [¶ 34]. Similarly, the Tribunal should look to the facts of the present dispute and imply a transfer of obligations. It would not have been logical for UAM to bear the CISG obligation to provide cars that would be fit for resale, since UAM was in no way involved in the assembly of the cars. In addition, UAM did not purchase the tools necessary to repair the defective cars or, in other words, was in no position to exercise the right to cure the defect [Art. 48 CISG], which is closely linked to the obligation to provide conforming goods. This is evidence of Universal's and UAM's intent to transfer to Universal the obligation to provide cars that would be fit for resale.

99. The transfer of the obligation was also valid because it received the necessary consent from Claimant, who accepted that Universal take steps to repair the cars [Art. 9.2.3] [Cl.Ex. 5]. Even though Claimant's consent was not given at the time of the actual transfer, that is when the contract between Claimant and UAM was concluded and UAM/Universal therefore incurred the obligation to provide conforming cars, his consent was valid because it was given as soon as he became aware of the transfer. Claimant could not reasonably have learned of the transfer before Universal manifested its intention to repair the cars, at which point he manifested his consent.

**c. The arbitration clause was transferred with the obligation**

100. When parties transfer all of or part of their obligations in a contract, the arbitration contract is also transferred [Hanotiau section IV]. In a similar situation to this, the Swiss Federal Court approved an arbitrator's interim award transferring the arbitration clause to a company that had assumed the obligations of another [L. v. M.- Swiss Federal Court of 18 December 2001 20 ASA Bull. 482 (2002)]. The arbitration clause in that agreement held that "all disputes directly related to the contract or arising out of it would be subject to arbitration" (*our trans.*), which is nearly identical to the one contained in the present contract [Cl.Ex. 1]. The Swiss tribunal was swayed by the fact that the party assuming the obligations had expressly referred to the contract and was aware of the arbitration agreement [L. v. M. 484, 490]. Again, the preset situation is similar in that Universal was aware of the contract's terms and the arbitration agreement [*supra* ¶ 71 *et seq.*].

**d. Universal is jointly and severally liable for UAM's breach of contract**

101. Universal is jointly and severally liable for the obligation to provide conforming cars, as there is no evidence that Claimant discharged Universal [Art. 9.2.5(3) UNIDROIT; IAC SCH-4921]. Since the failure to provide conforming cars directly caused Claimant's to avoid the contract and incur a loss, Universal and UAM are jointly and severally liable for the damage caused to Claimant by UAM's breach of contract.



#### **IV. CLAIMANT WAS JUSTIFIED IN AVOIDING THE CONTRACT FOLLOWING THE FUNDAMENTAL BREACH BY UAM**

102. The substance of the present dispute stems from UAM's breach of contract, which was so essential that it entitled Claimant to put an end to the parties' relationship. The contract between Claimant and UAM was an instalment contract, since it allowed "[p]artial shipment[s]" [Cl. Ex. 1, ¶3; Art. 73 CISG]. All the conditions were met under Art. 73 CISG, entitling Claimant to avoid the contract both retroactively and for the future.
103. UAM's failure to deliver conforming cars in the first instalment constituted fundamental breach (1), entitling Claimant to avoid the contract for that instalment (2). In addition, UAM's breach raised serious doubts about future performances, authorizing Claimant to avoid for upcoming instalments as well (3). Finally, Claimant exercised his right to avoid in conformity with all requirements (4).

