

ALBERT-LUDWIGS
UNIVERSITÄT FREIBURG



MEMORANDUM FOR RESPONDENTS

On behalf of:

UAM
Distributors Oceania, Ltd.
FIRST RESPONDENT

and

UNIVERSAL
Auto Manufacturers, S.A.
SECOND RESPONDENT

Against:

JOSEPH TISK
Reliable Auto Imports
CLAIMANT



TABLE OF CONTENTS

INDEX OF ABBREVIATIONS IV

INDEX OF AUTHORITIES VI

INDEX OF CASES..... XXI

INDEX OF AWARDS.....XXV

STATEMENT OF FACTS 1

ISSUE 1: UNIVERSAL IS NOT BOUND BY THE ARBITRATION AGREEMENT

BETWEEN UAM AND CLAIMANT 2

A. UNIVERSAL did not consent to be bound by the arbitration agreement 2

B. UAM did not act as UNIVERSAL’s agent 3

I. UAM did not act in the name of UNIVERSAL 4

II. UAM did not have the authority to act as UNIVERSAL’s agent 4

a. UAM had no power of representation 5

b. The lack of authority cannot be overcome by an apparent authority 5

c. UNIVERSAL did not subsequently ratify the conclusion of the contract by UAM..... 5

C. The Group of Companies theory is inapplicable in the case at hand 6

I. The Group of Companies theory exists only in French Case Law and is therefore inapplicable to the case at hand 6

II. In the alternative, the theory cannot be applied because the issue of binding non-signatories is exclusively governed by Oceanian national law 7

III. In any case, the requirements of the Group of Companies theory are not met 8

a. UNIVERSAL and UAM do not form a corporate group 8

b. UNIVERSAL’s involvement in the main contract did not lead to the assumption that it became a real party to the contract 9

c. UNIVERSAL did not derive any benefits from the sales contract 10

Conclusion to First Issue 11



ISSUE 2: UAM’S INSOLVENCY PRECLUDES THE ARBITRAL TRIBUNAL’S JURISDICTION 12

- A. The insolvency proceedings preclude the Arbitral Tribunal’s jurisdiction over UAM 12
 - I. The Arbitral Tribunal’s jurisdiction is inhibited by virtue of the insolvency law of Oceania 13
 - a. The insolvency law of Oceania retroactively rejects UAM’s capacity to enter into the arbitration agreement with CLAIMANT 13
 - b. In the alternative, the objective arbitrability of the dispute is governed and rejected by the insolvency law of Oceania 14
 - II. In any case, the nonenforceability of an award precludes the Arbitral Tribunal’s jurisdiction 16
 - a. The Tribunal’s award will be unenforceable in Oceania 17
 - b. The Arbitral Tribunal cannot ensure enforcement of the award in Polaria..... 17
 - c. The award cannot be paid voluntarily 18
- B. Even if the arbitration agreement was extended to UNIVERSAL, the Tribunal would still have no jurisdiction over it 19
- Conclusion to Second Issue..... 20

ISSUE 3: UNIVERSAL IS NOT LIABLE FOR THE BREACH OF CONTRACT

- COMMITTED BY UAM..... 21**
- A. CLAIMANT and UNIVERSAL did not enter into a contractual relationship 21
 - I. UNIVERSAL and CLAIMANT did not conclude any contract..... 21
 - II. CLAIMANT and UAM did not modify the sales contract in such a way as to include UNIVERSAL into their contractual relationship..... 21
 - a. An alleged modification was not initiated by the primary parties to the contract..... 22
 - b. In any case, UNIVERSAL did not consent to become a party to the contract 22
 - III. UAM did not act as an agent of UNIVERSAL..... 23
- B. There is no direct liability of UNIVERSAL as manufacturer of the cars 23
 - I. Direct liability against the manufacturer does not exist under the CISG..... 23
 - a. A direct action against the manufacturer does not exist under the CISG 23
 - b. UNIVERSAL is not liable on the basis of product liability rules 24
 - aa. There is no product liability under the CISG..... 24



bb. UNIVERSAL is not liable as CLAIMANT’s property was not damaged..... 24

II. A direct liability against the manufacturer does not exist
under the otherwise applicable national law 25

III. UNIVERSAL did not give any warranty to CLAIMANT 25

Conclusion to Third Issue 26

ISSUE 4: CLAIMANT WAS NOT ENTITLED TO AVOID THE CONTRACT 27

A. The delivery of 25 defective cars did not amount
to a fundamental breach of contract 27

I. The delivery of 25 defective cars did not cause
CLAIMANT a substantial detriment 27

a. UAM was offered possible subsequent performance 28

b. UAM offered reasonable subsequent performance 29

aa. UAM would have cured the defect under reasonable conditions 29

bb. UAM would have cured the defect within a reasonable time frame 29

II. An assumed substantial detriment would not have been foreseeable 31

B. Even if there was a fundamental breach, CLAIMANT would not
have been authorised to avoid the contract in its entirety 32

I. CLAIMANT could not declare the contract avoided after
having set an additional period of time 32

II. The prerequisites of Art. 49(1) CISG are not met 33

III. The prerequisites of Art. 73(2) CISG are not met 33

Conclusion to Fourth Issue 34

REQUEST FOR RELIEF 35

CERTIFICATE.... 35



INDEX OF ABBREVIATIONS

€	Euro
Art.	Article
BGH	Bundesgerichtshof (German Supreme Court)
Cf.	confer
Circ.	Circuit
CISG	United Nations Convention on Contracts for the International Sale of Goods
CILS	Centre for International Legal Studies
e.g.	exempli gratia
emph. add.	emphasis added
et al.	et alia
et seq.	et sequentes (and following)
ibid.	ibidem (at the same place)
ICC	International Chamber of Commerce
i.e.	id est
LG	Landgericht (German Regional Court)
Ltd.	Limited
MüKo-BGB	Münchener Kommentar zum Bürgerlichen Gesetzbuch
MüKo-HGB	Münchener Kommentar zum Handelsgesetzbuch
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NJW-RR	Neue juristische Wochenschrift-Rechtsprechungsreport (German Law Report)
No.	Number
OLG	Oberlandesgericht (German Upper Regional Court)
OGH	Oberster Gerichtshof (Austrian Supreme Court)
p./pp.	page/pages
para.	paragraph
paras.	paragraphs
Q.B.D.	Queen's Bench Division



RIW	Recht der Internationalen Wirtschaft (German law magazine)
S.A.	Société Anonyme
SCC	Stockholm Chamber of Commerce
UAM	UNIVERSAL Automobile Manufacturer Distributors Oceania, Ltd.
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL ML	UNCITRAL Model Law on International Commercial Arbitration
UNIVERSAL	UNIVERSAL Automobile Manufacturers, S.A.
U.S. Ct. App.	United States Court of Appeals
U.S. Dist. Ct.	United States District Court
USD	United States Dollar(s)
v.	versus



INDEX OF AUTHORITIES

- ACHILLES**, Wilhelm-Albrecht Kommentar zum
UN-Kaufrechtsübereinkommen (CISG),
Neuwied (2000)
(cited: *ACHILLES*, in para. 109)
- AUDIT**, Bernard La vente international de marchandises,
Convention des Nations-Unies du 11 avril 1980,
Paris (1990)
(cited: *AUDIT*, in para. 109)
- BAMBERGER**, Heinz Georg Kommentar zum Bürgerlichen Gesetzbuch,
ROTH, Herbert Vol. 1, §§1-610, CISG,
2nd edition,
München (2007)
(cited: *BAMBERGER/ROTH/AUTHOR*, in para. 85)
- BAMFORTH**, Richard Joining non-signatories to an
VAN FLEET, Irina arbitration: recent developments, in:
TYMCZYSZYN, Mark A Corroero Dispute Resolution 2007/08 Vol. 2: Arbitration
(cited: *BAMFORTH*, in para. 25)
- BIANCA**, Cesare Massimo Commentary on the International Sales Law
BONELL, Michael The 1980 Vienna Sales Convention,
Milan (1987)
(cited: *BIANCA/BONELL/AUTHOR*, in paras. 98,
115, 120)
- BLESSING**, Marc The law applicable to the arbitration clause and
arbitrability, in:
ICCA Congress Series No. 9 (1998)
(cited: *BLESSING*, in para. 30)



- BONELL, Michael Joachim** The 1983 Geneva Convention on Agency in the International Sale of Goods in:
The American Journal of Comparative Law,
Vol. 32 (1984), pp. 717-749
(cited: *BONELL*, in paras. 18 and 30)
- BÖCKSTIEGEL, Karl-Heinz** Public Policy and Arbitrability,
ICCA Congress series No. 3,
New York (1986)
(cited: *BÖCKSTIEGEL*, in para. 49)
- BORN, Gary B.** International Commercial Arbitration,
2nd Edition (2001)
(cited: *Born*, in paras. 6, 45, 64)
- BRUNNER, Christoph** UN-Kaufrecht - CISG, Kommentar zum
Übereinkommen der Vereinten Nationen über
Verträge über den internationalen Warenkauf von
1980,
Bern (2004)
(cited: *BRUNNER*, in paras. 98, 109, 117, 124)
- CHUKWUMERIJE, Okezie** Choice of Law in International Commercial
Arbitration,
Westport, Connecticut; London (1994)
(cited: *CHUKWUMERIJE*, in para. 58)
- CRAIG, William Laurence** International Chamber of Commerce arbitration
PARK, William W. (ICC publication 594),
PAULSSON, Jan 3rd Edition,
New York et al. (2000)
(cited: *CRAIG/PARK/PAULSSON*, in para. 50)



- DERAINS, Yves**
Schwartz, Eric A. A guide to the ICC Rules of Arbitration,
2nd Edition,
The Hague (2005)
(cited: Derains/Schwartz, in paras. 32 and 64)
- ENDERLEIN, Fritz**
MASKOW, Dietrich
STROHBACH, Heinz Internationales Kaufrecht, Kaufrechtskonvention,
Verjährungskonvention, Vertretungskonvention,
Rechtsanwendungskonvention,
Berlin (1991)
(cited: ENDERLEIN/MASKOW/STROHBACH, in
paras. 98 and 117)
- EROGLU, Muzaffer** Multinational Enterprises and Tort Liabilities:
An Inter-Disciplinary and Comparative
Examination,
Edward Elgar Publishing (2008)
(cited: *EROGLU*, in para. 33)
- EVANS, Malcolm** Explanatory Report on the Convention on Agency in
The International Sale of Goods in:
Uniform Law Review (1984),
pp. 72-159
(cited: *Explanatory Report on the Convention on
Agency*, in paras. 18 and 30)
- FLECHTNER, Harry** Issues Relating to the Applicability of the United
Nations Convention on Contracts for the
International Sales of Goods (“CISG”), in:
Legal Studies Research Paper Series,
Working Paper No. 2008-07 (2008),
[http://papers.ssrn.com/sol3/papers.cfm?abstract_
id=1118118](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1118118)
(cited: FLECHTNER, in para. 101)



- FOUCHARD, Philippe** On international commercial arbitration,
GAILLARD, Emmanuel The Hague (et. al.) (1999)
GOLDMAN, Berthold (cited: *FOUCHARD/GAILLARD/GOLDMAN*,
in paras. 2, 6, 25, 26, 27, 32, 33, 58, 59, 78)
- FOUSTOUCOS, Anghelos C.** Conditions Required for the Validity of an
Arbitration Agreement in:
Journal of International Arbitration,
Vol. 5 No. 4 (1988)
(cited: *FOUSTOUCOS*, in para. 49, 50)
- GALSTON, Nina M.** International Sales
SMIT, Hans The United Nations Convention on Contracts for the
International Sale of Goods,
New York (1984)
(cited: *GALSTON/SMIT*, in para. 111)
- GOODE, Roy** The Role of the Lex Loci Arbitri in International
Commercial Arbitration, in:
Arbitration International, Vol. 17, No.1 (2001),
pp. 19-39
(cited: *GOODE*, in para. 45)
- Graffi, Leonardo** Case law on the concept of “fundamental breach” in:
the Vienna Sales Convention,
Revue de droit des affaires internationales/
International Business Law Review (2003)
(cited : *GRAFFI*, in para. 109)



- HIRSCH, Laurent** Binding Non-signatories to International Arbitral Awards in: International Arbitration and Mediation, Symposium, Salzburg, CILS, Session 1 on June 17, 2006
(cited: *HIRSCH*, in paras. 2, 27, 32)
- HOLTHAUSEN, Rüdiger** Die wesentliche Vertragsverletzung des Verkäufers nach Art. 25 UN-Kaufrecht,
in: Recht der Internationalen Wirtschaft (1990), pp. 101-107
(cited: *HOLTHAUSEN*, in para. 109)
- HONNOLD, John O.** Uniform Law for International Sales under the 1980 United Nations Convention,
2nd Edition,
Deventer, Boston (1991)
(cited: *HONNOLD*, in paras. 98, 101, 109, 110, 124)
- HONSELL, Heinrich** Kommentar zum UN- Kaufrecht,
Berlin, Heidelberg (1997)
(cited: *HONSELL/AUTHOR*, in para. 120)
- HOWELLS, Geraint** The Law of Product Liability,
London (2000)
(cited: *HOWEELS*, in para. 99)
- HORVATH, Günther J.** The Duty of the Tribunal to Render an Enforceable Award, in:
Journal of International Arbitration (2001), pp. 135-158
(cited: *HORVATH*, in paras. 64 and 65)



- HUBER, Peter** CISG - The Structure of Remedies,
in: *Rabels Zeitschrift für ausländisches und
internationales Privatrecht* (2007),
pp. 13-34
(cited: *P.HUBER*, in paras. 109 and 115)
- HUBER, Ulrich** Der UNCITRAL- Entwurf eines Übereinkommens
über internationale Warenkaufverträge,
in: *Rabels Zeitschrift für ausländisches und
internationales Privatrecht* (1979),
pp. 413- 526
(cited: *U.HUBER*, in para. 122)
- HUBER, Peter** The CISG,
MULLIS, Alastair A new textbook for students and practitioners
(cited: *HUBER/MULLIS*, in paras. 109, 111, 115)
- KAROLLUS, Martin** UN-Kaufrecht,
Eine systematische Darstellung für Studium und
Praxis,
Wien (1991)
(cited: *KAROLLUS*, in paras. 98 and 109)
- KAUFMANN-KOHLER, Gabrielle** Arbitrage international,
RIGOZZI, Antonio Droit et pratique à la lumière de la LDIP,
Bern (2006)
(cited: *KAUFMANN-KOHLER/RIGOZZI*, in para. 58)



KÖHLER, Martin

Die Haftung nach UN-Kaufrecht im
Spannungsverhältnis zwischen Vertrag und Delikt:
ein rechtsvergleichender Blick aus Sicht des
deutschen und des französischen Rechts,
Saarbrücken (2002)
(cited: *KÖHLER*, in paras. 85 and 98)

KEIL, Andreas

Die Haftungsbefreiung des Schuldners im
UN-Kaufrecht im Vergleich mit dem deutschen und
US-amerikanischen Recht,
Frankfurt a.M., Lang (1993)
(cited: *KEIL*, in para. 122)

KNUTSON, Robert

Recent Treatment of Construction awards by the
ICC International Court of Arbitration,
a paper given to meeting of the Society of
Construction Law in London on 3 February 2004
(cited: *KNUTSON*, in para. 25)

KRITZER, Albert H.