##### **1. UAM FUNDAMENTALLY BREACHED THE CONTRACT WITH RESPECT TO THE 1<sup>ST</sup> INSTALMENT UNDER ART. 25 CISG**

104. UAM breached its obligation to deliver conforming goods, as the 25 seriously defective cars were neither fit for their ordinary purpose [Art. 35(2)(a) CISG], nor for the purpose of resale for which they were bought [Art. 35(2)(b) CISG]. As required by Arts. 73(1) and 49(a) CISG, UAM's misperformance constituted a "fundamental breach of contract" for the 1<sup>st</sup> instalment, since it resulted "in such detriment [...] as substantially to deprive [the other party] of what he [was] entitled to expect under the contract" [Art. 25 CISG] (a). In addition, this result was foreseeable for UAM [Art. 25 CISG] (b).
- (a) UAM's misperformance caused such detriment as to completely frustrate Claimant of his purpose under the contract**
105. As the "detriment" referred to in Art. 25 CISG is primarily measured by the "importance of the interest which the contract [...] create[s] for the promisee" [Schlechtriem 1998 p. 177], Claimant's detriment was of the most serious kind. Claimant had entered into the contract for purchase of Universal cars for the purposes of his retail business; when UAM delivered a first consignment of vehicles defective to the point of being "practically undriveable" [St. of Cl. ¶11], it deprived Claimant of his legitimate expectation under the contract to obtain cars fit for resale to his customers. Claimant had organized his business in reliance on the contract with UAM [Proc. Ord. 2 ¶ 28]. The received cars being obviously unmarketable in the ordinary course of the buyer's business, there is no doubt that Claimant was frustrated of the whole benefit of his bargain [*Model locomotives case*; *Designer clothes case*].



**(b) Claimant's loss under the contract was foreseeable to UAM and the reasonable person**

106. The predominant understanding of Art. 25 CISG is that the party causing substantial detriment is liable for his breach, unless he can prove that he “did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result” [Art. 25 CISG; Schlechtriem 1998 p.177; Will p.216; Koch “Fundamental Breach” p.228]. UAM cannot reasonably claim that it did not foresee the consequences of its serious misperformance. The foreseeability requirement ensures that the seller does not bear liability for a minor deviation from the contract, where he could not have foreseen that it would adversely affect the buyer [Honold *Uniform Law* p.258]. UAM's delivery of “practically undriveable” cars [St. of Cl. ¶11] was all but a minor breach; it cannot come into the purview of this excusing ground.

**2. UAM'S FUNDAMENTAL BREACH ENTITLED CLAIMANT TO AVOID THE CONTRACT FOR THE 1<sup>ST</sup> INSTALMENT UNDER ARTS. 73(1) AND 49 CISG**

107. With respect to the first instalment [Art. 73(1) CISG], Claimant was justified in avoiding the contract because proof of the fundamentality of the breach was complete and the buyer's right to avoid the contract has priority where a breach is shown to be fundamental (a). Should the Tribunal hold, on the contrary, that the seller's right to cure should have precedence over the buyer's decision to avoid, Claimant argues that Universal's offer to cure the defects is still inapplicable in the circumstances because it was unreasonable (b).

**(a) Given UAM's fundamental breach, Claimant was entitled to avoid the contract under Art. 49(1) CISG**

108. Claimant submits that the existence of a foreseeable substantial detriment established all the elements of fundamental breach, thus justifying his decision to avoid the contract under Art. 49(1).
109. Claimant however acknowledges the need to justify his position in view of the on-going doctrinal controversy concerning the relationship between Arts. 25 (fundamental breach), 48 (seller's right to cure) and 49 (buyer's right to avoid) of the CISG. While a natural reading of the CISG appears to make the buyer's choice of remedy decisive [Koch “Art. 25 CISG-UP”, p.131], some scholars' comments and jurisprudence posit that a buyer will not have the right to immediate avoidance if the seller offers “realistic and prompt cure” [Magnus p.333]. Conceptually, they either contend that the buyer's deprivation of entitled expectations under the contract is not yet substantial if there is a possibility of cure [Schlechtriem “Article 25” p.294], or that the buyer's right to avoid, while existent upon proof of the seriousness of the breach, is suspended when a reasonable offer to cure exists [Will p.357]. Both theories produce the same practical effect by giving precedence to the seller's right to cure over the buyer's right to avoid the contract [Will p.352]. Claimant submits that



this alternative interpretation goes against the plain reading of the CISG, its legislative history and valid policy considerations.