Guide to Practical Applications of the United
Nations Convention On Contracts for the
International Sale of Goods,
Deventer, Boston (1989)
(cited: *Kritzer*, in para. 124)

LALIVE, Pierre

Transnational (or Truly International) Public Policy
and International Arbitration in:
ICCA Congress series No. 3,
New York (1986)
(cited: *LALIVE*, in paras. 49 and 50)



- LAUTENBACH, Boris** Die Haftungsbefreiung im internationalen
Warenkauf nach dem UN- Kaufrecht und dem
schweizerischen Kaufrecht,
Zürich (1990)
(cited: *LAUTENBACH*, in para. 122)
- LAUTERPACHT, Elihu**
GREENWOOD, C. J. International Law Reports,
Cambridge University Press (1994)
(cited: *LAUTERPACHT/GREENWOOD*, in para. 17)
- LAZIC, Vesna** The effect of arbitration agreements in insolvency
proceedings, in:
The Hague Yearbook of International Law,
The Hague (1995)
(cited: *LAZIC*, in paras. 55 and 58)
- LEADLEY, John**
WILLIAMS, Liz Peterson Farms: There is no Group of Companies
doctrine in English Law
(cited: *LEADLEY/WILLIAMS*, in para. 25)
- LEW, Julian D. M.**
MISTELIS, Loukas A.
KRÖLL, Stefan M. Comparative International Commercial Arbitration,
The Hague (2003)
(cited: *LEW/MISTELIS/KRÖLL*, in paras. 45, 57, 58, 59,
61, 64, 78)
- LOOKOFSKY, Joseph** Understanding the CISG,
A Compact Guide to the 1980 United Nations
Convention on Contracts for the International Sale of
Goods,
3rd (worldwide) Edition,
Alphen aan den Rijn (and others) (2008)
(cited: *LOOKOFSKY*, in para. 109)



- LIU, Chengwei** Remedies in International Sales,
Perspectives from CISG UNIDROIT Principles and
PECL
(cited: *LIU*, in para. 109)
- MANN, F.A.** Lex Facit Arbitrum, in:
International arbitration: liber amicorum for Martin
Domke (ed. by Pieter Sanders)
(cited: *MANN*, in para. 45)
- MOSES, Margaret L.** The Principles and Practice of International
Commercial Arbitration,
Cambridge et al. (2008)
(cited: *MOSES*, in paras. 6, 30, 55, 57, 74)
- NAÓN, Horacio A. Grigera** Choice-of-Law Problems in International
Commercial Arbitration,
Tübingen (1992)
(cited: *NAÓN*, in para. 25)
- PARK, William W.** Judicial Controls in the Arbitral Process in:
Arbitration International, Vol. 5, No. 3 (1989),
pp. 230 – 279
(cited: *PARK*, in para. 30)
- PIER-EILING, Kathrin** Das Nacherfüllungsrecht des Verkäufers aus
Art. 48 CISG unter besonderer Berücksichtigung
seines Verhältnisses zu den Rechtsbehelfen des
Käufers,
Berlin (2003)
(cited: *PIER-EILING*, in para. 109)



- Piltz, Burghard** Internationales Kaufrecht,
2nd Edition,
München (2008)
(cited: *Piltz*, in paras. 85, 98, 109)
- POUDRET, Jean-François** L'extension de la clause d'arbitrage: approches
française et suisse,
122 J. Droit International, 893 (1995), at 909
(cited: *POUDRET*, in para. 25)
- POUDRET, Jean-François** Comparative law of international arbitration,
BESSON, Sébastien 2nd Edition,
London (2007)
(cited: *POUDRET/BESSON*, in paras. 2, 25, 30, 32)
- PRESLMAYER, Martin** Handbuch der Produkthaftung,
2nd Edition,
Wien (2002)
(cited: *PRESLMAYER*, in para. 99)
- REDFERN, Alan** Law and Practice of International Commercial
HUNTER, Martin Arbitration,
4th Edition,
London (2004)
(cited: *REDFERN/HUNTER*, in paras. 6,17, 27, 30, 33,
45, 50, 57, 58, 59, 61, 64, 78)



- SCHLOSSER, Peter** Das Recht der internationalen privaten Schiedsgerichtsbarkeit, 2nd Edition, Tübingen (1989)
(cited: *SCHLOSSER*, in para. 74)
- SCHMIDT, Karsten**
GRUNEWALD, Barbara Münchener Kommentar zum Handelsgesetzbuch-CISG, 2nd Edition, München (2007)
(cited: *MÜKO-HGB/AUTHOR*, in paras. 96, 117, 124)
- SCHMIDT- KESSEL, Martin** Vertragsaufhebung nach UN- Kaufrecht, in: Recht der internationalen Wirtschaft (1996), pp. 60-65
(cited: *SCHMIDT-KESSEL*, in paras. 87 and 91)
- SCHNYDER, Anton**
STRAUB, Ralf Michael Das EG-Grünbuch über Verbrauchsgütergarantien und Kundendienst – Erster Schritt zu einem einheitlichen EG-Kaufrecht?, in: Zeitschrift für Europäisches Privatrecht (1996), pp. 8 -74
(cited: *SCHNYDER/STRAUB*, in para. 96)
- SOERGEL, Hans Theodor** Bürgerliches Gesetzbuch – Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG), Vol. 13, 13th edition, Stuttgart (2000)
(cited: *SOERGEL/AUTHOR*, in para. 98)



- Schroeter, Ulrich G.** UN-Kaufrecht und Europäisches Gemeinschaftsrecht: Verhältnis und Wechselwirkungen, Berlin (2005)
(cited: *SCHROETER*, in paras. 96 and 109)
- SCHWENZER, Ingeborg** Avoidance of the contract in case of non-conforming Goods (Art. 49(1)(a)CISG)
(cited: *SCHWENZER*, in para. 109)
- STAPLETON, Jane** Product Liability, London (1994)
(cited: *STAPLETON*, in para. 99)
- STAUDINGER, Julius von
MAGNUS, Ulrich** Kommentar zum Bürgerlichen Gesetzbuch, CISG, Berlin (2005)
(cited: *STAUDINGER/AUTHOR*, in paras. 96, 98, 120, 122, 133)
- STUCKI, Blaise** Extension of arbitration agreements to non-signatories
in ASA-Below 40 - Conference of 29 September 2006
(cited: *STUCKI*, in paras. 2, 28, 38)
- VAN HOUTTE, Hans** International Trade Law, London (1995)
(cited: *VAN HOUTTE*, in para. 30)
- WESTBROOK, Jay Lawrence** The Coming Encounter: International Arbitration and Bankruptcy, in:
Minnesota Law Review, Vol. 67 (1982, 1983), pp. 595-644
(cited: *WESTBROOK*, in para. 61)



- WITZ, Claude**
SALGER, Hanns-Christian
- International einheitliches Kaufrecht,
Praktiker-Kommentar und
Vertragsgestaltung zum CISG,
Heidelberg (2000)
(cited: *WITZ/SALGER/AUTHOR*, in para. 96)
- WITZ, Claude**
WOLTER, Gerhard
- Die ersten Entscheidungen französischer Gerichte
zum Einheitlichen UN-Kaufrecht, in:
Recht der Internationalen Wirtschaft (1995),
pp. 810-813
(cited: *WITZ/WOLTER I*, in paras. 96 and 133)



INDEX OF CASES

Austria

OGH,

7 September 2000,

Rechtsinformationssystem (RIS) der Republik Österreich, 8 Ob 22/00v

(cited: *OGH*, 7 September 2000, in para. 111)

France

Cour de Cassation

Thermo King v. Cigna Insurance Company of Europe,

5. January 1999,

CLOUT No. 241

(cited: *Cour de Cassation*, 5 January 1999, in para. 96)

Cour d' Appel Grenoble,

26 April 1995,

CISG-online No. 154

(cited: *Cour d' Appel Grenoble*, 26 April 1995, in para. 109)

Germany

BGH,

7. December 2006,

NJW-RR 2007, 529, 530,

(cited: *BGH*, 7 December 2006, in para. 91)

BGH,

2. March 2005,

CISG-online No. 999 = IHR 2005, 158, 159,

(cited: *BGH*, 2 March 2005, in para. 98)



BGH,

12. February 1998,

NJW 1998, 3205,

CISG-online No. 343,

(cited: *BGH, 12 February 1998*, in para. 85)

BGH,

3 April 1996,

www.unilex.info/case.cfm?pid=1&id=182&do=case

(cited: *BGH, 3 April 1996*, in para. 111)

OLG Köln,

14 October 2002,

CISG-online No. 709,

(cited: *OLG Köln, 14 October 2002*, in para. 109)

OLG Koblenz,

31 January 1997,

www.unilex.info/case.cfm?pid=1&id=223&do=case

(cited: *OLG Köln, 31 January 1997*, in para. 108)

LG Düsseldorf,

23. June 1994,

CISG-online No. 179

(cited: *LG Düsseldorf, 23 June 1994*, in para. 96)

Italy

Tribunale di Busto Arsizio,

13 December 2001,

<http://www.unilex.info/case.cfm?pid=1&id=927&do=case>

(cited: *Tribunale di Busto Arsizio, 13 December 2001*, in paras. 109, 111, 129)



Switzerland

Schweizerisches Bundesgericht,
Société des Grands Travaux de Marseille (France) v.
People's Republic of Bangladesh, Bangladesh Industrial Development,
Corporation; Cour de justice Gèneve,
5 May 1976,
V Yearbook of Commercial Arbitration (1980), pp. 217 *et seq.*
(cited: *Schweizerisches Bundesgericht, 5 May 1976*, in para. 50)

Handelsgericht Zürich,
Seller (Switzerland) v. Buyer (Germany),
26 April 1995,
CLOUT No. 196
(cited: *Handelsgericht Zürich, 26 April 1995*, in para. 109)

Handelsgericht des Kantons Aargau,
5 November 2002,
CISG-online No. 715
(cited: *Handelsgericht des Kantons Aargau, 5 November 2002*,
in para. 109)

United States of America

U.S. State Court of Appeals for the third circuit,
E.I. Dupont v. Rhone Poulenc Fiber Resin Intermediates,
269 F.3d 187, 195
(cited as: *E.I. DUPONT v. RHONE POULENC FIBER RESIN INTERMEDIATES*,
U. S. Ct. App. for the 3rd Circuit, in para. 17)



U.S. District Court, Northern District of California, San Jose Division,
Asante Technologies v. PMC-Sierra,
LXXVI Florida Bar Journal (2002), pp. 28-30
(cited as: *ASANTE TECHNOLOGIES v. PMC-SIERRA*, *Fed. Dist. Ct. California*, in para. 15)

U.S. District Court, District of St. Thomas and St. John
Rhône Méditerranée v. Achille Lauro, et al.,
District Court: 555 F. Supp. 481 (1982); Court of Appeals: 712 F.2d 50
(1983),
IX Y. B. CA 1984, pp. 474-481
(cited: *RHÔNE MÉDITERRANÉE v. ACHILLE LAURO, ET AL.*, *US Dist. Ct. (District of St. Thomas and St. John)*, in para. 74)

U.S. District Court, (N.D.Ill.),
Usinor Industeel v. Leeco Steel Products, Inc.,
28. March 2002,
CISG-online No. 696
(cited: *USINOR INDUSTRIEL v. LEECO STEEL PRODUCTS, INC.*, *U.S. District Court, (N.D.Ill.)*, in para. 85)



INDEX OF AWARDS

International Chamber of Commerce

Award in Case No. 2138 (1974),
JDI 1975, pp 934-938,
(cited. *ICC Case No. 2138*, in para. 32)

Dow Chemical v. Isover Gobain,
Case No. 4131 (1982),
JDI (1983), pp. 899 et seq.
(cited: *ICC Case No. 4131*, in paras. 25, 30, 32, 33)

Supplier (Italy) v. Buyer (South Korea),
Case No. 4132,
JDI 1983, pp. 891 et seq.,
(cited: *ICC Case No. 4132*, in para. 60)

Company (Bahamas), Company (parent of first Claimant) (Luxembourg)
v. Company (France), Company (parent of first Defendant) (France),
Case No. 4402 (1983),
ICCA YB Vol. IX, 1984, pp 138-141,
(cited: *ICC Case No. 4402*, in para. 32)

Company (Europe) v. Company (USA), Company, branch of the First
Defendant (Egypt), Physical person Z, manager of First Defendant,
Case No. 5721 (1990),
JDI (1990), pp. 1019-1029,
(cited: *ICC Case No. 5721*, in para. 33)