110. Firstly, Art. 25 does not mention subsequent performance, referring solely to the breach of an obligation and its effect on the aggrieved party's expectations under the contract. Adding the incurability requirement would substantially narrow the concept of fundamental breach [Will p.357], which already presents a high threshold, consistent with the CISG's policy of maintaining contractual relationships [Huber p.18]. Most importantly, the structure of remedies in the CISG shows the primacy of the buyer's right to avoid. Art. 48 allows the seller to cure his breach of contract by subsequent performance, but only "[s]ubject to Article 49". The ordinary and plain meaning of these words is that the seller's right is subordinate to the buyer's right to avoid the contract in a situation where the seller has fundamentally breached his obligations [Koch "Art. 25 CISG-UP p.131"; Yovel p.388; Enderlein *Dubrovnik Lectures*, p.193; *Scaffold fittings case*; *FCF S.A. v. Adriafil Commerciale S.r.l.*]. In contrast, where the seller's right to cure was meant to supersede the buyer's remedy, this was specifically set out [*cf.* Art. 50 CISG]. The same hierarchy is apparent from the provisions on notice in Art. 48(2) and (3): the seller must give notice of his intention to cure by which he "requests the buyer to make known whether he will accept performance" [emph. add.]. This implies that the seller must ask for the buyer's acceptance in order for his right to cure to be capable of suspending the buyer's right to avoid under Art. 49(2)(b)(iii). These provisions would be superfluous if the buyer had no right to refuse an offer to cure [Yovel p.389]. Reading the cure requirement into the evaluation of the gravity of the breach under Art. 25 CISG would effectively invert this hierarchy and defeat the structure of remedies provided in the CISG. This result would be contrary to the general rule of interpretation that "[a] treaty [should] be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" [*Vienna Convention* Art. 31(1)].
111. Such an interpretation would also be inconsistent with the intention of the drafters of the CISG, a majority of whom considered that the buyer's right to avoid should prevail [Honnold *History of CISG* pp.562-4; Will p.348]. Where the textual reading of a treaty "leaves the meaning ambiguous", reference may be made to the "preparatory work of the treaty and the circumstances of its conclusion" [*Vienna Convention* Art. 32]. The CISG's drafting history confirms its plain meaning. Moreover, the Tribunal should bear in mind that the CISG is the offspring of a thoroughly pondered international compromise; it was drafted in a way that is acceptable to all signatory states from very diverse legal, economic and social backgrounds. Indeed, Art. 7(1) specifically provides that "[i]n the interpretation of this Convention, regard is to be had to its international character". Any deviation from the plain meaning of the provisions and intention of the drafters threatens to



disregard this international compromise.

112. Furthermore, the need for certainty in international transactions militates in favour of this interpretation. The buyer, already in an extremely difficult situation because he has been deprived of his legitimate expectations under the contract, would be further afflicted by the lack of legal certainty as to his position. This would impair his ability to mitigate the costs of the seller's breach. Introducing such uncertainty into the scheme of the CISG would undermine its ultimate purpose [*Vienna Convention* Art. 31], which is to “[remove] legal barriers and promote the development of international trade” [CISG Preamble].

113. Claimant therefore acquired the right to avoid the contract when the seriously defective goods were delivered to him. He eventually exercised this right in good faith when it appeared to be his only reasonable option [Cl.Ex 10 & 11].

**(b) In the alternative, Claimant is entitled to avoid the contract, as Universal's offer to cure UAM's breach was unreasonable under Art. 48 CISG**

114. Even in case the Tribunal decides that the seller's right to cure should be given precedence by either influencing the fundamentality of UAM's breach or suspending Claimant's right to avoid, Universal's offer to cure fails under Art. 48 CISG. The repairs would inevitably cause Claimant “unreasonable delay” (i). Moreover, Universal's offer was uncertain to the point of constituting “unreasonable inconvenience” for Claimant (ii).