Société Casa v. Société Cambior,

Case No. 6697,

26 December 1990,

Revue de l'Arbitrage, 1992 - No. 1, pp. 135 – 146,

(cited : *ICC Case No. 6697*, in para. 65)

Company (Algeria) v Company (Morocco), Parent company of First

Defendant ,

Case No. 7610 (1996),

JDI 1998, pp 1027-1034,

(cited: *ICC Case No. 7610*, in para. 32)

Case No. 7754,

ICAB, Vol. 11/No. 2, pp. 46-49,

<http://cisgw3.law.pace.edu/cases/957754i1.html>,

(cited: *ICC Case No. 7754*, in para. 109)

ICC Case No. 7883 (1997),

Published by Kluwer Law Internation,

(cited: *ICC Case No. 7883*, in para. 2)

Company Maine, (USA) v Company (Belgium), Parent Company of First

Defendant (Belgium)

Case No. 8385 (1995)

JDI 1997, pp. 1061-1073

(cited: *ICC Case No. 8385*, in para. 33)



Schiedsgericht der Börse für Landwirtschaftliche Produkte Wien,

Buyer (Poland) v. Seller (Austria),

10 December 1997

CISG-online No. 351,

Österreichische Zeitschrift für Rechtsvergleichung (östZRVgl) (1998),

pp. 211-220

(cited: *Schiedsgericht der Börse für Landwirtschaftliche Produkte Wien,*

10 December 1997, in para. 133)



STATEMENT OF FACTS

- 18 January 2008** Mr. Joseph Tisk (hereinafter referred to as “CLAIMANT”), concludes a sales contract with UAM Distributors Oceania Ltd (hereinafter referred to as “UAM”) for the purchase of 100 Tera cars. The cars were to be transported in a number of separate consignments by ship as space was available.
- 6 February 2008** The first consignment of 25 cars is shipped from UAM, Oceania, to CLAIMANT, Mediterraneo.
- 12 February 2008** CLAIMANT is approached by Patria Importers, Ltd (hereinafter referred to as “Patria”) with an offer of 20 new Indo cars.
- 18 February 2008** 25 Tera cars arrive in Mediterraneo. CLAIMANT notes that the cars are defective.
- 19 February 2008** CLAIMANT rejects Patria’s offer of 20 Indo cars as further sales would be slow in Mediterraneo.
- 21 February 2008** CLAIMANT’s mechanic is not able to determine what is wrong with the Tera cars, though an Engine Control Unit (ECU) problem seems likely.
- 22 February 2008** CLAIMANT calls UAM in order to report the situation.
- 27 February 2008** UAM informs CLAIMANT that its service personnel cannot identify the defect of the cars, although an ECU issue is considered to be most likely.
- 28 February 2008** UNIVERSAL, the manufacturer of the cars, agrees to repair the defective cars as the repairing procedure calls for specially trained personnel and special equipment that UAM does not have. CLAIMANT asks how long it will take for the cars to be fixed. UNIVERSAL states that it cannot be sure until its personnel had inspected the cars. It adds that this probably will not be long and CLAIMANT will have cars ready for sale within a week.
- 29 February 2008** CLAIMANT accepts an improved offer by Patria. CLAIMANT sends a message to UAM stating that it is cancelling the contract. Later it informs UNIVERSAL of its actions. CLAIMANT also demands the return of its down payment of USD 380,000 from UAM.
- 09 April 2008** The District Court in Port City, Oceania, commences insolvency proceedings regarding UAM. As a consequence all arbitration clauses previously concluded are invalidated by virtue of Oceanian law.
- 17 May 2008** UNIVERSAL decides not to send its personnel to CLAIMANT. The defective cars are shipped from Mediterraneo to UNIVERSAL in Equatoriana.
- 19 June 2008** UNIVERSAL reports that all 25 of the defective Tera cars were repaired within 5 working days.
- 20 June 2008** CLAIMANT reiterates its request for the return of USD 380,000.
- 15 August 2008** CLAIMANT submits a request for arbitration to the SCC Arbitration Institute.



ISSUE 1: UNIVERSAL IS NOT BOUND BY THE ARBITRATION AGREEMENT BETWEEN UAM AND CLAIMANT

1 On 18 January 2008, UAM and CLAIMANT concluded a sales contract which contained an arbitration agreement [*Claimant's Exhibit No. 1, para. 13, p. 11*]. UNIVERSAL signed neither the sales contract nor the arbitration agreement. CLAIMANT, however, alleges that UNIVERSAL is bound by this agreement [*Memorandum for Claimant, para. 21*]. Contrary to this allegation UNIVERSAL is not bound as it neither consented to be bound (A) nor did UAM do so as UNIVERSAL's agent (B). Furthermore, the "Group of Companies" theory is inapplicable in the case at hand (C).

A. UNIVERSAL DID NOT CONSENT TO BE BOUND BY THE ARBITRATION AGREEMENT

2 UNIVERSAL is not bound as it did not consent to be bound. An arbitration agreement can only be extended to a non-signatory if this complies with the intentions of the parties [*ICC Case No. 7883; FOUCHARD/GAILLARD/GOLDMAN, para. 504; HIRSCH, para. 5; STUCKI, para. 13*]. Such intention can be expressed or implied [*FOUCHARD/GAILLARD/GOLDMAN, para. 504; POUDRET/BESSON, para. 253; HANOTIAU, para. 10*]. In line with CLAIMANT's submission it is the Arbitral Tribunal's duty to determine and follow the true intentions of the parties [*Memorandum for Claimant, para. 22*]. The former argues that since UNIVERSAL reviewed UAM's form contracts and did not choose to remove or modify the arbitration agreement, it was UNIVERSAL's implied intention to arbitrate all disputes arising out of the contract in dispute [*Memorandum for Claimant, para. 40*]. However, UNIVERSAL neither expressly nor impliedly consented to be bound by the arbitration agreement.

3 First, there is no indication that UNIVERSAL expressly consented to be bound by the arbitration agreement. UNIVERSAL was neither a signatory party to this contract nor did the contract contain any indication that it should become a contractual party [*Claimant's Exhibit No. 1, p. 11*]. Furthermore, neither UNIVERSAL nor CLAIMANT ever mentioned this agreement.

4 Second, UNIVERSAL's intention to arbitrate cannot be inferred from the fact that UNIVERSAL reviewed UAM's form contracts. By reviewing the form contracts UNIVERSAL solely ensured that UAM would generally respect its policies [*Procedural Order No. 2, para. 16, p. 43*]. Reviewing another company's form contracts is, however, far from agreeing oneself to that other company's obligations.

5 Third, UAM concluded all of its contracts independently [*Procedural Order No. 2,*



para. 16, p. 43]. UNIVERSAL did not contact UAM until weeks after the sales contract had been concluded. It can therefore be assumed that UNIVERSAL was unaware of the agreement between UAM and CLAIMANT.

- 6 Fourth, CLAIMANT could not have argued that UNIVERSAL became a party to the arbitration agreement by offering to repair the cars. This assumption would contradict the doctrine of separability. According to this doctrine the main contract and the arbitration agreement constitute separate agreements which have full legal autonomy [*REDFERN/HUNTER, para. 3-16; FOUCHARD/GAILLARD/GOLDMAN, para. 391; BORN, para. 20, p. 324; MOSES, p. 18*]. UNIVERSAL's offer to repair the cars, however, concerned only UAM's obligations arising out of the sales contract but not the arbitration agreement. Neither UNIVERSAL nor CLAIMANT ever referred to the existence of such an agreement. Additionally, UNIVERSAL was firm in stating that it "would undertake the repairs *without admission of liability*" [*Claimant's Exhibit No. 4, para. 3, p. 15; emph. add.*]. This demonstrates UNIVERSAL's intention to avoid any legally binding relationship with CLAIMANT. Therefore, UNIVERSAL's implication in the performance of the contract cannot lead to the conclusion that UNIVERSAL consented to become a party to the arbitration agreement.
- 7 Thus, UNIVERSAL did not consent to be bound by the arbitration agreement.

B. UAM DID NOT ACT AS UNIVERSAL'S AGENT

- 8 CLAIMANT argues that UNIVERSAL is bound by the arbitration agreement since UAM and UNIVERSAL allegedly had an agency relationship which was sufficiently close to bind UNIVERSAL [*Memorandum for Claimant, paras. 22-26*]. However, UAM did not act as UNIVERSAL's agent and can therefore not bind it to the arbitration agreement.
- 9 In accordance with its Art. 2(1) the Convention on Agency in the International Sale of Goods (hereinafter referred to as "CAISG") is applicable to the case at hand as the colourable principal and the third party have their places of business in different states [*Procedural Order No. 2, para. 7, p. 42*] and UAM, the alleged agent, has its place of business in Oceania, which is a Contracting State to the CAISG [*Procedural Order No. 2, para. 7, p. 42*]. Pursuant to Art. 12 CAISG an agent binds its principal if it acts in the name of the principal and within its scope of authority. UAM neither acted in the name of UNIVERSAL (I) nor did it have the authority to do so (II).



I. UAM DID NOT ACT IN THE NAME OF UNIVERSAL

- 10 UAM did not act in the name of UNIVERSAL. Pursuant to Art. 12 CAISG, the agent acts in the name of the principal if he undertakes to bind the principal and not himself only. In the case at hand, however, UAM did not undertake to bind UNIVERSAL.
- 11 First, UAM never mentioned that it was acting in the name of UNIVERSAL. The sales contract of 18 January neither contained UNIVERSAL's name [*Claimant's Exhibit No. 1, p. 11*] nor any hint that UAM was acting in the name of UNIVERSAL.
- 12 Second, UNIVERSAL sold the Tera cars directly to UAM and had already received full payment for them [*Procedural Order No. 2, para. 20, p. 44*]. Since UAM owned the Tera cars it wanted to bind itself only.
- 13 Third, CLAIMANT believed that UAM was acting in its own name. CLAIMANT negotiated the contract solely with UAM and paid the purchase price to UAM [*Statement of Claim, para. 9, p. 5*]. It also contacted exclusively UAM when it discovered the defect of the cars [*Claimant's Exhibit No. 2, p. 12*]. Thus, UAM did not act in the name of UNIVERSAL but in its own name.
- 14 CLAIMANT alleges that UNIVERSAL is bound by the arbitration agreement since UAM acted on behalf of UNIVERSAL [*Memorandum for Claimant, para. 23*]. Pursuant to Art. 12 CAISG, however, acting on behalf of the principal is only sufficient to bind him if the agent undertakes to bind the principal and not himself only. Since UAM intended to bind just itself it is irrelevant whether it acted on behalf of UNIVERSAL.
- 15 Furthermore, CLAIMANT argues that UAM acted on UNIVERSAL's behalf by marketing, importing and selling UNIVERSAL cars in Mediterraneo and Oceania [*Memorandum for Claimant, para. 24*]. Marketing, importing and selling correspond exactly to the common obligations of a distributor agreement [*ASANTE TECHNOLOGIES v. PMC-SIERRA, U.S. Dist. Ct. California, para. 78*]. As CLAIMANT itself admits, a distributor agreement does not define an agency relationship [*Memorandum for Claimant, para. 24*]. Hence, even if UAM acted on behalf of UNIVERSAL this would not be sufficient to bind UNIVERSAL since UAM undertook to bind itself only.

II. UAM DID NOT HAVE THE AUTHORITY TO ACT AS UNIVERSAL'S AGENT

- 16 UNIVERSAL did not authorise UAM to act as its agent. According to Art. 9(1) CAISG "the authorisation of the agent by the principal may be expressed or implied". UAM neither had power of representation (a) nor can this lack of authority be overcome by an apparent



authority (b) nor did UNIVERSAL subsequently ratify the conclusion of the contract (c).

a. UAM had no power of representation

17 CLAIMANT alleges that since UNIVERSAL was a co-founding party, holding 10 percent in the stocks of UAM and retaining a seat at the Governing Board of UAM it had sufficient influence on UAM to establish an agent-principal relationship [*Memorandum for Claimant, para. 58*]. Contrary to this allegation separate corporate entities are created in order to limit liability to these legal entities [*REDFERN/HUNTER, para. 3-31; LAUTERPACHT/GREENWOOD, para. 137*]. This purpose would be frustrated if one legal entity always had the authority to bind the parent company. Holding shares in a company does not establish any power of representation [*E.I. DUPONT V. RHONE POULENC FIBER RESIN INTERMEDIATES, U.S. Ct. App. (3rd Circ.)*]. Hence, UAM had no power of representation.

b. The lack of authority cannot be overcome by an apparent authority

18 CLAIMANT cannot rely on the theory of apparent authority, based on Art. 14(2) CAISG, to bind UNIVERSAL to the arbitration agreement. According to Art. 14(2) CAISG a principal “may not invoke against the third party the lack of authority of the agent” when its conduct reasonably causes third parties to believe that the agent has been authorised to act. At the time the contract was concluded CLAIMANT could not reasonably believe that it was actually contracting with UNIVERSAL. UNIVERSAL communicated with CLAIMANT for the first time five weeks after the conclusion of the contract [*Claimant’s Exhibit No. 3, pp. 13 and 14*]. CLAIMANT alleges that UNIVERSAL’s conduct subsequent to the conclusion of the contract created the impression of UAM having authority to act on UNIVERSAL’s behalf [*Memorandum for Claimant, para. 27*]. However, in order to justify the apparent authority of the agent this impression must be created before the contract was concluded. The theory of apparent authority shall protect a party’s expectation with regard to its contractual partner [*Explanatory Report on the Convention on Agency, Art. 14, para. 84; BONELL, p. 740*]. The contractual partner, however, is chosen at the latest when the contract is concluded. Hence, any impression induced after the conclusion of the contract cannot justify an apparent authority.