**i. Universal's offer would inevitably cause “unreasonable delay” to Claimant as time had become of the essence**

115. When Claimant received the defective cars on February 18, 2008 [St. of Cl. ¶¶ 10-11], time for subsequent performance started to run. While the waiting period already elapsed might not have constituted unreasonable delay *per se*, it was clear on February 28, when Universal finally notified Claimant that it intended to send its technicians to Mediterraneo [Cl.Ex. 4], that the time inherent in any repairs would cause unreasonable delay. Universal was therefore not in a position to “[remedy UAM's failure to perform its obligations] without unreasonable delay” [Art. 48(1) CISG], entitling Claimant to avoid the contract.

116. Determining the reasonable period for subsequent performance requires taking into account all the circumstances of the case, including whether the buyer had a known special interest in rapid delivery [Müller-Chen “Article 47” pp.566 & 556]. Pursuant to Art. 8(2) CISG, a “reasonable person of the same kind [...] in the same circumstances” as UAM ought to have known that it was important to Claimant that delivery be timely, in view of “all relevant circumstances [...] including [...] practices which the parties have established between themselves [and] usages” [Art. 8(3)].



117. Where the parties have not set out a timeframe, Art. 33(c) CISG mandates a “reasonable period of delivery.” This must be determined with regards to prior practices between the parties [Art. 9(1) CISG], as well as standard behaviour in the relevant industry [Art. 9(2) CISG]. In the international automobile industry, a three to four week delay is considered a reasonable time [*Automobile case*]. Claimant planned his business in reference to this norm [Proc. Ord. 2 ¶28]. His understanding must also have been based on his previous dealings with Respondents [Proc. Ord. 2 ¶17].
118. Furthermore, delivery within this standard period was an important requirement of the contract. Clause 2 of the contract sets the purchase price, followed by the phrase “CIF Incoterms 2000 Fortune City, Mediterraneo” [Cl.Ex.1]. The CIF Incoterm implies that delivery is at a fixed date and that timeliness is an important term of the contract [*Incoterms 2000* p.109; Jolivet p.254, *Iron molybdenum case*]. UAM, a sophisticated trader, must have known the significance of this international usage when it chose to incorporate the term in its standard-form contract [Proc. Ord. 2 ¶16]. It therefore expressly undertook to perform its delivery obligation in conformity with the agreed timeframe.
119. Considerations specific to Claimant’s situation within the Mediterraneo market, familiar to UAM, reinforce his special interest in a timely delivery. Claimant is a retailer depending on a quick turnover of his inventory, a feature common in Mediterraneo businesses due to the limited availability of credit [Proc. Ord. 2 ¶ 17]. As working capital was simply not financed by banks in Mediterraneo, Claimant needed to have on-going sales in order to cover his costs. Respondents had not only done business with Claimant in the past [Proc. Ord. ¶ 17]; they had acquired extensive knowledge of the Mediterraneo market from their fifteen year-long presence in the region [Cl.Ex. 16]. Therefore, Respondents cannot have ignored the fact that retailers, such as Claimant, relied heavily on dependable deliveries from suppliers. Analogous reasoning was adopted in the *Spanish paprika case*, where a German court held that the seller’s long standing business relations in Germany meant that he must have been aware of that country’s regulations. In the circumstances, holding that UAM did not recognize Claimant’s special interest in rapid delivery would be unreasonable under Art. 8 CISG.
120. UAM having delivered the defective cars three and a half weeks after the parties’ agreement [St. of Cl. ¶ 10], little, if any, time was left for it to remedy its misperformance. By the time Universal set out its offer to cure on February 28 [Cl.Ex. 4], Claimant had already spent ten days storing useless cars at his own expense. In the best case scenario, Universal technicians would arrive within three days and provide Claimant with saleable cars within the following week [St. of Cl. ¶ 17]. Counting from the date of the conclusion of the contract, this delay would amount to 51 days (inclusive of weekends). This constitutes a delay for delivery of more than seven weeks: approximately twice the



expected delivery period [see above ¶ 117]. Even the best case scenario was thus unacceptable to Claimant. He was justified in avoiding the contract.