19 Hence, the lack of authority cannot be overcome by an apparent authority.

c. UNIVERSAL did not subsequently ratify the conclusion of the contract by UAM

20 The conclusion of the contract by UAM has not been subsequently ratified by UNIVERSAL.



According to Art. 15(1) CAISG ratifying an act “produces the same effects as if it had initially been carried out with authority”. In accordance with Art. 15(8) CAISG a ratification may be expressed or “be inferred from the conduct of the principal”.

- 21 First, there is no indication that UNIVERSAL explicitly ratified the sales contract with CLAIMANT.
- 22 Second, UNIVERSAL’s subsequent conduct refutes any such impression. CLAIMANT alleges that UNIVERSAL’s communication with CLAIMANT created the impression of UAM acting with authority [*Memorandum for Claimant, para. 27*]. However, in the early stages of the correspondence with CLAIMANT, UNIVERSAL stated that “UAM is, of course, responsible to [CLAIMANT] for the condition of the Tera cars it has sold to [CLAIMANT]” [*Claimant’s Exhibit No. 4, para. 2, p. 15*]. Furthermore, it agreed to “undertake the repairs without admission of liability” [*Claimant’s Exhibit No. 4, para. 3, p. 15*]. UNIVERSAL therefore clearly rebutted any presumption of it having a legal relationship with CLAIMANT.
- 23 Hence, it did not subsequently ratify the conclusion of the sales contract by UAM.

C. THE GROUP OF COMPANIES THEORY IS INAPPLICABLE IN THE CASE AT HAND

- 24 CLAIMANT argues that UNIVERSAL is bound by the arbitration agreement contained in the sales contract between CLAIMANT and UAM according to the Group of Companies theory [*Memorandum for Claimant, para. 33*]. However, CLAIMANT cannot rely on this theory since it only exists in French Case law and is therefore inapplicable in the case at hand (I). Even if the Tribunal were to find that the doctrine is a general principle of international trade law it cannot be applied in the case at hand as the issue of binding non-signatories is exclusively governed by Oceanian law (II). In any case the requirements of the Group of Companies theory are not met (III).

I. THE GROUP OF COMPANIES THEORY EXISTS ONLY IN FRENCH CASE LAW AND IS THEREFORE INAPPLICABLE IN THE CASE AT HAND

- 25 The Group of Companies theory is inapplicable since it exists only in French Case Law. It is based on Art. 1998 of the French Code Civil [*POUDRET, p. 913; KNUTSON, p. 4*] and is therefore a part of French law [*FOUCHARD/GAILLARD/GOLDMAN, para. 502; POUDRET/BESSON, para. 265; BAMFORTH, p. 11; NAÓN, p. 133; LEADLEY/WILLIAMS, p. 6*]. The leading case on the Group of Companies doctrine *Dow Chemical*, provides persuasive authority to such finding. In this case the arbitral tribunal stated that it followed French Case Law to determine the scope of the arbitration agreement since it considered French law to be applicable [*ICC Case*



No. 4131]. The dispute between UNIVERSAL and CLAIMANT, however, is not connected to French law. Furthermore, two reasons militate against the application of the “Group of Companies” theory.

- 26 First, binding non-signatories to an arbitration agreement on the grounds that they belong to a group of companies would more often than not contradict the clear intentions of the parties [*FOUCHARD/GAILLARD/GOLDMAN, para. 503*].
- 27 Second, creating different separate entities each having their own legal personality to limit liability underlines the indignation of implying that the group affiliates are bound by an arbitration agreement [*HIRSCH, para. 8; SACHS, p. 33*]. Furthermore, since organising a company in this way is perfectly legal the parties should be able to trust in the existence of this legal separation. Therefore, the legal separation of different companies should only be disregarded under extremely rare circumstances [*FOUCHARD/GAILLARD/GOLDMAN, p. 501; SANDROCK, p. 54; SACHS, p. 33; REDFERN/HUNTER, para. 3-31*].
- 28 Thus, the Group of Companies theory is inapplicable to the case at hand since it does not form part of any law connected to this case.

II. IN THE ALTERNATIVE, THE THEORY CANNOT BE APPLIED BECAUSE THE ISSUE OF BINDING NON-SIGNATORIES IS EXCLUSIVELY GOVERNED BY OCEANIAN LAW

- 29 Even if the Tribunal were to find that the Group of Companies theory forms part of general principles of international law, the doctrine cannot be applied since the question of binding non-signatories is exclusively governed by Oceanian law. As shown above the CAISG is to be applied to the dispute at hand [*see supra, para. 9*].
- 30 The Group of Companies theory was established to protect the reasonable expectation of third parties [*BLESSING, p. 177*]. By virtue of this theory non-signatories have to be bound to an arbitration agreement if by virtue of their conduct they appeared to be veritable parties to the arbitration agreement [*ICC Case No. 4131*]. The rule of apparent authority in agency law, laid down in Art. 14(2) CAISG, equally provides for the protection of reasonable expectations of third parties [*Explanatory Report on the Convention on Agency, Art. 14, para. 84; BONELL, p. 740*]. It has to be assumed that the protection of third-party expectations cannot go beyond what is clearly fixed by national law. Additionally, applying an international principle contradicting the national law would promote unpredictable solutions [*PARK, p. 230*] and international legal principles are too vague a basis upon which to impose an arbitration agreement on non-signatories [*REDFERN/HUNTER, para. 3-33; POUURET/BESSON, para. 264*];



MOSES, p. 60]. Hence, the Tribunal should take recourse to more established principles of private law, such as agency, to determine the scope of the arbitration agreement [*REDFERN/HUNTER*, para. 3-33; *VAN HOUTTE*, pp. 399 and 412]. Therefore, the Group of Companies theory has to be measured by the applicable national law. Since the requirements of Art. 14(2) CAISG are not met in the present case [*see supra*, paras. 18-19], binding UNIVERSAL by virtue of an international principle would contradict the national provision. Even more, since Oceania, Mediterraneo and Equatoriana have all adopted the CAISG, all parties are familiar with this Convention.

- 31 Thus, the Group of Companies theory cannot be applied because the issue of binding non-signatories is exclusively governed by Oceanian law

III. IN ANY CASE THE REQUIREMENTS OF THE GROUP OF COMPANIES THEORY ARE NOT MET

- 32 Assuming but not conceding that the Group of Companies theory is applicable, it cannot bind UNIVERSAL to the arbitration agreement since its conditions are not met. The Group of Companies theory is only applicable in cases where the non-signatory and the signatory party form a corporate group at the time the arbitration agreement is concluded [*ICC Case No. 4131*; *FOUCHARD/GAILLARD/GOLDMAN*, para. 500]. Still, this does not suffice, as further conditions need to be fulfilled [*ICC Case Nos. 2138, 4402, 7610*; *SANDROCK*, p. 464; *POUDRET/BESSON*, para. 254; *FOUCHARD/GAILLARD/GOLDMAN*, para. 500; *DERAINS/SCHWARTZ*, p. 90; *SACHS*, p. 64; *HIRSCH*, para. 8]. First, the non-signatory's involvement in the contract must subsequently lead to the assumption that it became a real party to the contract. Second, the non-signatory party must benefit directly from the contract. In the case at hand, both requirements are not met. Neither do UNIVERSAL and UAM form a corporate group (a), nor did UNIVERSAL's involvement in the main contract lead to the assumption that it became a real party to the contract (b) nor did UNIVERSAL derive any benefits from the main contract (c).

a. UNIVERSAL and UAM do not form a corporate group

- 33 UNIVERSAL and UAM do not belong to the same group of companies. In terms of the Group of Companies theory different legal entities form a group when they constitute one economic entity [*REDFERN/HUNTER*, para. 3-31; *FOUCHARD/GAILLARD/GOLDMAN*, para. 500; *EROGLU*, p. 192]. Different juridical identities form an economic entity if one exercises absolute control over the other and their conduct demonstrates an abandonment of separateness [*ICC Case Nos. 4131, 8385, 5721*; *FOUCHARD/GAILLARD/GOLDMAN*, para. 285].



UNIVERSAL, however, neither controlled UAM nor did its conduct demonstrate a sufficient degree of coherence between the companies.

- 34 First, UNIVERSAL's legal position did not enable UNIVERSAL to control UAM. UNIVERSAL held only 10 percent in the stocks of UAM, whereas Oceania Partners held 90 percent [*Statement of Claim, para. 30, p. 8*]. Holding only a minimum investment stake in the company, UNIVERSAL was not entitled to block actions agreed upon by the majority of the Governing Board [*Procedural Order No. 2, para. 12, p. 43*]. Furthermore, UNIVERSAL holds only one of five seats on the Governing Board of UAM, which has the authority to establish the overall policy of the company. The remaining four seats are held by persons representing the investment of Oceania Partners. Further, the day to day management fell within the responsibility of a management unconnected to UNIVERSAL [*Procedural Order No. 2, para 12, p. 43*]. In addition, UAM put through its business plans against the expressed will of UNIVERSAL with the support of Oceania Partners [*Procedural Order No. 2, para. 32, p. 46*]. The fact that UNIVERSAL could not oppose Oceanian Partners' and UAM's decision to expand UAM's operations shows that UNIVERSAL's legal position did not enable it to control UAM.
- 35 Second, UNIVERSAL and UAM appeared as separate entities in public. The two companies operated separately and independently [*Procedural Order No. 2, para. 16, p. 43*]. UAM concluded all of the sales contracts with retailers without UNIVERSAL dictating any of the contractual wording or interfering in the negotiations [*Procedural Order No. 2, para. 16, p. 43*]. Furthermore, it had been widely reported in the automotive trade press that UNIVERSAL owned only 10 percent of UAM whereas Oceania Partners owned the remaining 90 percent [*Statement of Claim, para. 30, p. 8*]. It also had been widely reported that, since UNIVERSAL could not influence UAM to its desired degree, UNIVERSAL had been considering withdrawing its support of UAM [*Procedural Order No. 2, para. 32, p. 46*].
- 36 Thus, UNIVERSAL and UAM did not constitute one economic entity and did thus not form one Group of Companies.

b. UNIVERSAL's involvement in the main contract did not lead to the assumption that it became a real party to the contract

- 37 UNIVERSAL's involvement in the main contract did not lead to the assumption that it became a real party to the contract containing the arbitration agreement. UNIVERSAL did not appear as a party to the contract, but as the manufacturer, who is only contractually obliged to



UAM.

- 38 First, CLAIMANT did not communicate with UNIVERSAL prior to the conclusion of the contract. UNIVERSAL contacted CLAIMANT for the first time six weeks after the latter concluded the contract with UAM [*Claimant's Exhibit No. 3, p. 13*]. Since CLAIMANT had never dealt with UNIVERSAL before, CLAIMANT could not assume that UNIVERSAL became a real party to the contract.
- 39 Second, UNIVERSAL's willingness to repair the cars could not create the impression that it became a real party to the contract between UAM and CLAIMANT. UNIVERSAL explicitly explained to CLAIMANT that it would exceptionally undertake the repair of the cars for UAM "without admission of liability" for the sole reason of UAM not having "special equipment and specially trained personnel" to remedy a complicated ECU problem [*Claimant's Exhibit No. 4, paras. 2 and 3, p. 15*]. UNIVERSAL made it clear that it was not responsible for the condition of the Tera cars since they were sold to CLAIMANT by UAM [*Claimant's Exhibit No. 4, para. 2, p. 15*]. Hence, UNIVERSAL's involvement in the main contract did not lead to the assumption that it became a real party to the contract containing the arbitration agreement.

c. UNIVERSAL did not derive any benefits from the sales contract

- 40 UNIVERSAL did not derive any material or immaterial benefits from the sales contract between UAM and CLAIMANT. UNIVERSAL had already received full payment for the Tera cars from UAM [*Procedural Order No. 2, para. 20, p. 44*]. Therefore, UNIVERSAL did not derive any monetary benefits from the sales contract between UAM and CLAIMANT. CLAIMANT argues that UNIVERSAL as the manufacturer of the cars had its own interest in the contract as problems with the Tera cars could damage its reputation [*Memorandum for Claimant, para. 35*]. Having such a general interest in the trouble-free performance of contracts concerning its products does not constitute a direct but an indirect benefit to UNIVERSAL. If such interest were to be sufficient there would be a general binding effect of every arbitration agreement concluded by distributors with regard to all manufacturers. This is clearly not an accurate description of the law. Moreover, a purported entry into the contract would have burdened UNIVERSAL with additional obligations. UNIVERSAL would not derive any benefits but merely avoid further detriment. In any case, it cannot be held that the delivery of 25 defective Tera cars could seriously threaten the reputation of a globally operating company, such as UNIVERSAL [*Statement of Facts, para. 6, p. 4*]. Hence,



UNIVERSAL did not derive any benefits from the contract. The conditions of the Group of Companies theory are not met.

- 41 Thus, UNIVERSAL is not bound by the arbitration agreement by virtue of the Group of Companies theory.
-

CONCLUSION TO FIRST ISSUE:

- 42 UNIVERSAL is not bound by the arbitration agreement as it neither consented to be bound, nor is it bound by virtue of the rules on agency. Furthermore, the Group of Companies theory is inapplicable in the case at hand.



ISSUE 2: UAM'S INSOLVENCY PRECLUDES THE ARBITRAL TRIBUNAL'S JURISDICTION

43 The Arbitral Tribunal does not have jurisdiction. According to the insolvency law of Oceania, the opening of insolvency proceedings voids any arbitration agreement concluded by the insolvent party [*Claimant's Exhibit No. 14, para. 4, p. 25*]. As UAM is insolvent, its arbitration agreement with CLAIMANT is void under Oceanian law. Nevertheless, CLAIMANT asserts that the insolvency proceedings in Oceania do not affect the arbitration proceedings in Danubia and that the Arbitral Tribunal therefore has jurisdiction over the dispute [*Memorandum for Claimant, para. 46*]. Contrary to CLAIMANT's assertion, however, the insolvency proceedings preclude the Arbitral Tribunal's jurisdiction over UAM (A) as well as over UNIVERSAL (B).

A. THE INSOLVENCY PROCEEDINGS PRECLUDE THE ARBITRAL TRIBUNAL'S JURISDICTION OVER UAM

- 44 CLAIMANT argues that the Arbitral Tribunal's power derives exclusively from the parties' arbitration agreement and not from any national legal system. It therefore alleges that the Tribunal's jurisdiction cannot be precluded by any national law, such as the insolvency law of Oceania [*Memorandum for Claimant, para. 47*].
- 45 Contrary to CLAIMANT's assertion, arbitral proceedings cannot be detached from national legal systems. An arbitral award shall be legally binding [*REDFERN/HUNTER, para. 1-16; BORN, p. 1*]. Legal effects, however, can only derive from national legal systems [*MANN, p. 160*]. Accordingly, international arbitration does not take place in a legal vacuum but within the confines of national legal systems [*REDFERN/HUNTER, para. 2-02; LEW/MISTELIS/KRÖLL, para. 4-54; MANN, pp. 157 and 160; GOODE, p. 29*]. Since the domain of arbitration is therefore established by national laws, these laws are also authorised to exclude certain parties and certain subject-matters from this domain [*REDFERN/HUNTER, paras. 3-13 and 3-25; LEW/MISTELIS/KRÖLL, paras. 7-33 and 9-2; HANOTIAU, Arbitrability, p. 146*]. If a party lacks the capacity to enter into an arbitration agreement or the dispute is not arbitrable under the applicable national law, the arbitration agreement cannot establish an arbitral tribunal's jurisdiction [*REDFERN/HUNTER, paras. 3-12 and 3-25; LEW/MISTELIS/KRÖLL, paras. 7-3 and 9-3; HANOTIAU, Arbitrability, p. 146*].
- 46 The Arbitral Tribunal's jurisdiction is inhibited by virtue of the insolvency law of Oceania (I). In any case, the nonenforceability of an arbitral award precludes the Arbitral Tribunal's jurisdiction (II).



I. THE ARBITRAL TRIBUNAL'S JURISDICTION IS INHIBITED BY VIRTUE OF THE INSOLVENCY LAW OF OCEANIA

47 The Arbitral Tribunal's jurisdiction is inhibited by virtue of the insolvency law of Oceania. The insolvency law of Oceania retroactively rejects UAM's capacity to enter into the arbitration agreement with CLAIMANT (a). CLAIMANT could have asserted that UAM's insolvency does not concern the latter's capacity to enter into an arbitration agreement but only the objective arbitrability of the dispute. Even if the Tribunal were to agree with this theory, it would have to decline its jurisdiction as the objective arbitrability of the dispute is governed and rejected by the insolvency law of Oceania (b).

a. The insolvency law of Oceania retroactively rejects UAM's capacity to enter into the arbitration agreement with CLAIMANT

- 48 The arbitration agreement between CLAIMANT and UAM was not validly concluded as UAM's capacity to enter into this arbitration agreement is governed and retroactively rejected by the insolvency law of Oceania.
- 49 Restrictions on arbitration concerning the involvement of certain parties limit the capacity of the respective parties to enter into an arbitration agreement or, in other words, the subjective arbitrability [*LALIVE*, p. 296; *BÖCKSTIEGEL*, p. 181; *FOUSTOUCOS*, p. 125]. Such restrictions are based on specific qualities of the respective parties [*HANOTIAU*, *Arbitrability*, p. 147]. In other words, "[objective] 'arbitrability' answers the question *what* can be arbitrated and [...] 'capacity' answers the question *who* can arbitrate" [*BÖCKSTIEGEL*, p. 181].
- 50 The law governing the capacity of a party is the law of the state in which the respective party is incorporated [*REDFERN/HUNTER*, para. 3-27; *CRAIG/PARK/PAULSSON*, p. 44; *LALIVE*, p. 296; *FOUSTOUCOS*, p. 125]. This can be deduced from the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "New York Convention") and from common principles of international arbitration. Art. V(1)(a) New York Convention stipulates that enforcement of an arbitral award can be refused if "the parties to the agreement [...] were, under the laws applicable to them, under some incapacity." According to common principles of international arbitration, the law applicable to a corporation is the law of the state it is incorporated in [*REDFERN/HUNTER*, para. 3-27; *CRAIG/PARK/PAULSSON*, p. 44; *LALIVE*, p. 296; *FOUSTOUCOS*, p. 125]. As a legal person derives its legal capacity from the law of the state in which it is incorporated, limitations to that capacity must also be governed by that law [*Schweizerisches Bundesgericht*, 5 May 1976].



- 51 Since UAM is incorporated in Oceania [*Statement of Claim, para. 4, p. 4*], its capacity to enter into an arbitration agreement with CLAIMANT is governed by Oceanian law.
- 52 According to the insolvency law of Oceania, all arbitration agreements concluded by UAM were voided when the insolvency proceedings were commenced [*Claimant's Exhibit No. 14, para. 4, p. 25*]. This limitation on arbitration is based on UAM's insolvency, i.e. on a specific quality of that party. UAM's insolvency does not render the subject matter of a certain dispute incapable of being arbitrated but every dispute UAM is involved in: it does not matter *what* is arbitrated but *who* agreed to arbitration. Hence, the insolvency law rejects UAM's capacity to enter into an arbitration agreement. Since UAM's capacity to enter into an arbitration agreement with CLAIMANT is governed by Oceanian law, UAM lacked this capacity.
- 53 CLAIMANT could have argued that since UAM was not insolvent at the time the arbitration agreement was concluded it was not under incapacity. However, the insolvency law of Oceania has a retroactive effect on all arbitration agreements of UAM: it voids them ab initio [*Procedural Order No. 2, para. 5, p. 42*]. Thus, Oceanian law denied UAM's capacity to arbitrate at the time the agreement with CLAIMANT was concluded.
- 54 To conclude, UAM's capacity to enter into an arbitration agreement with CLAIMANT is rejected by Oceanian law. Accordingly, the arbitration agreement was not validly concluded and cannot establish the Arbitral Tribunal's jurisdiction.

b. In the alternative, the objective arbitrability of the dispute is governed and rejected by the insolvency law of Oceania

- 55 It is also argued that the insolvency of a party concerns the objective arbitrability of a dispute but not the respective party's capacity to enter into arbitration agreements [*MOSES, p. 68; LAZIC, p. 52*]. Accordingly, CLAIMANT could have alleged that Oceanian law cannot preclude the Tribunal's jurisdiction as the objective arbitrability of the dispute is exclusively governed by the law of the seat of arbitration, i.e. Danubian law.
- 56 Even if the Tribunal were to find that UAM's insolvency concerns the objective arbitrability of the dispute, it would have to decline its jurisdiction as the arbitrability is governed and rejected by Oceanian law.
- 57 The law applicable to the question of arbitrability may differ from the law of the seat of arbitration, which governs the arbitral proceedings, and from the law governing the arbitration agreement [*REDFERN/HUNTER, paras. 2-14 and 3-13; LEW/MISTELLIS/KRÖLL, paras. 6-26, 9-5, 9-28; MOSES, pp. 64-69*]. Neither the UNCITRAL Model Law on International Commercial



Arbitration (hereinafter referred to as “UNCITRAL ML”), in effect as the *lex loci arbitri*, nor the institutional rules chosen by the parties, the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter referred to as “SCC Rules”) determine the law applicable to the question of arbitrability. In such cases, Art. 47 SCC Rules sets forth the general rule that “in all matters not expressly provided for in these Rules, [...] the Arbitral Tribunal [...], shall act in the spirit of these Rules”. The only provision in which the SCC Rules determine an applicable law is Art. 22(1), which stipulates that the Arbitral Tribunal shall apply “the law it considers to be most appropriate” to the merits of the dispute. Hence, it derives from the spirit of the SCC Rules that the most appropriate law shall apply.

- 58 Limitations on arbitrability established by national laws are meant to protect the respective state’s public policy [REDFERN/HUNTER, para. 3-12; FOUCHARD/GAILLARD/GOLDMAN, para. 533; LEW/MISTELIS/KRÖLL, para. 9-2; KAUFMANN-KOHLER/RIGOZZI, paras. 190 and 191; LAZIC, p. 52]. An effective protection of each state’s public policy requires that the arbitrability of a dispute is determined according to the laws of those states whose public policies would be affected by arbitral proceedings due to their close connection to the dispute [REDFERN/HUNTER para. 3-13; CHUKWUMERIJE, p. 55].
- 59 It is not appropriate to determine the arbitrability of the dispute according to Danubian law. The party-chosen seat of arbitration is usually not connected to the case as it is chosen for its neutrality [REDFERN/HUNTER para. 2-05; FOUCHARD/GAILLARD/GOLDMAN, para. 443; LEW/MISTELIS/KRÖLL para. 4-48]. Accordingly, CLAIMANT and UAM chose Danubia as seat of arbitration, which is not connected to the sales contract. Since Danubia is therefore a neutral state it is unlikely that its public policy would be affected by the arbitral proceedings. Furthermore, an effective protection of public policy would be impossible if the parties could circumvent limitations on arbitrability by choosing an arbitration-friendly seat like Danubia.
- 60 In contrast, it is most appropriate to determine the arbitrability according to Oceanian law because Oceania is most closely connected to the case and arbitral proceedings would affect its public policy. UAM is incorporated and has its seat of business in Oceania [Statement of Claim, para. 4, p. 4]. Hence, enforcement of an award will be sought primarily in this state. The importance of the law of the enforcing state for determining the objective arbitrability is well-illustrated in ICC Case No. 4132. In this case, the arbitrator sitting in The Hague determined the objective arbitrability according to the law of the enforcing state South Korea. He reasoned that an arbitral tribunal “is empowered to apply national public law insofar as the Tribunal is satisfied that [...] pursuant to [...] the published and stated policy of the competent



national authorities the acts under considerations of the Arbitral Tribunal are deemed null and void and unenforceable as prohibited by any relevant national public law”. Hence, it is appropriate to determine the objective arbitrability according to Oceanian law.

61 Furthermore, insolvency proceedings against UAM were initiated in Oceania [*Claimant’s Exhibit No. 14, para. 1, p. 25*]. Since insolvency proceedings aim at a centralised and orderly dispersion of the insolvent party’s assets [*REDFERN/HUNTER, paras. 3-13 and 3-14; LEW/MISTELIS/KRÖLL, para. 9-56; WESTBROOK, p. 598*] any legal proceeding against UAM taking place outside of the Regional Court of Port City affects Oceania’s public policy. If an arbitral award in favour of CLAIMANT was rendered and enforced, UAM’s bankruptcy estate and the recoveries of UAM’s other creditors would be substantially diminished. Hence, it is necessary to centralise all claims against an insolvent debtor in one court “in order to protect the insolvent’s creditors from spurious or inflated claims against the estate” [*WESTBROOK, p. 606*]. Accordingly, Oceanian law provides for the exclusive jurisdiction of the Regional Court of Port City over all disputes involving UAM [*Claimant’s Exhibit No. 14, paras. 3 and 4, p. 25*]. Arbitral proceedings with regard to UAM would circumvent the Regional Court’s jurisdiction and therefore contravene Oceania’s public policy. In order to protect this public policy it is therefore necessary to apply Oceanian law to the question of arbitrability.

62 To conclude, the arbitrability of the dispute is governed by Oceanian law. The insolvency law of Oceania rejects the arbitrability of the dispute by voiding the arbitration clause. Thus, the Arbitral Tribunal lacks jurisdiction since the dispute is not arbitrable.

II. IN ANY CASE, THE NONENFORCEABILITY OF AN AWARD PRECLUDES THE ARBITRAL TRIBUNAL’S JURISDICTION

63 Even if the Tribunal were to find that Oceanian law does not affect its jurisdiction, it would have to decline its jurisdiction as an arbitral award will lack enforceability. If an arbitral tribunal is not able to render an enforceable award it is obliged to decline its jurisdiction. This obligation derives from the parties’ justified interests and from Art. 47 SCC Rules.

64 First, it is in the parties’ interest that an arbitral tribunal declines its jurisdiction if it cannot ensure the enforceability of its award. Arbitration and in particular international commercial arbitration obliges the parties to pay significant fees and expenses of the respective arbitration institution [*REDFERN/HUNTER, para. 1-46; LEW/MISTELIS/KRÖLL, para. 1-30*]. According to the SCC Rules, at an amount in dispute of \$382,000 (295 757 €) UAM and CLAIMANT will have to pay administrative fees in the amount of 6,632 €, arbitrators’ fees in the amount of up to



45,731 € and additional expenses [cf. *SCC Rules, Appendix II*]. Furthermore, arbitral proceedings can continue for lengthy periods [*LEW/MISTELIS/KRÖLL, para. 1-29; BORN, pp. 9-10*]. In exchange, the parties expect a legally binding decision of the arbitral tribunal as otherwise time and money would be spent in vain. An enforceable award is the *raison d'être* of international arbitration [*DERAINS/SCHWARTZ, p. 385*] and no duty of an arbitrator “is more important than the duty to render an enforceable award” [*HORVATH, p. 135*]. Hence, it would contravene the parties’ legitimate interest if time-consuming and costly arbitration proceedings were initiated although they cannot lead to an enforceable award.