**ii. In the alternative, Universal's offer was so uncertain as to cause Claimant "unreasonable inconvenience"**

121. Even if the Tribunal holds that Claimant did not have a right to immediate avoidance, Claimant was still not bound by Universal's offer to cure, as the latter was insufficiently defined to be reasonable under Art. 48 CISG. Claimant was not forced to await Universal's actions when there was only an uncertain possibility of cure in an undefined timeframe, as it would subject him to unreasonable inconvenience.
122. The possibility of cure of the defects is evaluated from the objective standpoint of the reasonable buyer in the same circumstances [Will p.351], in light of the seller's offer to cure [Chengwei p.152; Honnold *Uniform Law* p.375]. Indeed, Art. 48(1) CISG makes the right to cure "[s]ubject to article 49". This enables the buyer, who bears the burden of evaluating the gravity of the situation, to judge whether the seller's offer is acceptable. The buyer must consider avoidance by asking himself the question: "Will the seller cure?" [Will p.351].
123. Claimant, or a reasonable buyer in his circumstances, could not answer this question in the affirmative with any degree of certainty. Universal merely stipulated that their technicians would be in Mediterraneo within three days [Cl.Ex. 4]. When pressed by Claimant to state how much time would actually be required to repair the cars, Mr. Steiner could or would not respond with any satisfactory precision. In fact, not only did Mr. Steiner not want to commit to a repair period of one week or ten days, he admitted that it was not sure whether the cars could be repaired at all [St. of. Cl. ¶ 17]. In addition, Claimant reasonably took into account the aggravating circumstance of the looming strike at Mediterraneo's only international airport, which could prevent Universal from sending its personnel for an extended period of time. Prior experience of the tense labour relations at the airport, as well as the Mediterraneo government's refusal to intervene in the event of a strike [Proc. Ord. 2 ¶ 35], reasonably led Claimant to believe that repairs, if they did occur, would be further delayed.
124. As a matter of desirable policy, the seller should not be able to lock the buyer into a protracted waiting period [Chengwei p.162]. In the *Designer clothes case*, the Appellate Court of Köln (Germany) found that the buyer faced with a fundamental breach was not required to accept the seller's subsequent performance where the latter had merely mentioned that he would "try" to cure his misperformance, without providing any deadlines. Preventing the buyer from avoiding the contract as long as it is not known that repair won't take place would be an interpretation contrary to the principle of good faith [Art. 7 CISG; Will p.349].



125. The present case illustrates the rationale behind this policy. Compelling Claimant to accept Universal's offer would also cause him utterly unreasonable inconvenience. Indeed, it would put Claimant's business at risk of bankruptcy [Cl.Ex. 13]. While the cars were defective, Claimant had limited income, as his showroom was almost empty [Cl.Ex. 2]. Furthermore, due to the particularities of the Mediterraneo credit market, known to Respondents, he was not in a position to purchase substitute cars while bound by the large contract with UAM. In the reasonably likely event that the cars would be fixed too late or not at all, the consequences of accommodating Universal's desire to redress its own and UAM's negligence would be fatal for Claimant's business. This constitutes a burden well above the required threshold, which is that the inconvenience be more than minor [Müller-Chen "Article 48" p.566].
126. Universal's offer was thus unreasonable. It cannot influence Claimant's right to avoid the contract.

**3. UAM'S FUNDAMENTAL BREACH GAVE CLAIMANT GOOD GROUNDS TO AVOID THE CONTRACT FOR FUTURE INSTALMENTS UNDER ART. 73(2) CISG**