- 65 Second, Art. 47 SCC Rules obliges the Arbitral Tribunal to ensure that its award is legally enforceable. If it is not able to do so it has to decline its jurisdiction. This finding is confirmed by the reasoning of the arbitral tribunal in *ICC Case No. 6697*. In this case, the tribunal found that Art. 26 ICC Rules (which corresponds to Art. 47 SCC Rules) intends to preserve the reputation of international arbitration as an unenforceable award would “cast a dark shadow over the [arbitral] proceedings” [*HORVATH, p. 135*]. It therefore held that an arbitral tribunal is obliged to decline its jurisdiction if the laws of the states in which enforcement of the future award will be sought preclude the enforcement of such an award.
- 66 The Arbitral Tribunal is obliged to decline its jurisdiction since its award will be unenforceable in Oceania (a) and it cannot ensure enforcement of its award in Polaria (b). Without legal enforcement an award will not be effective because it cannot be paid voluntarily (c).

a. The Tribunal’s award will be unenforceable in Oceania

- 67 Any award issued by the Arbitral Tribunal will not be enforceable in Oceania because the enforcement of the award would contravene Oceania’s public policy.
- 68 According to Art. V(2)(b) New York Convention, enforcement of an award can be rejected if this enforcement “would be contrary to the public policy of that country”. Oceania is a Contracting State to the New York Convention [*Statement of Claim, para. 26, p. 8*]. Arbitral proceedings involving UAM would contravene Oceania’s public policy with regard to the treatment of insolvent parties [*see supra, para. 61*]. Hence, an award rendered by the Arbitral Tribunal will lack enforceability in Oceania by virtue of Art. V(2)(b) New York Convention.

b. The Arbitral Tribunal cannot ensure enforcement of the award in Polaria

- 69 CLAIMANT alleges that an award rendered by the Arbitral Tribunal will be enforceable in Polaria [*Memorandum for Claimant, para. 48*]. However, the Arbitral Tribunal has to decline



its jurisdiction because it cannot ensure that an award will be enforceable in Polaria.

- 70 An arbitral tribunal has to decline its jurisdiction not only if it is sure that an award will lack enforceability, but also if there exist serious doubts with regard to the enforceability. The parties have a right to receive a legally binding decision on their dispute. If an arbitral award turns out to be unenforceable the parties are deprived of this right as the award is not legally binding and national courts lack jurisdiction. Hence, the Arbitral Tribunal must decline its jurisdiction if serious doubts with regard to the enforceability of an award exist.
- 71 CLAIMANT argues that UAM has a claim for money due in Polaria and that it requested the court in Polaria to issue an order for preliminary measures, which should stop the payment of the claim [*Memorandum for Claimant, paras. 49, 52, 53*]. CLAIMANT therefore alleges that the enforcement of an award in Polaria is ensured.
- 72 Contrary to CLAIMANT's allegations its request for preliminary measures does not suffice to ensure the enforceability of an award. Ms. Powers, the Insolvency Representative of UAM, also filed a request for preliminary measures with the court in Polaria. She requested the court to order the payment of the claim to the estate of UAM as part of the assets to be distributed in the insolvency proceedings [*Procedural Order No. 2, para. 34, p. 47*]. If the court was to follow this request no assets of UAM will be left and an award will therefore be unenforceable in Polaria. Hitherto, the court has not decided which request it will grant. A comparable issue is neither governed by Polarian statutory law nor has it been decided in previous cases [*Procedural Order No. 2, para. 34, p. 47*].
- 73 Hence, the court's decision is unpredictable. There remains the strong possibility that an award will be unenforceable in Polaria. These serious doubts with regard to the enforceability of an award in Polaria oblige the Arbitral Tribunal to decline its jurisdiction.

c. The award cannot be paid voluntarily

- 74 CLAIMANT could have argued that despite the lack of enforceability the parties' interests in an effective award would not be frustrated as arbitral awards are usually paid voluntarily and without legal enforcement [*RHÔNE MÉDITERRANÉE V. ACHILLE LAURO, ET AL., US Dist. Ct. (District of St. Thomas and St. John); SCHLOSSER, para. 755; MOSES, p. 69*].
- 75 In the case at hand, however, it is impossible for UAM to pay an award voluntarily as it is insolvent. UAM's Insolvency Representative, Ms. Powers, is exclusively responsible for UAM's assets. The dispersion of these assets will be adjudicated by the Regional Court of Port City, Oceania [*Claimant's Exhibit No. 14, paras. 1, 2, 4, p. 25*]. Hence, UAM is not able



to pay an award voluntarily. Due to the lack of enforceability the parties' interest in an effective award would be frustrated by the arbitral proceedings. Thus, even if the Tribunal were to find that the dispute is arbitrable it would have to decline its jurisdiction due to the lack of enforceability of an award.

B. EVEN IF THE ARBITRATION AGREEMENT WAS EXTENDED TO UNIVERSAL, THE TRIBUNAL WOULD STILL HAVE NO JURISDICTION OVER IT

- 76 CLAIMANT could have asserted that the insolvency law of Oceania cannot affect the Arbitral Tribunal's jurisdiction over UNIVERSAL, irrespective of its effect on the Tribunal's jurisdiction over UAM. It could have argued that the provisions of the insolvency law only preclude the UAM's capacity to enter into an arbitration agreement but not UNIVERSAL's capacity to do so.
- 77 However, the Arbitral Tribunal's jurisdiction over UNIVERSAL would require that the arbitration clause, which was concluded between CLAIMANT and UAM, was extended to UNIVERSAL [*see supra, para. 1*]. Even if one assumes that the prerequisites of such an extension could be met, the Arbitral Tribunal's jurisdiction over UNIVERSAL cannot be established as the arbitration agreement is void in any case.
- 78 A party lacking the required capacity cannot validly conclude an arbitration agreement [*REDFERN/HUNTER, para. 3-25; LEW/MISTELIS/KRÖLL, para. 7-3*]. Even if the Tribunal were to find that UAM's insolvency concerns merely the objective arbitrability of the dispute this result would not be altered. If a dispute which is covered by an arbitration agreement is not arbitrable the arbitration agreement is voided and cannot establish an arbitral tribunal's jurisdiction [*FOUCHARD/GAILLARD/GOLDMAN, para. 1617; LEW/MISTELIS/KRÖLL, para. 9-3*]. The same result derives from the simple wording of the insolvency law of Oceania, which states that any arbitration agreement concluded by an insolvent party is "void" [*Claimant's Exhibit No. 14, para. 4, p. 25*].
- 79 Since the law of Oceania governs UAM's capacity or, in the alternative, the arbitrability [*see supra, paras. 51, 57-62*] its wording must be respected. The arbitration agreement between CLAIMANT and UAM is therefore void. As nothing can come from nothing an invalid arbitration agreement cannot be the basis of the Tribunal's jurisdiction over UNIVERSAL.
- 80 Such finding is reasonable as CLAIMANT's disputes with UAM on the one hand and UNIVERSAL on the other hand are closely connected. Both disputes arose from the same contract and concern the same claims. Due to this close connection, the voidness of the



arbitration agreement between UAM and CLAIMANT could be undermined if one dispute was submitted to arbitration. In the interest of a uniform and predictable application of law the Regional Court of Port City might feel obliged to consider the Arbitral Tribunal's award when adjudicating the dispute between CLAIMANT and UAM. Hence, the Tribunal's decision would have a persuasive effect on the dispute between CLAIMANT and UAM. In this way, the voidness of the arbitration agreement would be undermined. To avoid such an effect the arbitration agreement must be considered void as a whole.

- 81 Due to the close connection of the disputes and the fact that the Tribunal's jurisdiction over UNIVERSAL would derive from the arbitration agreement concluded by UAM it appears not only logic but also reasonable to submit UAM and UNIVERSAL to the same 'legal fate' with regard to the arbitration agreement. By contrast, separating the 'legal fate' of UAM and UNIVERSAL would lead to the absurd result that UNIVERSAL, the party that never signed an arbitration agreement had to appear before the Arbitral Tribunal, while UAM the signatory to the arbitration clause would be granted its right of access to the courts.

CONCLUSION TO SECOND ISSUE:

- 82 The Arbitral Tribunal has jurisdiction neither over UAM nor over UNIVERSAL as the arbitration agreement, which would be the basis of the Tribunal's jurisdiction, is void. Even if the Tribunal were to find that the arbitration agreement is not void, its jurisdiction would be precluded by the lack of enforceability of an award.
-



ISSUE 3: UNIVERSAL IS NOT LIABLE FOR THE BREACH OF CONTRACT COMMITTED BY UAM

83 CLAIMANT argues that UNIVERSAL is liable for the breach of contract committed by UAM [*Memorandum for Claimant, paras. 56-76*]. It is undisputed that UAM committed a breach of contract by delivering cars which were not in conformity with the sales contract under Art. 35(1) of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as “CISG”). The CISG is applicable by virtue of Art. 1(1)(a) since all parties to the dispute have their places of business in different Contracting States.

However, UNIVERSAL is not liable for UAM’s breach of contract. CLAIMANT and UNIVERSAL neither entered into a contractual relationship (A) nor can UNIVERSAL directly be held liable as manufacturer of the cars (B).

A. CLAIMANT AND UNIVERSAL DID NOT ENTER INTO A CONTRACTUAL RELATIONSHIP

84 CLAIMANT argues that a direct contractual relationship between UNIVERSAL and itself was established [*Memorandum for Claimant, para. 63*]. Confuting CLAIMANT’S allegation, UNIVERSAL is not contractually bound for the following reasons: First, UNIVERSAL and CLAIMANT did not conclude any contract (I). Second, UAM and CLAIMANT did not modify their sales contract in such a way as to include UNIVERSAL into their contractual relationship (II). Third, UAM did not act as an agent of UNIVERSAL (III).

I. UNIVERSAL AND CLAIMANT DID NOT CONCLUDE ANY CONTRACT

85 Under the CISG rights and obligations only concern the contracting parties. A third party is only liable if it was integrated into the contract [*BGH, 12 February 1998; USINOR INDUSTRIE V. LEECO STEEL PRODUCTS, INC., U.S. Dist. Ct. (N. D. Ill.); SCHLECHTRIEM/SCHWENZER/FERRARI, Art. 4, para. 10; PILTZ, para. 2-137; BAMBERGER/ROTH/SAENGER, Art. 74, para. 2; KÖHLER, p. 131*]. UNIVERSAL and CLAIMANT did not have any contact before or at the time the contract was concluded. UNIVERSAL was not even mentioned in the sales contract between UAM and CLAIMANT [*Claimant’s Exhibit No. 1, p. 11*]. Thus, UNIVERSAL and CLAIMANT did not conclude any contract.

II. CLAIMANT AND UAM DID NOT MODIFY THE SALES CONTRACT IN SUCH A WAY AS TO INCLUDE UNIVERSAL INTO THEIR CONTRACTUAL RELATIONSHIP

86 UNIVERSAL did not enter the contractual relationship between CLAIMANT and UAM. Such a modification was not initiated by the primary parties to the contract, neither by UAM nor by



CLAIMANT(a). In any case, UNIVERSAL did not consent to become a party to the contract between UAM and CLAIMANT (b).

a. An alleged modification was not initiated by the primary parties to the contract

87 Art. 29 CISG applies solely to substantive modifications of a contract by two parties that already have concluded a contract [*SCHLECHTRIEM/SCHWENZER/SCHLECHTRIEM/SCHROETER, Art. 29, para. 10; SCHMIDT-KESSEL, p. 61*]. Consequently, the primary contracting parties must decide first whether a third party shall enter the contractual relationship. However, no such agreement was reached between CLAIMANT and UAM. CLAIMANT could not have argued that UNIVERSAL entered the contract by discussing the possibilities of repairing the Tera cars with UAM. This is due to the fact that CLAIMANT, i.e. a primary party to the contract, was not involved in the negotiation of this alleged modification [*Claimant's Exhibit No. 4, para. 3, p. 15*]. Hence, a modification by which UNIVERSAL would have entered the contractual relationship was not initiated by the contracting parties UAM and CLAIMANT.

b. In any case, UNIVERSAL did not consent to becoming party to the contract

88 Even if the Tribunal considered it unnecessary that the modification of the contract is initiated by the primary parties, UNIVERSAL did not consent to enter the contract as a third party. According to Art. 29(1) CISG a contract may be modified by the agreement of the parties. Interpreting UNIVERSAL's conduct leads to the conclusion that UNIVERSAL did not have the intention to become a contracting partner being liable for any defaults.

89 First, when UNIVERSAL was asked to get involved in the obligations between CLAIMANT and UAM it expressly excluded any "admission of liability" [*Claimant's Exhibit No. 4, para. 3, p. 15*].

90 Second, UNIVERSAL was only involved as a third party that was engaged for supplementary performance. It intended to fulfil its own obligation towards UAM, but not to assume new obligations towards CLAIMANT. UNIVERSAL had to remedy any damages that UAM sustained as the defective cars were delivered to UAM by UNIVERSAL in the first place. It was in UNIVERSAL's and UAM's best interest that UNIVERSAL would have remedied the damages directly in Mediterraneo since this would have been the most economic way. If a supplier is already obliged towards a seller to remedy a defect, it has to be assumed that he only intends to perform his own obligations to the seller and not to become involved in the seller's contractual obligation towards his sub-purchasers [*cf. SCHLECHTRIEM/SCHWENZER/STOLL/ GRUBER, Engl. ed., Art. 79, para. 26;*



SCHLECHTRIEM/SCHWENZER/SCHWENZER, Art. 79, para. 36]. Accordingly, UNIVERSAL intended to fulfil its obligation towards UAM by repairing the Tera cars, but not to assume a new obligation towards CLAIMANT.

- 91 Third, the correspondence between UNIVERSAL and CLAIMANT did not establish a contractual relationship. According to Art. 8(3) CISG any subsequent conduct of the parties is to be considered in determining the intent of a party. Nonetheless, the matter of subsequent conduct is only relevant when the party's intent was questionable at the time the contract was concluded [*BGH*, 7 December 2006; *SCHLECHTRIEM*, para. 57; *SCHLECHTRIEM/SCHWENZER/SCHMIDT-KESSEL*, Art. 8, para. 50]. UNIVERSAL clearly outlayed its indignation to become contractually involved by stressing that it excluded any "admission of liability". Correspondence between UNIVERSAL and CLAIMANT took place to clarify the terms of repairing. However, the mere correspondence cannot create a contractual relationship.

III. UAM DID NOT ACT AS AN AGENT OF UNIVERSAL

- 92 In contrast to CLAIMANT's assertion [*Memorandum for Claimant*, paras. 56 and 58], UAM did not act as UNIVERSAL's agent. This is due to the fact that, first, UAM acted in its own name and, second, did not have authority to bind UNIVERSAL [see *supra* paras 16-23]. Thus, UAM did not act as UNIVERSAL's agent.
- 93 To conclude, no contractual relationship between CLAIMANT and UNIVERSAL, from which UNIVERSAL's liability could be derived, was established.

B. THERE IS NO DIRECT LIABILITY OF UNIVERSAL AS THE MANUFACTURER OF THE CARS

- 94 Contrary to CLAIMANT's allegation [*Memorandum for Claimant* paras. 72 et seq.] UNIVERSAL may not be held directly liable as the manufacturer of the defective Tera cars since a direct liability against the manufacturer exists neither under the CISG (I) nor under the otherwise applicable national law (II). Moreover, UNIVERSAL did not give any warranty to CLAIMANT (III).

I. DIRECT LIABILITY AGAINST THE MANUFACTURER DOES NOT EXIST UNDER THE CISG

- 95 Direct liability against the manufacturer does not exist under the CISG since neither direct actions (a) nor product liability rules (b) are applicable to the Convention.

a. A direct action against the manufacturer does not exist under the CISG

- 96 A direct action against the manufacturer does not exist under the CISG which only governs



the rights and the obligations of the parties to the sales contract, cf. Art. 4 CISG [STAUDINGER/MAGNUS, Art. 4, para. 15]. Although a manufacturer may be important for the conclusion of a contract and may cause the deficiency of his products, he is only liable when he concludes a contract [STAUDINGER/MAGNUS, *ibid.*]. Hence, under the CISG a direct action against the manufacturer does not exist by operation of law when no contractual relationship was established [Cour de Cassation, 5 January 1999; LG Düsseldorf, 23 June 1994; STAUDINGER/MAGNUS, Art. 1, para. 14; WITZ/WOLTER, p. 284; SCHROETER, § 6 para. 276; MüKo-HGB/BENICKE, Art. 4, para. 3; KÖHLER, p. 131; WITZ/SALGER/LORENZ/ LORENZ, Art. 4, para. 9; SCHNYDER/STRAUB, p. 51].

b. UNIVERSAL is not liable on the basis of product liability rules

- 97 UNIVERSAL is not liable on the basis of product liability rules as there is no product liability by operation of law under the CISG (aa). Even if the Tribunal were to find product liability rules applicable, UNIVERSAL is not liable as CLAIMANT's property was not damaged (bb).

aa. There is no product liability under the CISG

- 98 CLAIMANT argues that “modern product liability law allows suits by third parties to be brought against a manufacturer” [Memorandum for Claimant, para. 72]. CLAIMANT's argumentation is based on illustrating comparative law [Memorandum for Claimant, *ibid.*]. It tries to integrate such liability by virtue of the rules of private international law pursuant to Art. 7(2) CISG. The Convention, though, must be interpreted autonomously without considering particular national rules [BGH, 2 March 2005; BIANCA/BONELL/BONELL, Art. 7, para. 2.2.2; BRUNNER, Art. 7, para. 2; SOERGEL/LÜDERITZ/FENGE, Art. 7, para. 2; KAROLLUS, pp. 16]. The CISG governs only the rights and obligations between buyer and seller whereas product liability rules are not within the Convention's scope [HONNOLD, Art. 4, para. 73; STAUDINGER/MAGNUS, Art. 4, para. 14; ENDERLEIN/MASKOW/STROHBACH, Art. 5, para. 1.2; HERBER, 105; PILTZ, paras. 2-128 and 2-129].

bb. UNIVERSAL is not liable as CLAIMANT's property was not damaged

- 99 Even if the Tribunal were to find that product liability rules should apply, UNIVERSAL is not liable as CLAIMANT's property was not damaged. CLAIMANT stated that its property had been damaged because it had received defective ECUs [Memorandum for Claimant, paras. 73 and 74, p. 22]. This is legally incorrect. The defect of the Tera cars did not cause any damages to its property. Even though this might have lead to an economic disadvantage for CLAIMANT,



product liability does not exist in cases of mere “pure economic loss” [*STAPLETON*, p. 278; *PRESLMAYER*, p. 16; *HOWELLS*, pp. 169 et seq.] Having received the defective cars CLAIMANT did not sustain any property damage. Its claims concerning the defective Tera cars can only be asserted on a contractual basis. CLAIMANT and UNIVERSAL, however, were in no contractual relationship [*see supra paras 84-93*]. Consequently, UNIVERSAL cannot be held liable as CLAIMANT’s property was not damaged.

II. A DIRECT LIABILITY AGAINST THE MANUFACTURER DOES NOT EXIST UNDER THE OTHERWISE APPLICABLE NATIONAL LAW

100 There is no direct action of a commercial sub-purchaser against the manufacturer under the national laws of Mediterraneo, Equatoriana or Oceania respectively [*Procedural Order No. 2, para. 6, p. 42*]. Solely Mediterraneo’s legal system contains a direct action against the manufacturer in favor of consumers [*Procedural Order No. 2, ibid.*]. CLAIMANT, however, is not a consumer, but a sole trader car dealer and purchased the Tera cars for its business [*Statement of Claim, para. 3, p. 4*]. Consequently, the direct action of Mediterranean law does not grant it protection, if it was to apply at all. Thus, UNIVERSAL is not liable under the otherwise applicable national law as a direct liability against the manufacturer does not exist.

III. UNIVERSAL DID NOT GIVE ANY WARRANTY TO CLAIMANT

- 101 Even assuming that the CISG allows a direct action against a manufacturer who got involved into a contract by giving a warranty [*cf. HONNOLD, Art. 4, para. 63; FLECHTNER, para. 63*] a liability of UNIVERSAL cannot be established. Interpreting UNIVERSAL’s conduct leads to the conclusion that it never gave a warranty to CLAIMANT.
- 102 First, before UAM and CLAIMANT concluded the contract UNIVERSAL did not give any warranty in favour of CLAIMANT [*Procedural Order No. 2, para. 6, p. 42*].
- 103 Second, the fact that UNIVERSAL referred to reviews [*Claimant’s Exhibit No. 3, para. 1, p. 13*] did not create a warranty. Since the reviews were not compiled by UNIVERSAL itself [*Statement of Claim, para. 9, p. 5*], it is not responsible for their effects on sub-purchasers. In fact, there was no prior correspondence between UNIVERSAL and CLAIMANT.
- 104 Third, UNIVERSAL did not give a warranty by advising CLAIMANT to continue to buy UNIVERSAL’s products. The respective message was sent after the conclusion of the contract between CLAIMANT and UAM [*Claimant’s Exhibit No. 12, para. 5 p. 23*]. However, at the time the contract was concluded no such advertising campaign existed.



Therefore, UNIVERSAL did not give any warranty to CLAIMANT in connection with the sales contract between UAM and CLAIMANT.

- 105 To conclude, UNIVERSAL is not liable as the manufacturer of the cars as there is neither a direct liability under the CISG nor under the otherwise applicable national rules and UNIVERSAL did not give a warranty to CLAIMANT.
-

CONCLUSION TO THIRD ISSUE:

- 106 UNIVERSAL is not liable for the breach of contract committed by UAM. Neither a contractual relationship between CLAIMANT and UNIVERSAL was concluded nor is there a direct liability of UNIVERSAL as manufacturer of the defective cars.
-



ISSUE 4: CLAIMANT WAS NOT ENTITLED TO AVOID THE CONTRACT

107 CLAIMANT purchased 100 Tera cars from UAM. 25 of these cars were delivered and turned out to be defective. Contrary to CLAIMANT's allegation [*Memorandum for Claimant, para. 86*], the delivery of 25 defective cars did not amount to a fundamental breach of contract (A). Even if there was a fundamental breach, CLAIMANT would not have been authorised to avoid the contract in its entirety (B).

A. THE DELIVERY OF 25 DEFECTIVE CARS DID NOT AMOUNT TO A FUNDAMENTAL BREACH OF CONTRACT

108 The delivery of 25 defective cars by UAM did not constitute a fundamental breach of contract. Art. 25 CISG requires the buyer to suffer a substantial detriment and the seller or a reasonable third party to foresee such a result. In the present case the delivery of 25 defective cars did not cause CLAIMANT a substantial detriment (I). Moreover, an assumed substantial detriment would not have been foreseeable (II).

I. THE DELIVERY OF 25 DEFECTIVE CARS DID NOT CAUSE CLAIMANT A SUBSTANTIAL DETRIMENT

109 CLAIMANT suffered no substantial detriment by receiving 25 defective cars. A breach must essentially depreciate the aggrieved party's justified expectations to cause a substantial detriment [*SCHLECHTRIEM/SCHWENZER/SCHLECHTRIEM/SCHROETER, Art. 25, para. 9; BRUNNER, Art. 25, para. 8; ACHILLES, Art. 25, para. 3; KAROLLUS, p. 91; HOLTHAUSEN, p. 102; PILTZ, para. 5-20; GRAFFI, p. 339*]. It is agreed among courts and scholars that even in the case of a serious defect, a substantial detriment is precluded if the seller offers possible and reasonable subsequent performance [*OLG Köln, 14 October 2002; OLG Koblenz, 31 January 1997; Cour d'Appel Grenoble, 26 April 1995; Handelsgericht Zürich, 26 April 1995; Handelsgericht des Kantons Aargau, 5 November 2002; Tribunale di Busto Arsizio, 13 December 2001; ICC Case No. 7754; HONNOLD, Art. 25, para. 184; SCHLECHTRIEM/SCHWENZER/SCHLECHTRIEM/SCHROETER, Art. 25, paras. 27 and 29; MÜKO-BGB/GRUBER, Art. 25, para. 24; Schwenger, para. IV; LOOKOFSKY, p. 121*]. This is due to the fact that it is the Convention's ratio to maintain the sales contract as long as possible [*SCHLECHTRIEM/SCHWENZER/MÜLLER-CHEN, Art. 49, para. 2; HUBER/MULLIS, p. 181; AUDIT, p. 122; P.HUBER, p. 19; LIU, § 6.2, PIER-ELING, p. 57*]. This is true for the following reasons:

110 First, from an economic perspective cancelling a contract is a expensive remedy. Restitution of the goods leads to appreciable costs and risks which can be avoided if the parties uphold



the contract [*HONNOLD, Art. 25, paras. 181 and 184; MÜKO-BGB/GRUBER, Art. 25, para. 3*]. These costs and risks increase in particular if parties from different nations are involved in the transaction. In the case at hand, the contractual parties, UAM and CLAIMANT, are situated in different countries, Oceania and Mediterraneo. Therefore, it would have been more favourable to await subsequent performance, so the arrival of UNIVERSAL's mechanics, than to ship the 25 defective Tera cars back to UAM. Subsequent performance would have been less expensive and low in risk compared to the restitution of the goods.

- 111 Second, in general both parties have an interest in keeping the contract alive. On the one hand, the seller does not want the efforts he undertook to be frustrated by a defect which could easily be cured at his expense. The buyer, on the other hand, is not charged with costs as he can claim damages [*HUBER/MULLIS, p. 182; GALSTON/SMIT, § 9, para. 9-12*]. Hence, the termination of the contract must be a remedy of last resort (*ultima ratio*). Legal remedies such as subsequent performance, reducing the purchase price and damages have to be given priority over avoidance [*BGH, 3 April 1996; OGH, 7 September 2000; Tribunale di Busto Arsizio, 13 December 2001; SCHLECHTRIEM/SCHWENZER/MÜLLER-CHEN, Art. 49, para. 2*].
- 112 In the case at hand, there was no substantial detriment, and hence no fundamental breach of contract since UAM offered a possible (a) and reasonable subsequent performance (b).

a. UAM offered possible subsequent performance

- 113 UAM was able to arrange for the repair of the defective Tera cars. Although UAM could not cure the defect itself, UNIVERSAL was willing to repair the cars by sending special equipment and specially trained personnel to Mediterraneo [*Statement of Claim, para. 16, p. 6*]. At no time it was likely that the defect would be irreparable. UAM assured CLAIMANT that it would have cars ready for sale within the near future. Regardless of the exact nature of the defect, a repair would have always been possible [*Claimant's Exhibit No. 6, p. 17*].
- 114 Though UNIVERSAL did not inspect the defective Tera cars, it was able to give CLAIMANT precise information about the procedure for repairing them [*Claimant's Exhibit No. 3, pp. 13 and 14*]. UAM arranged the shipment of personnel and equipment so that the repair could have started immediately after their arrival [*Statement of Claim, para. 16, p. 6*]. Moreover, UNIVERSAL's regional manager was sure that CLAIMANT would have cars ready for sale within one week [*Statement of Claim, para. 17, p. 6*]. Thus, UAM offered possible subsequent performance.

**b. UAM offered reasonable subsequent performance**

115 UAM offered CLAIMANT a reasonable cure of the defect. The seller's cure of the defect is reasonable if neither the conditions nor the time needed to cure amounts to an oppressive burden for the buyer [*BIANCA/BONELL/WILL, Art. 48, para. 2.1.1.1.2., SCHLECHTRIEM/SCHWENZER/MÜLLER-CHEN, Art. 48, paras. 9 and 15; P.HUBER, p. 21; HUBER/MULLIS, p. 183*]. UAM would have cured the defect under reasonable conditions (**aa**) and within a reasonable time frame (**bb**).

aa. UAM would have cured the defect under reasonable conditions

116 The conditions under which the cars were to be repaired were adequate. CLAIMANT could have argued that the conditions were unreasonable as it would have received repaired Tera cars instead of new ones, which would have had to be sold at a lower price. However, the cars would have been repaired by UNIVERSAL, the manufacturer itself, which would have installed genuine parts. Hence, the repaired cars would have been equivalent to new ones and CLAIMANT could have sold them as such. In fact, this is what UNIVERSAL did when it included the 25 repaired cars in its stock of newly manufactured ones [*Procedural Order No. 2, para. 24, p. 45*]. UAM would have cured the defect under reasonable conditions.

bb. UAM would have cured the defect within a reasonable time frame

117 CLAIMANT argues that the time needed for curing would have been unreasonable for it as at the time it declared termination, it was uncertain how long curing would take [*Memorandum for Claimant, para. 89*]. The seriousness of the detriment for the buyer is primarily determined on the basis of the contractual stipulations [*SCHLECHTRIEM/SCHWENZER/SCHLECHTRIEM/SCHROETER, Art. 25, paras. 12 and 13; BRUNNER, Art. 25, para. 9; MÜKO-HGB/BENICKE, Art. 25, para. 14; ENDERLEIN/MASKOW/STROHBACH, p. 102; HERBER/CZERWENKA, Art. 25, para. 7*].