127. Pursuant to Art. 73(2) CISG, "[i]f one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future". The gravity of the grounds is evaluated through the objective test of a reasonable person [*Secretariat Commentary*; Hornung, p.738; *Barley case*]; it should be noted that this threshold is significantly lower than the one governing anticipatory breach of contract, where Art. 72 CISG requires that it be 'clear' that future fundamental breach will occur [*Secretariat Commentary*].
128. Claimant had compelling grounds to conclude that fundamental breach would occur with respect to future instalments: UAM's misperformance caused Claimant to seriously question its ability to deliver conforming cars in the future (a); Claimant reasonably suspected that future deliveries, if they were to be conforming, would not be done within a reasonable time (b); UAM and Universal offered no assurances to Claimant as to the future conformity or timeliness of their deliveries (c).
- (a) UAM's breach gave Claimant good grounds to conclude that future deliveries would not conform to the contract**
129. After delivery of the first instalment, it was reasonable for Claimant to entertain serious apprehensions about the quality of the automobiles yet to be delivered. UAM had sent Claimant a whole consignment, representing a quarter of the total quantity ordered, of cars unfit for their basic function of locomotion. These were also obviously unmerchantable. The reasonableness of such apprehensions was recognized in the *Designer clothes case*, where the seller delivered a first consignment of garments with "defects regarded as conceded and obvious to a layperson". At the



time of the events, it appeared likely to Claimant that the same ECU problems would occur again, as the fact that all 25 cars were defective led to believe that all the items from the same production run had the same problem [St. of Cl. ¶ 13]. The reasonable buyer would also fear that other, more or less serious problems would occur. Indeed, Respondents' behaviour had demonstrated their lack of due diligence in the performance of their obligations with respect to manufacturing and testing (especially since these cars were the result of a change in production [Cl.Ex. 3], and merited higher scrutiny). Even though Universal and UAM had allegedly inspected the cars prior to delivering them to Claimant [Proc. Ord. 2 ¶ 18], a highly conspicuous fact is that neither the manufacturer, nor the distributor noticed that the cars were so defective as to be "practically undriveable"; this was immediately obvious to Claimant. Respondents performed their obligations inconsistent with the general principle of good faith or reasonableness, which runs through the CISG [Schlechtriem p.104]. Such behaviour portrays UAM and Universal as unreliable suppliers and continuing relations with them could bring irreparable harm to Claimant.

**(b) UAM's breach gave Claimant good grounds to conclude that future deliveries would not be done within a reasonable time**

130. This situation also gave Claimant reason to believe that the delivery of future cars would be much delayed. That all 25 cars from the same production run have the same defect indicates a systematic problem. It is reasonable to conclude that either producing new cars with different ECUs or repairing the existing defective cars would require a substantial amount of time. This particularly transpires from Universal's inability to guarantee the duration of the repairs of Claimant's cars [St. of Cl. ¶ 17]. In the meantime, shipments to Claimant would be delayed. Demanding that the buyer remain bound by the contract where it is uncertain how long the seller would be unable to deliver conforming goods would be unreasonable [*Spanish Paprika case*]. This is especially true considering Claimant's interest in rapid delivery [see above ¶¶ 117-120]. Such delays would therefore lead to further fundamental breach of contract.

**(c) Respondents offered no assurances as to the conformity of future deliveries**

131. It was reasonable for Claimant to entertain serious doubts about UAM's ability to perform its obligations [see above ¶¶ 129-130]. UAM or Universal should have been aware of this; if they considered Claimant's doubts unfounded, and valued the preservation of the contract, they could have soothed Claimant's worries by providing proof of their ability and willingness to comply with the contract [*Barley case*]. Respondents gave Claimant no reason to believe that the expected problems would not in fact occur. For example, it was never suggested that UAM had other cars from a different production run to deliver to Claimant, or that Universal had already successfully dealt with this kind of problem in the past. The fact that Respondents never offered to deliver



substitute cars to Claimant, even though they had 120 Tera cars in stock as of February 29 [Proc. Ord. 2 ¶ 26], speaks to the conclusion that Respondents did not in fact strive to maintain their relationship with Claimant.

132. As a matter of policy, the seller or the manufacturer, who has control of his production process and inventory, is much better placed to bear the burden of informing the buyer of his circumstances than is the already aggrieved buyer of requiring detailed information from the seller. The buyer bears the significant costs of the seller's misperformance and of evaluating his situation. Therefore, if he wants to keep the contract alive, the breaching seller acting in good faith should have to provide his buyer with all the information necessary to reassure the latter. Having failed to do this, Respondents cannot claim that Claimant should have blindly trusted their commitment to the relationship. In fact, it appears in retrospect that in February 2008, Universal was aware of UAM's precarious financial situation and was already seriously negotiating a replacement distribution agreement with Patria Importers [Proc. Ord. 2 ¶ 33]. As such, Universal had no interest in maintaining UAM's contracts.