118 First, since CLAIMANT agreed on a partial shipment clause, it cannot appeal to an unreasonable time required for subsequent performance [*Claimant's Exhibit No. 1, para. 3, p. 11*]. This clause allowing shipment "as space is available" did not oblige UAM to deliver instantly. CLAIMANT and UAM did not determine any date for the cars to arrive. If no space had been available, CLAIMANT would have received the cars at a late point in time what would have resulted in the same difficult situation for CLAIMANT. The consequences of receiving the cars late and the effect of late repair are identical and CLAIMANT accepted to bear this risk.



- 119 Second, under regular circumstances it would have taken eight days to repair the defective cars: three days for the technical personnel to arrive in Mediterraneo and five days to repair the defect [*Statement of Claim para. 16, p. 6; Claimant's Exhibit No. 12, para. 3, p. 23; Procedural Order No. 2, para. 22, p. 44*]. Such a result was conceivable for CLAIMANT at the time it declared the contract avoided as UAM on several occasions assured that repairing the cars would not have taken an unreasonable time [*Statement of Claim, para. 17, p. 6; Claimant's Exhibit No. 6, p. 17*]. Therefore, CLAIMANT cannot refer to the favourable Indo offer of Patria which would have impeded the threatening insolvency. Patria was able to deliver the 20 Indo cars within 5 days [*Statement of Claim, para. 19, p. 7*], CLAIMANT would have received the repaired Tera cars just 2 days later. Furthermore, CLAIMANT pointed out that it needed cars ready for sale within 10 days [*Statement of Claim, para. 17, p. 6*]. UAM's subsequent performance would not have exceeded this period of time.
- 120 Third, any remaining uncertainty as to whether repairing would be prolonged has to be borne by CLAIMANT. Uncertainty can never be completely eliminated. Therefore, it is necessary to distribute the burden of uncertainty as fairly as possible and to hold both the buyer's interest in easy avoidance and the seller's interest in upholding the contract at a fair balance [*BIANCA/BONELL/WILL, Art. 48, para. 2.1.1.1*]. In order to please the buyer's interest it is only the buyer's and not the seller's knowledge that counts when determining the fundamentality of a breach of contract [*SCHLECHTRIEM/SCHWENZER/MÜLLER-CHEN, Art. 48, para. 9; STAUDINGER/MAGNUS, Art. 48, para. 14; HONSELL/SCHNYDER/STRAUB, Art. 48, para. 20; HERBER/CZERWENKA, Art. 48, para. 3*]. Thus, there is always an uncertainty for the seller if the buyer is entitled to declare avoidance. In return, the buyer generally has to bear the risk that curing may be prolonged when serious efforts to cure are in sight [*BIANCA/BONELL/WILL, Art. 48, para. 2.1.1.1*]. CLAIMANT knew of UAM's willingness to cure the defect as well as of the high likelihood of successful repair as both was repeatedly communicated to him [*Statement of Claim, para. 17, p. 6; Claimant's Exhibit No. 6 p. 17*]. Thus, CLAIMANT had to bear the risk of prolonged repair.
- 121 Fourth, the time needed for repair cannot be considered unreasonable just because CLAIMANT was threatened by insolvency. It is not unusual that the buyer receives goods which are not in conformity with the contract. This situation, however, does normally not lead to the buyer's insolvency. Furthermore, the contract at hand did not arrange for CLAIMANT's tight calculation. Thus, CLAIMANT's precarious financial situation does not give reason for



qualifying the time needed to repair the cars as unreasonable and therefore the breach of contract as fundamental.

- 122 Finally, CLAIMANT may not argue that the threat of an airport strike which would have delayed the repair [*Statement of Claim, para. 17, p. 6*] rendered awaiting subsequent performance unreasonable. A strike causing a lack of general transport is commonly agreed to exempt liability under Art. 79(1) CISG [*SCHLECHTRIEM/SCHWENZER/STOLL/GRUBER (engl.), Art. 79, para. 36; STAUDINGER/MAGNUS, Art. 79, para. 21; U. HUBER, p. 476; KEIL, p. 169; LAUTENBACH, p. 46*]. This ratio must also apply in case of subsequent performance. Further, the strike was to happen in CLAIMANT's country, Mediterraneo [*Statement of Claim, para. 17, p. 6*], what makes it even more unreasonable to place the burden on UAM.
- 123 Since UAM would have cured the defect within reasonable time, it offered reasonable subsequent performance to CLAIMANT. The delivery of 25 defective cars did not cause CLAIMANT a substantial detriment. It had to await subsequent performance or keep the defective cars and claim damages.

II. AN ASSUMED SUBSTANTIAL DETRIMENT WOULD NOT HAVE BEEN FORESEEABLE

- 124 Even if the delivery of 25 defective cars caused CLAIMANT a substantial detriment, it cannot convincingly argue that this development was foreseeable for UAM and UNIVERSAL [*Memorandum for Claimant, para. 88*]. Pursuant to Art. 25 CISG a breach of contract is fundamental unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. Foreseeability must be determined in the light of the circumstances known at the time of the conclusion of the contract [*HONNOLD, Art. 25, para. 183; BRUNNER, Art. 25, para. 9; MÜKO-HGB/BENICKE, Art. 25, para. 14; KRITZER, Art. 25, p. 27*].
- 125 If CLAIMANT suffered a substantial detriment, it was not caused by merely receiving 25 defective cars, but because of its additional precarious financial situation. UAM, however, could not foresee putting CLAIMANT on the edge of insolvency by a single irregular shipment of cars. It had no insight into CLAIMANT's account books. Moreover, it is not a usual business strategy to calculate that tightly; especially UNIVERSAL could not foresee CLAIMANT's substantial detriment as it got to know CLAIMANT only six weeks after the sales contract was concluded. Neither the delivery of defective goods nor a slight uncertainty regarding the time needed to cure are unusual. A substantial detriment resulting out of these circumstances was unforeseeable for UAM.



- 126 Furthermore, UAM could not foresee CLAIMANT's threatening insolvency since the latter had never propounded its existential dependency on an instant delivery. To the contrary, it had agreed to a partial shipment clause which allowed shipment as space was available instead of fixing a precise date of delivery. Thus, UAM could have reasonably obtained the impression that CLAIMANT did not need the cars urgently [*Claimant's Exhibit No. 1, para. 3, p. 11*]. Moreover, CLAIMANT mentioned its financial problems for the first time after the Tera cars arrived in Mediterraneo [*Claimant's Exhibit No. 2, para. 4, p. 12*] and thereby to late.
- 127 An assumed substantial detriment would not have been foreseeable. As a result, the breach of contract did not amount to a fundamental breach of contract in terms of Art. 25 CISG as required for the termination of a contract under the CISG.

B. EVEN IF THERE WAS A FUNDAMENTAL BREACH, CLAIMANT WOULD NOT HAVE BEEN AUTHORISED TO AVOID THE CONTRACT IN ITS ENTIRETY

- 128 Even if there was a fundamental breach, CLAIMANT had no right to declare avoidance of the entire contract. It could not declare the contract avoided after having set an additional period of time (I). Even if CLAIMANT retained its right of avoidance, it was not entitled to declare the contract avoided in its entirety as the prerequisites of neither Art. 49(1)(a) CISG (II) nor Art. 73(2) CISG (III) were met.

I. CLAIMANT COULD NOT DECLARE THE CONTRACT AVOIDED AFTER HAVING SET AN ADDITIONAL PERIOD OF TIME

- 129 By agreeing to subsequent performance CLAIMANT forfeited its right to avoid the contract. Pursuant to Art. 47(2) CISG if the buyer fixes an additional period of time for performance, he is not entitled to declare avoidance of the contract until this deadline has expired. If the buyer sets an additional period of time for performance, the seller has the right to cure until this period of time has expired. The buyer would abuse this right and violate the principle of good faith if it avoided the contract although it had allowed the seller to cure the defect [*Tribunale di Busto Arsizio, 13 December 2001*]. In this case the latter reasonably trusts in being given the opportunity for subsequent performance. The seller is in need for protection as often it has already made efforts and incurred financial expense.
- 130 In the case at hand, CLAIMANT agreed to subsequent performance on 28 February 2008. It stated that it was very pleased with UNIVERSAL undertaking the repair and sending its personnel to Mediterraneo within three days [*Claimant's Exhibit No. 5, para. 1, p.16*]. Then, it set a deadline of ten days for UAM to cure the defect [*Statement of Claim, para. 17, p. 6*].



Accordingly, CLAIMANT had no right to cancel the contract. However, it did so in its letter of the following day [*Claimant's Exhibit No. 5, para. 1, p. 16*]. This constitutes an abuse of right since UAM was not allowed to cure the defect within 10 days. Thus, CLAIMANT could not declare the contract avoided after having accepted UAM's reasonable offer to cure.

II. THE PREREQUISITES OF ART. 49(1)(a) CISG ARE NOT MET

131 CLAIMANT argues that it had the right to declare the contract avoided in its entirety pursuant to Art. 49(1)(a) CISG [*Memorandum for Claimant, para. 91*]. Avoiding the contract is allowed if the other party committed a breach of contract with regard to the contract in its entirety. The first consignment contained solely 25 defective cars. However, there were 75 cars still to be delivered. Thus, not more than one quarter of the purchased cars lacked conformity. CLAIMANT was not entitled to declare the contract avoided in its entirety according to Art. 49(1)(a) CISG.

III. THE PREREQUISITES OF ART. 73(2) CISG ARE NOT MET

132 CLAIMANT did also not have the right to avoid the contract pursuant to Art. 73(2) CISG. The provision stipulates that if one party fails to perform its obligations in respect of any instalment and this failure gives the other party good grounds to conclude that a fundamental breach of contract will also occur with respect to future instalments, the other party may declare the contract avoided for the future. CLAIMANT, however, had no grounds to expect a fundamental breach regarding future deliveries.

133 If the seller is able to rebut the presumption that the future instalments are also defective the buyer has no good grounds to expect a fundamental breach with respect to future instalments [*Schiedsgericht der Börse für Landwirtschaftliche Produkte Wien, 10 December 1997; SCHLECHTRIEM/SCHWENZER/HORNUNG/FOUNTOULAKIS, Art. 73, para. 22; STAUDINGER/MAGNUS, Art. 73, para. 22; WITZ/WOLTER, p. 811*]. It is crucial that the proper performance of the future instalment queried to a serious extent [*SCHLECHTRIEM/SCHWENZER/HORNUNG/FOUNTOULAKIS, Art. 73, para. 22; STAUDINGER/MAGNUS, Art. 73, para. 23; HEILMANN, p. 540*]. For the following reasons CLAIMANT had no good grounds to believe that the remaining 75 cars would be defective.

134 First, the Tera cars had already received very favourable, even enthusiastic reviews in the trade press [*Statement of Facts, para. 9, p. 5*]. It would therefore be unreasonable to assume that all of them are misconstructured. It seemed more likely that the 25 Tera cars were defective due to a production default which occurred only on one day. Furthermore, UAM stated in a



telephone conversation that this was the first time that it had ever heard of any such difficulties with the Tera cars [*Statement of Facts, para. 12, p. 5*]. Thus, it was not likely that all of the 100 purchased cars suffered a structural default.

- 135 Second, UAM would have been able to repair the cars that were still due. As none of the 75 cars had yet been sent off [*Procedural Order No. 2, para. 26, p. 45*], UAM would have had the cars repaired which were in its possession before shipping them to CLAIMANT. This was in its own interest as it would have saved the costs for sending technical personnel to Mediterraneo. As a result, CLAIMANT did not have good grounds to expect a fundamental breach regarding future deliveries. Hence, the prerequisites of Art. 73(2) CISG are not met.
- 136 Thus, even if there was a fundamental breach, the right to declare the contract avoided would be precluded.
-

CONCLUSION TO FOURTH ISSUE

- 137 The breach of contract committed by UAM did not amount to a fundamental breach of contract as required for the termination of a contract under the CISG. The delivery of defective cars did not cause CLAIMANT a substantial detriment. In addition, an assumed substantial detriment would not have been foreseeable for UAM.
- 138 Even assuming that there was a fundamental breach, CLAIMANT was not authorised to declare the contract avoided after having set an additional period of time. Even if it retained its right to declare the contract avoided, it was not entitled to declare the contract avoided in its entirety either according to Art. 49(1)(a) or to Art. 73(2) CISG as the delivery of 25 defective cars did not constitute a breach of contract with regard to the contract in its entirety.
-



REQUEST FOR RELIEF

In response to the Tribunal's Procedural Orders and the Memorandum for CLAIMANT, Counsel makes the above submissions on behalf of RESPONDENTS. For the reasons stated in this Memorandum, Counsel respectfully requests the honourable Arbitral Tribunal to declare that:

- UNIVERSAL is not bound by the arbitration agreement between UAM and CLAIMANT (**FIRST ISSUE**)
- UAM's insolvency precludes the jurisdiction of the Arbitral Tribunal (**SECOND ISSUE**)
- UNIVERSAL is not liable for the breach of contract committed by UAM (**THIRD ISSUE**)
- CLAIMANT was not entitled to avoid the contract (**FOURTH ISSUE**)

CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

Freiburg im Breisgau,

22 January 2009

Phillipp Hofmann	Alexander Horn	Dagna Knytel	Heinrich Nemecek
Tobias Schönberger	Maren Schöne	Katharina Weitz	Hannah Wirtz