#### **4. CLAIMANT VALIDLY EXERCISED HIS RIGHT TO AVOID THE WHOLE CONTRACT, AS THE DECLARATION OF AVOIDANCE RESPECTED ALL TIMING REQUIREMENTS**

133. Claimant respected all notice requirements, relating to non-conformity of the goods [Art. 39(1) CISG] and avoidance of the contract [Art. 26 CISG]. Furthermore, in conformity with Arts. 73(2) and 49(2)(b), avoidance was declared within a reasonable time after Claimant knew of the breach (a). Finally, Claimant was free to declare avoidance, as his right was not withheld for any additional period of time (b).

**(a) Claimant declared avoidance within a reasonable time after he knew of the breach, in conformity with Arts. 49(2)(b)(i) and 73(2) CISG**

134. Claimant has signified his avoidance of contract to Respondents within a reasonable time after he knew of the seller's breach. Claimant had waited 11 days after the delivery of the cars to declare the contract avoided [CL.Ex. 10 & 11], using this time to evaluate the situation. Once the uncertainty of Universal's ability to repair the cars satisfactorily became evident, Claimant avoided the contract without delay, thus preventing the sellers from incurring any useless expenses. Claimant therefore exercised his right to avoid in good faith.

**(b) Claimant's right to avoid was not suspended under Arts. 49(2)(b)(ii) and 49(2)(b)(iii) for any additional period of time set by either Claimant or Universal**

135. Claimant was not precluded from avoiding the contract immediately upon the finding of fundamental breach, since he had not exercised his right to fix an additional period of time for



subsequent performance, as allowed by Art. 47(1) CISG. The declaration that the buyer is fixing additional time for performance must be unambiguous [Müller-Chen “Article 47” p.551] and express [UNCITRAL Digest p. 355]. Claimant’s inquiries as to the time the repairs would take cannot be interpreted as such a communication.

136. In addition, even if Claimant’s questions were interpreted differently, it was also clear from the parties’ communications that Universal did not intend to be bound by a determined period of time for repairs [St. of Cl. ¶ 17]. This constituted an indication that “the seller ha[d] declared that he will not perform his obligations within such an additional period” [Art. 49(2)(b)(ii)]. Similarly, Universal’s statements preclude Universal from arguing that it had indicated a specific period of time within which it would perform its repairs that could prevent the buyer from avoiding the contract under Art. 49(2)(b)(iii) [St. of Cl ¶ 17].

**PRAYER FOR RELIEF**

137. In light of the above submission, the Claimant respectfully requests that the Tribunal find:
- That the Tribunal has jurisdiction to consider the dispute between Joseph Tisk, doing business as Reliable Auto Imports, as claimant, and UAM Distributors Oceania Ltd and Universal Auto Manufacturers, S.A. as respondents;
  - that Universal is liable for the breach by UAM of the contract of sale dated January 18, 2008;
  - that there was a fundamental breach of the contract;
  - that Claimant was justified in avoiding the contract on February 29, 2008;
  - that UAM Distributors Oceania Ltd and Universal Auto Manufacturers, S.A. are jointly and individually responsible to reimburse Claimant USD 380,000;
  - that UAM Distributors Oceania Ltd and Universal Auto Manufacturers, S.A. are jointly and individually liable for the USD 2,000 storage costs;
  - that Claimant should recover interest and arbitration costs.
138. Claimant further requests the Tribunal to order UAM Distributors Oceania Ltd and Universal Auto Manufacturers, S.A. jointly and individually
- to pay Claimant the sum of USD 382,000,
  - to pay interest on the said sum from January 23, 2008 to the date of payment, and
  - to pay the costs of arbitration.

(signed)

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Élise Béland

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Anja Grabundzija

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Eric van Eyken

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Paula Viola

4 December 2008